THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1491/2024

In the matter between:

J[...] B[...] **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *B[...] v The State* (1491/2024) [2026] ZASCA 71 (13 May 2026)

Coram: MOLEFE, KEIGHTLEY and BAARTMAN JJA, KGANYAGO and NORMAN AJJA

Heard: 10 March 2026

Delivered: 13 May 2026

Summary: Criminal Law and Procedure – conviction on two counts of rape – sentence – special leave – application to introduce further evidence – s 16(1)(*b*) and s 19(*b*) of the Superior Courts Act 10 of 2013 – whether the appellant should be granted leave to lead further evidence relating to his HIV-status – whether the sentence imposed on the appellant is excessive – high court relied on appellant's knowledge of HIV-status – as an aggravating factor in terms of s 51(1) of the

Criminal Law Amendment Act 105 of 1997 – further evidence proved negative HIV-status the State is obliged to prove by way of medical evidence that the accused is HIV-positive – and that he knew of his HIV-positive status – the State must also establish through medical evidence that the victim is also HIV-positive as a result of the rape incident.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Yacoob J and Bhoola AJ, sitting as the court of appeal):

1 The application for adducing further evidence on appeal is granted.

2 The appeal is upheld.

3 The decision of the full bench dismissing the appeal is set aside and is replaced with the following order:

'1 The appeal is upheld.

2 The sentence of life imprisonment imposed by the regional court in respect of count 1 is set aside and is replaced with the following:

'In respect of count one: The accused is sentenced to undergo 15 years imprisonment, ten years of which shall run concurrently with the sentence of ten years in count two. Effectively the accused will serve a term of 15 years imprisonment.

3 The sentence is antedated to 09 November 2021.'

JUDGMENT

Norman AJA (Molefe, Keightley, Baartman JJA and Kganyago AJA concurring)

[1] The appellant, Mr J[...] J[...] B[...] was arraigned before the regional court sitting in Krugersdorp (the regional court) on two charges of rape. The rape in count one, was committed on 5 April 2019, when the appellant was 18 years old and the complainant in question was a 17-year-old male (CR). The rape in count

two was committed on 27 June 2018, the complainant was a 15-year-old male (MVW). The offences were committed in the juvenile section, at the Bosasa Youth Centre (Bosasa), where both the appellant and the complainants were detained. The appellant had been detained in connection with allegations relating to the theft of a motor vehicle.

[2] The appellant was legally represented. He was duly warned that in the event of his conviction, the provisions of s 51(1)(*a*) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Act), a minimum sentence of lifetime imprisonment would apply. He pleaded guilty to both charges. Consequently, he was convicted on his plea. Prior to sentence, the regional magistrate directed that a pre-sentence report be obtained. A pre-sentence report was compiled by the probation officer, Mrs Annette Vergeer (Mrs Vergeer) and presented to the court by consent between the parties. It was in that pre-sentence report that the issue of the appellant's Human Immunodeficiency Virus (HIV)-positive status emