

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH-WEST DIVISION, MAHIKENG)

CASE NO.: CA 58/2023

REGIONAL COURT CASE NO.: RC50/2021

IN THE APPEAL OF:

DESTA ESHETHU DEFERE

APPELLANT

and

THE STATE

RESPONDENT

ORDER

It is ordered that: The Appellant's appeal against both conviction and sentence are dismissed and the judgement and order ad sentence of the court a quo is confirmed.

JUDGMENT

CORAM: REID J et LAUBSCHER AJ:

LAUBSCHER AJ:

BACKGROUND FACTS RELEVANT TO THIS APPEAL:

- [1] This is an appeal against both the conviction and the sentence imposed upon the Appellant on a charge of rape in the Lichtenburg Regional Court in the North-West Province on 20 April 2023.
- [2] According to the record availed to this Court the Appellant was charged with the offence of rape in that Appellant is guilty of the contravention of the provisions of section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the **Criminal Law Amendment Act (Sexual Offence and Related Matters), Act 32 of 2007** (hereafter “the SORM Criminal Law Amendment Act”) read with sections 256, 257 and 261 of the **Criminal Procedure Act, Act 51 of 1977** (hereafter “the Criminal Procedure Act”) and the provisions of section 51(1) and Schedule 2 of the **Criminal Law Amendment Act, Act 105 of 1997** (hereafter “the Criminal Law Amendment Act”) as amended, in that on or about 6 July 2021 and at or near Coligny in the Regional Division of Ditsobotla the Appellant did unlawfully and intentionally commit an act of a sexual penetration with a female person to wit KP, 12 years of age by inserting his penis into the vagina of KP without her consent. Section 51(1) and Schedule 2 of the Criminal Law Amendment Act being applicable as KP is younger than 16 years of age.

- [3] The Appellant pleaded not guilty to the charges levied against him and the matter proceeded to trial. The Respondent adduced the evidence of the: (i) mother of KP, Kidebone Miriam Phogojane, the victim KP (who testified through the intermediary Tsatsinyane Bontle) and the forensic nurse Darius Motsumi Motsepe. After the close of the Respondent's case, the Appellant testified in his own defence.
- [4] During the trial proceedings a number of exhibits were entered into evidence including the a statement made by KP's mother to the SAPS, the birth certificate of KP indicating that she was born on 20 September 2009, the J88 medical examination form completed by the forensic nurse, Mr Motsepe and a statement made by KP, as well as sketch plan of the shop and shack were the incident occurred.
- [5] On the evidence before the court *a quo* the court *a quo* found the Appellant guilty on the charge levied against him, the details of which shall be set in more detail below.
- [6] The Appellant was sentenced to:
- (a) life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act;
 - (b) it was ordered that the Appellant's name must be included in the National Register for Sex Offenders; and

- (c) the Appellant was declared unfit to possess a firearm in terms of section 103 of the **Firearms Control Act, Act 60 of 2000**.

[7] In terms of the provisions of section 309(1)(a) of the Criminal Procedure Act as amended by the provisions of section 10 of the **Judicial Matters Amendment Act, Act 42 of 2023** the Appellant is entitled to an automatic right of appeal once the court *a quo* has imposed a sentence of life imprisonment. In the record before this Court there is also an application launched by the Appellant to apply for condonation for the failure to prosecute this appeal within the timeframes as stipulated. This application was not opposed by the Respondent. In as far as this appeal was prosecuted outside of the prescribed time periods, the necessary condonation is granted.

[8] The Appellant's appeal to this Court is predominantly premised on the following grounds:

- (a) That the court *a quo* misinterpreted the evidence before it, e.g the court *a quo* focussed on immaterial inconsistencies and failed to have regard to the facts in the matter.
- (b) The court *a quo* erred in finding that the Respondent proved the case against the Appellant beyond reasonable doubt and that there was no evidence before the court proving the Appellant's guilt beyond reasonable doubts.

- (c) There were no DNA evidence placed before the court a quo. The court a quo incorrectly found that the victim was penetrated and raped as there is no evidence to that effect.
- (d) The court a quo overemphasised the fact that certain averments made by the Appellant were not put the Respondent's witnesses.
- (e) The medical examination of the victim shows no injuries to the victim and shows that the victim's hymen was intact.

[9] The State, the Respondent in this appeal opposed the Appellant's appeal.

[10] The Appellant in this appeal was represented by Mr G A Mooka of G A Mooka Attorneys and the Respondent was represented by counsel G R Zazo of the office of the Director of Public Prosecutions. Written heads of argument were submitted to this Court on behalf of both the Appellant and the Respondent, the contents of which assisted this Court in the adjudication of this appeal.

THE GENERAL PRINCIPLES APPLICABLE TO AN APPEAL ON CONVICTION:

[11] This Court has in the past in numerous judgments stated the general principles applicable to an appeal on conviction and sentence. These principles remain germane to each criminal appeal which is presented to this Court for adjudication. It is therefore of importance in each appeal judgment to reiterate these principles for the sake of the parties involved in the matter, and as such the Court shall proceed to restate and reiterate these principles.

[12] A court of appeal must always observe the following trite principles in the adjudication of an appeal ad conviction:

(a) In the matter of R v Dhlumayo and Another¹ the Appeal Court (as it was then known) stated:

“The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing the demeanor, but also their appearances and whole personality. This should not be overlooked”.

(b) In the matter of A M and Another v MEC Health, Western Cape² the court referred to the matter of ST v CT³ and reiterated the following “trite principles” as reaffirmed by the Constitutional Court : *“In Makate v Vodacom (Pty) Ltd*⁴ *the Constitutional Court, reaffirmed the trite principles outlined in Dhlumayo, quoting the following dictum of Lord Wright in Powell and Wife v Streatham Nursing Home”: ‘Not having seen the witnesses puts the appellant judges in a permanent position of disadvantage against the trial judges, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the Higher Court ought not to take the responsibility of reversing*

¹ 1948 (2) SA 677 (A) at 705.

² 2021 (3) SA 337 (SCA) at para [8].

³ 2018 (5) SA 479 (SCA) para [26].

⁴ 2016 (4) SA 121 (CC).

conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case". (own emphasis)

- (c) A court of appeal can **only** reject the trial court's assessment of the evidence if the **court of appeal is convinced that the trial court's assessment of the evidence was wrong**. If the appeal court is in doubt, the trial court's judgment must remain in place.⁵
- (d) The court of appeal must be careful in making decisions, which are purely based on paper and representations in court without the presence of the parties in the actual case.⁶
- (e) The above referred to principles were stated in a similar vein in the matter of S v Kebana⁷ as follows:

"It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. 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".

⁵ S v Robinson 1968 (1) SA 666 (A) at 675 H.

⁶ Bernert v ABSA Bank Ltd 2011 (3) SA 92 CC at para [106].

⁷ S v Kebana [2010] 1 All SA 310 (SCA) para [12].

(f) In Khoza v S⁸ it was confirmed that a “...court of appeal is not at liberty to depart from the trial court’s findings of fact and credibility unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.”

(g) Ponnann JA in the matter of S v Monyane and Others⁹ confirmed the following regarding the powers of a court of appeal:

“This court’s powers to interfere on appeal with the findings of fact of a trial court are limited... In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645 e-f).”

[13] In dealing with an appellant’s appeal against conviction this Court’s must have regard to the following principles and methods of assessing the evidence before the trial court:

(a) It is trite that the onus of proof rests with the Respondent to prove the guilt of the Appellant beyond reasonable doubt.

⁸ (A222/2022) [2023] ZAGPPHC 1122 (8 September 2023) at para [16].

⁹ 2001 (1) SACR 543 (SCA) at para 15 and also see S v Francis 1991 (1) SACR 198 (A) at 198 J – 199 A.

- (b) If the Appellant's version might be reasonably possibly true, he or she would be entitled to an acquittal. The Supreme Court of Appeal in the matter of Shackle v S¹⁰ stated:

"The court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true, in substance, the court must decide the matter on acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities; but it cannot be rejected merely because it is improbable. It can only be rejected on the basis of inherent probabilities if it can be said that it will be so improbable that it cannot be reasonably possibly true".

- (c) In the matter of S v Munyai¹¹ the court stated:

"A court must investigate the defense case with the view of discerning whether it is demonstrable false or inherently so improbable as to be rejected as false".

- (d) The Supreme Court of Appeal in the matter of S v Chabalala¹² stated:

¹⁰ 2001 (1) SACR 279 (SCA) at 288 E-F.

¹¹ 1988 (4) SA 712 at 915 G.

¹² 2003 (1) SACR 134 (SCA) at page 140 A-B.

"The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture in evidence."

(e) In the matter of S v Sithole and Others¹³ it was succinctly stated:

"There is only one test in a criminal case and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that the accused is entitled to an acquittal if there is a reasonable possibility that there is an innocent explanation which he has proffered might be true".

¹³ 1999 (1) SACR 585 W at 590.

- (f) In S v Molaza¹⁴ the court stated and confirmed the following test:

"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence that the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable, but none of it may be simply ignored."

- (g) Addressing the concept of "reasonable doubt" the Appeal Court (as it was then known) in the matter of R v Mlambo¹⁵ started:

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man after mature consideration comes to the

¹⁴ (2020) 4 All SA 167 (GJ) 31 para [45].

¹⁵ 1957 (4) SA 727 (A) at 738 A-C.

conclusion that there exists no reasonable doubt that the accused has committed the crime charged. He must in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of the doubt that may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable influences which are not in conflict with, or outweighed by the proved facts of the case."

- (h) The above referred to approach was confirmed by the Supreme Court of Appeal in the matter of S v Phallo and Others¹⁶ referring to it as a "classic decision". The SCA went on to state that the approach of our law as represented by the said judgement corresponds with that adopted and stated by the English Courts. Olivier JA in the SCA went on to quote from *Miller v Minister of Pensions* [1937] 2 All EL 272 (KB) wherein the following was stated:

"The evidence must reach the same degree of cogency as required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man to

¹⁶ (1999) (2) SACR 558 (SCA) at 562g to 563e.

leave only a remote possibility in his favour, which can be dismissed with a sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice."

- (i) The above referred to measurement must be applied by having regard to the general principle in evaluating evidence in a criminal case. This principle was stated in the matter of S v van der Meyden¹⁷ as follows:

*"The onus of proof in a criminal case is discharged by the State. If the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from the opposite perspective. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other ... in whatever the form the test is expressed, it must be satisfied upon a consideration of all the evidence. **A court does not look at the***

¹⁷ 1999 (1) SACR 447 (WLD) at 448 f-h.

evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt and so too, it does not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true." (own emphasis)

- (j) The evaluation of evidence in a criminal trial comprises of the evaluation of the **"mosaic of evidence as whole"** as aptly stated in the matter of Khumalo v S ¹⁸ as follows:

*"Considering all the circumstances of this case, I am of the view that **the evidence tendered by the State weighs so heavily as to exclude any reasonable doubt about the applicant's guilt.** Expressed differently, **the mosaic of the evidence as a whole is, beyond reasonable doubt, inconsistent with the applicant's innocence.** The inescapable inference is that the applicant was the aggressor on the night of the incident; that he shot at the complainant, chased him into a yard, fired more shots at the complainant and then robbed him of his money."* (own emphasis)

THE GENERAL PRINCIPLES APPLICABLE TO AN APPEAL AGAINST SENTENCE:

¹⁸ (723/2020) [2022] ZASCA 39 (4 April 2022) at para [19] and also see R v Blom 1939 AD 188 at 202, Cornick and Another v S 2007 (2) SACR 115 (SCA) at para 42, S v Van den Meyden 1999 (1) SACR 447(W) at 449d-e, cited with approval in S v Van Aswegen 2001 (2) SACR 97 (SCA) at 101a-f.

[14] First and foremost, in the adjudication of an appeal against sentence this Court must have regard to the general and overarching principles which have been laid down in this regard by the Supreme Court of Appeal. These are the following:

- (a) An appeal court must be loath to interfere with the sentence of a trial court. As far back as 1920, the Appellate Division (as it was then known) in the case of R v Maphumulo and Others¹⁹ stated that:

"The infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal. And we should be slow to interfere with its discretion."

- (b) In S v Barnard²⁰ the Supreme Court of Appeal stated: "A court sitting on appeal on sentence should always guard against eroding the trial court's discretion ... and should interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it

¹⁹ 1920 AD 56 at 57.

²⁰ 2004 (1) SACR 191 (SCA) at para [9].

shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably.”

- (c) The above quoted phrase succinctly states the general and overarching principle which must be adopted by this Court in the adjudication of appeals on sentence and hence in this appeal.
- (d) In S v Hewitt,²¹ Maya DP held that: *“It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a “striking” or “startling” or “disturbing” disparity between the trial court’s sentence and that which the appellate court would have imposed. And in*

²¹ 2017 (1) SACR 309 (SCA).

such instances the trial court's discretion is regarded as having been unreasonably exercised.”²²

- (e) In S v Bogaards,²³ Khampepe J in the Constitutional Court held the following, that:

“It can only do so [i.e. interfere with the sentence imposed] where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.”

- [15] Consequently, this Court of appeal in the present matter can only interfere with the sentence where the trial court's exercise of its discretion was patently incorrect. The sentence must otherwise be left undisturbed.

- [16] This principle was also echoed by and phrased by Du Toit²⁴ as follows: *“The sentence will not be altered unless it is held that no reasonable court ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or*

²² At paragraph [8].

²³ 2013 (1) SACR 1 (CC) at para [41].

²⁴ Commentary on the Criminal Procedure Act (Jutastat, 31 January 2021) at 30-41.

insufficient, or that the trial judge had not exercised his discretion properly, or that it was in the interest of justice to alter it.”²⁵

[17] The court *a quo* “...enjoys pre-eminent discretion and the court of appeal will not lightly interfere with the exercise of same.”²⁶ A court of appeal will not interfere lightly with the trial court’s exercise of its discretion.²⁷ In S v Singh²⁸ Tshiqi JA held that: “*The task of imposing an appropriate sentence is in the discretion of the trial court. A court of appeal may only interfere if the sentence is shockingly inappropriate.*”

[18] In the matter of Chitumbura and Another v S²⁹ the court quoted the above referred to phrase from du Toit with approval and proceeded to referred to the Supreme Court of Appeal matter of S v Kgosimore³⁰ and stated the following: “*Regard may be had also to the judgment of Scott, JA in S v Kgosimore, 1999(2) SACR 238 (SCA), relied on by the State, where his lordship held that if the discretion of the trial court was properly and reasonably exercised, there was no scope at all for interference in the sentence. This collection of*

²⁵ Also see S v Fhetani 2007 (2) SACR 590 (SCA), Director of Public Prosecutions, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA), S v Anderson 1964 (3) SA 494 (A); Nevilimadi v S (545/13) [2014] ZASCA 41 (31 March 2014) and S v Asmal (20465/14) [2015] ZASCA 122 (17 September 2015).

²⁶ Gqika v S (CA&R 112/2021) [2022] ZAECGHC 15 (1 March 2022) at para [20].

²⁷ See S v Rommer 2011 (2) SACR 153 (SCA), S v Hewitt 2017 (1) SACR 309 (SCA) and S v Livanje 2020 (2) SACR 451 (SCA).

²⁸ 2016 (2) SACR 443 at para [23].

²⁹ (A190/201) [2017] ZAGPJHC 274 (14 September 2017) at para [9] and [10].

³⁰ 1999(2) SACR 238 (SCA).

expressions of resistance to interference in lower court sentencing underscores just how jealously our judicial hierarchy protects the prerogative below, and it is difficult to add to it.”

THE EVIDENCE BEFORE THE COURT A QUO

[19] Having regard to the above set out principles, this Court must accordingly proceed to consider the contents of the evidence adduced on behalf of both the Respondent and the Appellant during the trial in this matter. The Court now proceeds to do so.

[20] The victim’s mother testified that:

- (a) She is KP’s mother.
- (b) She saw bloodstains between the legs of trousers which KP wore and proceeded to investigate the reasons for same, initially thinking that it was as a result of KP menstruating.
- (c) KP told her that she was raped by the Appellant. She referred to the Appellant as “Tebe” (also alter in the record referred to as “Teddy” – but there is no dispute between the State and the Appellant that the references were both to the Appellant. This report was made on a Tuesday (8 June 2021), and the incident occurred on the previous Sunday (6 June 2021).
- (d) She also inspected KP’s private parts and found a discharge present.

- (e) She told her husband and she proceeded to report the matter to the SAPS, whereafter they went to Mahikeng to have KP medically examined.
- (f) As a result of the incident the family moved to another place of residence and KP is "always anxious" as a result of the incident.
- (g) At the time of the investigation, she noted that KP's private parts were swollen and that there was a discharge. This was testified to by the witness during cross examination and it was put to the witness that her version as to what was found during her inspection of KP's private parts differ in cross examination from her evidence in chief.
- (h) The witness was also confronted with a version which made by the witness to a social worker that KP never disclosed the raped "voluntarily". It was put to the witness that this version differs from the witness's version in her evidence in chief.
- (i) The witness was also referred in cross examination to her statement made to the SAPS and that certain detail which she is testifying to in court was not contained in her statement to the SAPS.
- (j) The witness was confronted with the contents of her statement made to the SAPS that her husband discovered the bloodstains on KP's trousers and not the witness as stated in her evidence in chief. The witness then confirmed that her husband is the one who discovered the bloodstains on KP's trousers.

- (k) During cross examination the witness testified that “the doctor” told her that that KP’s private parts were “swollen but she will recover quickly”.

[21] The victim, KP, testifying through the use of an intermediary, testified that:

- (a) They had to move from place to another because she was taunted as a result of the rape.
- (b) On the Sunday in question, she went to the store operated by Teddy to purchase electricity, they were the only two people in the shop at the time, when Teddy dragged her from the shop to “the shack” (at the back of the shop) where he proceeded to rape her. KP testified about the rape incident in detail in her testimony in chief.
- (c) During the rape a person came to the store and “Teddy” put his hand over her mouth so that she could not scream and alert the person in the store as to what was going on in the shack.
- (d) After the rape her private parts hurt and when she walked it was painful.
- (e) KP did not tell her mother of the rape the same day but went to sleep. She only told her mother on the Tuesday when she was confronted by her mother with the bloodstains on her trousers.
- (f) She told her mother that “Teddy” raped her and provided the detail of the incident to her mother.
- (g) She never went back to the shop again.

- (h) During cross examination she was asked about other injuries she sustained, and she testified that her wrists were reddish.
- (i) She testified under cross examination that she tried to escape from “Teddy” when they were in the shack, but he grabbed her again and threw her on a mattress in the shack. That is where the rape took place.
- (j) A portion of the cross examination of KP is not contained in the record provided to this Court. Due this fact the Court carefully scrutinised the closing arguments adduced on behalf of the Appellant to the court a quo after the close of the defence’s case to note any additional issues raised by the defence emanating from the cross examination of KP.

[22] The forensic nurse, Mr Motsepe testified that:

- (a) He is a forensic nurse trained to examine rape victims with more than 30 years of experience. He examined KP.
- (b) He completed the J88 document which was entered into evidence, and which recorded that KP sustained no visible bodily injuries except for the following note made on page 4 of the report at the sketch of the female genitalia: “*medial healing inflammation*” accompanied by two marks indicting where the “*medial healing inflammation*” indications were noticed by him on KP’s private parts. This inscription was also contained on page 2 of the report at paragraph 9 which deals with the:” Labia Minora”.

- (c) At paragraph 16 on page 2 of the J88 report the witness noticed “clefts” at the seven o’clock position of the female genitalia. In his examination in chief, he testified that this cleft was a “cut”. In cross examination the witness confirmed that this was not a “fresh” cut.
- (d) At paragraph 20 of the J88 form a discharge with an offensive smell was noted and written down by the witness.
- (e) He stated on the J88 on more than one instance that the absence of injuries does not exclude sexual assault.
- (f) As to the “*medial healing inflammation*” reference on the sketch on page 4 of the J88 form he testified that:
- i. *“Actually there was healing inflammation meaning that the rectus it was red meaning that there was healing wounds during sexual intercourse.”;*
 - ii. *“Healing inflammation on the medial aspect of the minora was noted during the examination there was redness around there.”*
 - iii. *“Meaning that there was penetration which injured the inside of the vagina of the victim but now this injury was healing gradually.”*
 - iv. *“What I have noticed there was a healing inflammation on the medial aspect of the labia minora”*
- (g) During cross examination the issue of the “*medial healing inflammation*” was addressed at length and the witness explained his notes in the J88 form on this aspect as follows:

- i. *“Let me try to explain this. The cause of inflammation meaning that the cause of redness if you look at this if I do this for a long time like this, this area is going to be reddish in colour because I have applied the force here. This is what I have noticed that upon the medial because immediately the penis actually it affects the medial aspect of the vagina. As it goes to and fro it causes redness and when I examined the patient I realised that redness was disappearing meaning that it was healing. There is nothing that can cause redness on the medial aspect of the labia minora except an object, and except a penis, except anything that can be inserted inside. If you look at the structure of the minora the labia majora is on top and the labia minora is inside so inside that is where now the pain comes into contact with the vagina so it causes that redness or repair meaning that the redness of the skin. Hence now I see this redness is healing the healing is process it is a wound that is fresh can be noticeable that this wound is healing but the wound that has some ...[indistinct] it shows signs of healing hence now I say healing.”*
- ii. *“Yes that is why I am saying it is common cause. You have already trauma force applied I said that – in this case I said it was through trauma the force applied because there is friction and friction is force”.*

- iii. *"Your Worship, the vagina is injured inside hence the inflammation – this vagina is injured inside and it is very important although things are not ... [indistinct] but the vagina is injured."*

[23] After adducing the testimony of the above referred to three witnesses the Respondent closed its case. The Appellant then launched an application in terms of the provisions of section 174 of the Criminal Procedure Act. This application was dismissed by the Court.

[24] The Appellant then proceeded to testify in his own defence. He testified that:

- (a) He is 32 years old. However later in the Appellant's attorney's address to the court a quo before sentencing it was stated that the Appellant is 29 years old and was born on 27 May 1991.
- (b) On the day in question KP came into his shop around lunch time and she wanted to purchase electricity. He sold her the electricity and she left. She then came back five minutes later and purchased three stick sweets and left. He did not see her again.
- (c) The Appellant was asked: *"Did you have any sexual intercourse with her?"* He answered: *"No"*
- (d) He was asked: *"Did you do anything wrong to this lady?"* and he answered *"No, I did not do any wrong."*

- (e) The detailed evidence of KP as to the manner in which the rape occurred was put to the Appellant who denied every element thereof.
- (f) In cross examination the Appellant denied that there is a mattress in the shack as testified to by KP.
- (g) During cross examination the Appellant denied the version of KP that she was raped and the details of the crime as testified to be her in her testimony in chief.

[25] The defence called no other witnesses and closed its case after the testimony of the Appellant.

JUDGMENT OF THE COURT A QUO

[26] After receiving closing arguments on behalf of the Respondent and the defence, the court a quo proceeded with its judgment.

[27] In its judgment the court a quo inter alia stated and found the following:

- (a) On key aspects in the matter there are no material contradictions between the state witnesses.
- (b) The testimony of KP's mother was straight forward and to the point as to what was told to her by KP, and any contradictions her evidence and that of KP was non-material. Her evidence was consistent with that of KP.

- (c) The court a quo found that KP's evidence was much more detailed than that of her mother and that KP ***"...made a favourable impression as a witness. Despite her age, she spoke clearly and forthrightly. She withstood intense repetitive and sometimes embarrassing cross-examination for two days. Her recollection of the incident and narration remained consistent. She was very calm under this pressure. There is nothing in her whole testimony that creates a suspicion that she was fabricating any aspect of her testimony. In my view she is an honest witness. She even managed to clearly explain away the irrelevant contradictions in her police statement and her testimony and in any event, some of the testimony that she gave, was left unchallenged by the accused."***
- (d) In respect of the evidence of the forensic nurse the court a quo noted that the language which he used to described certain finding during his examination of KP was not clear. However, his findings are to a certain extent corroborated by KP's mother's evidence, i.e. the swelling and discharge present on KP's private parts.
- (e) This is also corroborated by KP who testified that she experienced pain whilst walking.
- (f) The court a quo found: "In my view there is sufficient corroboration to the fact that the victim was sexually penetrated."
- (g) Importantly for the purposes of this appeal, the court a quo – being the court before whom the Appellant testified – found the following regarding the evidence of the Appellant: *"The accused did not*

impress me as an honest witness. His evidence developed during cross-examination by the prosecutor. It also was creatively developed during re-examination. Important aspects were not put to witnesses when they were testifying. For instance, we have already spoken about the issue of time. It was important in my view that the mother, at least when she was testifying, be confronted about the fact that it was not in the morning, but at lunch time. It was also important along those lines for the accused to have confronted the mother to say that in fact, your husband he is used to coming here and buying on credit. It was also important in my view for also the mother to have been confronted around the fact about the description of the layout of the outside of the shack and the tuckshop. That is that the tuckshop does not have a perimeter fence and anyone can actually access the tuckshop from the front and anyone can actually go to the back of the tuckshop at the shack or nearby because there is no security perimeter. It was also important for the victim for it to have been put to the victim the fact the shack, the corrugated iron there, is not bended because the victim is saying when I held on to the arrogated iron in order to resist being pushed into the shack, the iron could not injure me, because it is blended. That much was not disputed.”

- (h) The court a quo proceeded to find that: *“In my view the corroborated and straight forward evidence of the state witnesses is sufficient. The evidence of the accused on the above assessment is highly improbable and stands to be rejected. The*

victim's testimony to a materially greater extent in my view, was clear satisfactory and reliable. In my view indeed the state managed to prove the case against the accused beyond a reasonable doubt."

[28] The court proceeded to find the Appellant guilty of the crime of rape that he was charged with.

SENTENCE BY THE COURT A QUO

[29] In dealing with sentence the court *a quo* took into account the following personal circumstances of the Appellant which placed before the court:

- (a) He is 29 years old.
- (b) He is a first offender as the Respondent was not able to prove any previous convictions against the Appellant.
- (c) He is an Ethiopian who resides the past 10 years in South Africa.
- (d) He is unmarried and have no children but has five brothers and a sister who are all residing in South Africa and all conduct tuck shop businesses. The Appellant earned approximately R 10 000.00 per month from his tuck shop business.
- (e) Subsequent to the committing of the crime the community looted the business and destroyed same.

[30] The court *a quo* also took note of and discounted the seriousness of the crime committed against a child. The court *a quo* dealt with the prescribed minimum

sentence in view of the fact that KP was under the age of 16 years when she was raped by the Appellant as contemplated in and Schedule 2 of the Criminal Law Amendment Act.

- [31] In this regard the court *a quo* stated, *"The victim, and I know I am mentioning this for probably the third time, but the victim in this case was 12 years old. So, I agree with the PP, that the fact that she was weak and vulnerable is something indeed that should be looked as an aggravating aspect against you."*

After a detailed consideration of the seriousness of the crime, the personal circumstances of the Appellant, the interest of society and the question of whether there was any substantial and compelling circumstances present to deviate from the prescribed sentence, the court *a quo* stated the following: *"...the totality of your submissions, together with considerations, as I said earlier on, of Ubuntu and mercy, do not bring a conclusion that there are substantial and compelling circumstances that exist and were placed before this court. By, in answering the last question, I do not think the prescribed sentence would be disproportionate under the particular circumstances."*

- [32] The court *a quo* accordingly found that there were no substantial and compelling circumstances present to warrant the departure from the prescribed minimum sentence as per the provisions of section 51(1) of the Criminal Law Amendment Act, for the offence of which the Appellant was found guilty, i.e., rape as contemplated in section 3 of the SORM Criminal Law

Amendment Act where the victim is a person under the age of 16 years, as contemplated in the provisions of Schedule 2, Part 1, (Rape)(b)(i) to the Criminal Law Amendment Act.

- [33] The court *a quo* accordingly proceeded to sentence the Appellant as set out in paragraph [6] above.

THE PRESCRIBED MINIMUM SENTENCE

- [34] The provisions of section 51(1) of the Criminal Law Amendment Act are applicable in this matter and prescribe the following minimum sentence in a peremptory manner: *“Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court **shall sentence a person**— (a) if it has convicted [a person] of an offence referred to in Part 1 of Schedule 2 ... **to imprisonment for life.**”* (own emphasis)

- [35] Section 51(3)(a) of the Criminal Law Amendment Act contains a redeeming provision and states the following: *“If any court referred to in subsection (1) or (2) **is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence** than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and [may] must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction*

to impose a term of imprisonment for a period not exceeding 30 years.” (own emphasis)

- [36] Section 51(3)(aA) of the Criminal Law Amendment Act aids the interpretation of the phrase “**substantial and compelling circumstances**” by stating which facts shall not constitute “**substantial and compelling circumstances**”. This provision reads as following: “*When imposing a sentence in respect of the offence of rape the following **shall not** constitute substantial and compelling circumstances justifying the imposition of a lesser sentence: (i) The complainant's previous sexual history; (ii) an apparent lack of physical injury to the complainant; (iii) an accused person's cultural or religious beliefs about rape; or (iv) any relationship between the accused.*” (own emphasis)

- [37] The provisions of section 51(1) refer to Schedule 2, Part 1. In respect of this matter the applicable provisions of this Part of Schedule 2 is the part which deals with “rape”. This part reads as follows:

“Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 —

(a) *when committed—*

- (i) *in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;*

- (ii) *by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;*
 - (iii) *by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or*
 - (iv) *by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;*
- (b) *where the victim—*
- (i) *is a person under the age of 16 years;*
 - (iA) *is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);*
 - (ii) *is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or*
 - (iii) *is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or*
- (c) *involving the infliction of grievous bodily harm.”*

THE PERTINENT ISSUES IN THIS APPEAL IN RESPECT OF CONVICTION AND SENTENCE

- [38] On the evidence as adduced before the court *a quo*, the court *a quo* applied the provisions of section 51(1) of the Criminal Law Amendment Act and sentenced the Appellant to life imprisonment, having found no “**substantial and compelling circumstances**” as contemplated in section 51(2) of the Criminal Law Amendment Act, to trigger the redeeming effect of the last mentioned section.
- [39] Having regard to the fact that the court *a quo*, following and implementing the provisions of section 51(1) of the Criminal Law Amendment Act and sentenced the Appellant as aforestated, the crisp issue in this appeal in respect of the Appellant’s appeal against his sentence is whether the court *a quo* was correct in its finding that there are no “**...substantial and compelling circumstances justifying the imposition of a lesser sentence...**” than life imprisonment.
- [40] Accordingly, one needs to turn to the content and interpretation which was given in the past by the courts to the phrase “**...substantial and compelling circumstances...**”.
- [41] In respect of sentence the Appellant placed his personal circumstances as referred to above before the Court. It must also be emphasised that the Appellant was a first offender, as the Respondent was not able to prove the Appellant’s previous conviction which related to the transgression of the Disaster Management Act during the Covid pandemic.

[42] The Respondent pointed out a number of aggravating circumstances which emanated from the facts which were considered proven by the court *a quo*. The Respondent submitted that both the conviction and sentence imposed by the court *a quo* were appropriate.

[43] The main aggravating factor in the matter being that KP was a young child who was raped by the Appellant. This Court has quoted the findings by the court *a quo* in this regard above.

[44] Having regard to the findings made by the court *a quo*, this Court of appeal is satisfied that the conviction of the appellant should not be overturned.

[45] Turning to the prescribed minimum sentences imposed by the court *a quo*. In the matter of S v Malgas,³¹ (a matter to which the court *a quo* also referred in passing sentence) the following was stated by Marais JA in the SCA regarding sentencing and the implementation of the provisions of section 51 of the Criminal Law Amendment Act and the concomitant imposing of prescribed minimum sentences brought about thereby:

“...The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be “business as usual” when sentencing for the commission of the specified crimes.

³¹ 2001 (1) SACR 469 (SCA).

In what respects was it no longer business as usual? First, 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. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

*Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in *Flannery v Halifax Estate Agencies Ltd* by the Court of Appeal, 'a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based- than if it is not'. Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. **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...”³² (own emphasis)

[46] In the matter of S v GN,³³ Du Plessis J stated in respect of the Malgas judgment:

“...As I understand the Malgas judgment, the prescribed minimum sentence may be departed from if, having regard to all the factors that play a role in determining a just sentence, the court concludes that the imposition of the prescribed minimum would in the particular case constitute an injustice or would be “disproportionate to the crime, the criminal and the legitimate needs of society”...”³⁴

³² At paragraph [7] to [9].

³³ 2010 (1) SACR 93 (TPD).

³⁴ At paragraph [6].

[47] The Supreme Court of Appeal has recently confirmed that certain mitigating personal circumstances of an accused and even the fact that an accused person is a first offender do not constitute “**substantial and compelling circumstances**” as contemplated in section 51(2) of the Criminal Law Amendment Act. The SCA in the matter of Mthanti v The State³⁵ stated the following:

“[19] The last issue is whether there were substantial and compelling circumstances that justified deviation from the minimum prescribed sentences in this case. It is apparent from the above description of the events that took place on the three occasions that the aggravating circumstances present when committing the crimes by far outweighed the mitigating factors. The high court was correct in considering that the appellant’s criminal conduct was not ‘fleeting and impetuous’; that it was ‘calculated and callous’, and that there was no reason to deviate from the prescribed minimum sentences.

[20] The only submission made on appeal was that the appellant’s mother died when he was 7 years old. The suggestion was that the appellant was troubled by the fact that his mother died without revealing the identity of his father. But all of this was considered by the high court. The court also considered in the appellant’s favour, his personal circumstances - that he was gainfully employed at the time of his arrest for the offences in question and supporting his two minor children. It considered that although he lost his only biological

parent early in his life, his uncle and aunt gave him 10 a 'good and warm upbringing' until he abandoned his post matric studies without telling them'. The court considered that the appellant was a first offender.

[21] The appellant ruthlessly exploited the vulnerabilities of the most exposed members of our society. He preyed on those most affected by the high levels of unemployment in the country. He deceived women, causing them to leave the security and comfort of their homes. He caused them to use their meagre financial resources to travel to Pietermaritzburg. He robbed them of their scant belongings and then humiliated the second and third complainants by raping them. In respect of the third complainant the rape happened in the most degrading manner, in the presence of a third person. He then left the complainants to their own devices in remote places at night. This he did repeatedly, as the high court correctly found. In all three incidents there was no basis for a departure from the prescribed minimum sentences."

[48] The above referred to case (as confirmed in the Malgas matter) confirms that certain mitigating factors from the Appellant's personal circumstances are in isolation not sufficient to justify a departure from the imposition of a minimum sentence. There must be substantial and compelling reasons to do so. The court *a quo* in casu did not find substantial and compelling circumstances to deviate from the minimum prescribed sentences. As stated above, there exists no reasons for this Court of appeal to upset or interfere in this finding of the court *a quo*.

[49] The usual triad of the crime, the offender, and the interests of society, as enunciated in S v Zinn³⁶ were considered by the court *a quo* and this Court. In facts this was the point of departure for the court *a quo* in passing sentence.

[50] With regard to the offence of rape, which are disturbingly prevalent in our country, this Court, as it has done in the past in numerous judgments in instances where the crime of rape was dealt with by the court, deems it appropriate to make reference to the following:

(a) The court in the matter of Vilakazi³⁷ held as follows:

“...The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important. From those who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with

³⁶ 1969 (2) SA 537 (A) at 540G to H.

³⁷ 2009 (1) SACR 552 (SCA) at para [21].

the sentence of life imprisonment must never blunt one to the fact that its consequences are profound.”

- (b) Most recently, in the matter of Director of Public Prosecutions, Kwazulu-Natal Pietermaritzburg v Ndlovu³⁸ the Supreme Court of Appeal Stated:

“Rape is an utterly despicable, selfish, deplorable, heinous and horrendous crime. It gains nothing for the perpetrator, save perhaps fleeting gratification, but inflicts lasting emotional trauma and, often, physical scars on the victim. More than two decades ago, Mohamed CJ, writing for a unanimous court,³⁹ aptly remarked that: ‘Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.’

³⁸ (888/2021) [2024] ZASCA 23 (14 March 2024) at para [73] and [74].

³⁹ With reference to S v Chapman 1997 (3) SA 341 (SCA) at paras [3] to [4].

In similar vein Nugent JA, writing for a unanimous court⁴⁰, in equal measure described rape in these terms: 'Rape is a repulsive crime, it was rightly described by counsel in this case as an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity.'"

- (c) In Tshabalala v S (Commissioner for Gender Equality and Centre for Applied Legal Studie sas Amici Curiae); Ntuli v S⁴¹ the Constitutional Court stated "...rape is not rare, unusual and deviant. It is structural and systemic..."

- (d) In Masiya v Director of Public Prosecution Pretoria and Another (Centre for Applied Legal Studies and another as Amici Curiae)⁴² the Constitutional Court said the following of rape:

"Today rape is recognised as being less about sex and more about the expression of power through degradation and concurrent violation of the victim's dignity, bodily integrity and privacy. Regrettably, 26 years, since the decision of this Court in Chapman, the scourge of rape has shown no signs of abating. On the contrary, it appears to be on an upward trajectory."

⁴⁰ With reference to S v Vilakazi supra at para [1].

⁴¹ 2020 (2) SACR 38 (CC) at para [67].

⁴² 2007 (5) SA 30 (CC) at para [51].

(e) In recent times, this “...upwards trajectory...” referred to by the Constitutional Court in 2007 seems to be continuing unabated, notwithstanding numerous efforts from government and society at large to address violence committed against women and children.

(f) It is not only this Court that is saying this. In the matter of Director of Public Prosecutions, Grahamstown v T M⁴³

*“The reality is that South Africa has five times the global average in violence against women. There is mounting evidence that these disproportionately high levels of violence against women and children, has immeasurable and far-reaching effects on the health of our nation, and its economy. Despite severe underreporting, there are 51 cases of child sexual victimisation per day. UNICEF research has found that over a third (35.4%) of young people have been the victim of sexual violence at some point in their lives. **What cannot be denied is that our country is facing a pandemic of sexual violence against women and children. Courts cannot ignore this fact. In these circumstances the only appropriate sentence is that which has been ordained by statute.**”*
(footnotes omitted and own emphasis)

[51] Against this background, it is again stated that:⁴⁴ *“....the courts in this country must not shy away from its role to address and discount the fact that violence committed against woman and children must be condemned in the strongest terms, eradicated and the seriousness of this task must be reflected in the manner in which the courts address same. This must be done whilst striking a balance with the court’s compelling duty to ensure that the punishment fits the crime and, of course, the offender.”*

[52] In the matter of Ndou v S⁴⁵ Shongwe JA stated that:

“Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly. In rape cases, for instance, where a minor is a victim, more information on the mental effect of the rape on the victim should be required, perhaps in the form of calling for a report from a social worker. This is especially so in cases where it is clear that life imprisonment is being considered to be an appropriate sentence. Life imprisonment is the ultimate and most severe sentence that our courts may impose; therefore a sentencing court should be seen to have sufficient information before it to justify that sentence”.

[53] After a proper analysis of the all the relevant information placed before the court a quo, the court a quo was of the view there was no substantial and

⁴⁴ Nyoka v S (CA02/2023) [2026] ZANWHC 33 (19 February 2026) at para 53.

⁴⁵ [2012] JOL 29522 (SCA) at para [14].

compelling circumstances to justify the imposition of a lesser sentence than the prescribed minimum sentence. Having scrutinised the reasoning of the court *a quo*, this Court finds no reason to interfere with this finding.

[54] As to the conviction of the Appellant, the court *a quo* in the view of this Court correctly found that the full conspectus or mosaic of evidence placed before it established the guilt of the Appellant. The conclusion reached by the court *a quo* rationally and meticulously accounted for all the evidence before it. There is no reason for this Court of appeal to interfere with the finding of the court *a quo* in respect of the conviction of the Appellant on the count of rape as per the charge levied against him.

[55] If one then has regard to the manner in which the court *a quo* dealt with the sentencing of the Appellant it is evident that a proportioned, balanced and all-inclusive approach was adopted by the court *a quo*, taking into account all the relevant evidence placed before it.

[56] The imposition of life imprisonment is, however, the most severe sanction available to the court. It is imperative, therefore, that this Court is satisfied that the sentence is indeed proportionate *in casu*.

[57] This Court specifically noted the fact that the court *a quo* specifically addressed the element of “proportionality” in passing sentence.

[58] In S v Dodo⁴⁶ Ackermann J dealt with the “concept of proportionality” and stated the following:

“...The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. This was recognized in S v Makwanyane. Section 12(1)(a) [of the Constitution] guarantees, amongst others, the right “not to be deprived of freedom... without just cause.” The “cause” justifying penal incarceration and thus the deprivation of the offender’s freedom, is the offence committed. “Offence”, as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender’s freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus, the length of punishment must be proportionate to the offence. ...To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a

⁴⁶ 2001 (5) BCLR 423 (CC) at paras [37] and [38].

*sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in paragraph 37 above) the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity."*⁴⁷

[59] The principle of proportionality was also addressed in Vilakazi v S,⁴⁸ where Nugent JA observed that a prescribed sentence cannot be assumed, *a priori*, to be proportionate in a particular case. This was an issue to be determined upon consideration of all the circumstances in the matter. In casu, the court *a quo* did so, and there is no reason for this Court to interfere with the sentence imposed by the court *a quo*.

[60] In this matter this Court is satisfied that the imposition of the prescribed minimum sentence would most definitely not constitute an injustice, neither would it be disproportionate to the crime, the criminal and the legitimate needs of society. Again, the court *a quo* in dealing with the element of

⁴⁷ At paragraphs [37] and [38].

⁴⁸ [2008] 4 All SA 396 (SCA).

"proportionality" acted in a manner which warrants no interference by this Court.

CONCLUSION AND JUDGMENT

[61] Having had regard to the record and the arguments led on behalf of the Appellant and Respondent, respectively, this Court is satisfied that there is no basis upon which to interfere with the finding of guilt and the sentence imposed by the court *a quo*.

[62] Accordingly, following order is made:

"The Appellant's appeal against both conviction and sentence are dismissed and the judgement and order ad sentence of the court a quo is confirmed".



N G LAUBSCHER
ACTING JUDGE OF THE HIGH COURT
NORTH-WEST DIVISION, MAHIKENG

I agree and it is so ordered.



FMM REID
JUDGE OF THE HIGH COURT
NORTH-WEST DIVISION, MAHIKENG

DATE OF HEARING: 3 May 2024

DATE OF JUDGMENT: 6 May 2026

**For the Appellant: Mr G A Mokaa
G A Mokaa Attorneys**

**For the Respondent: Adv G R Zazo
Office of the Director of Public Prosecutions**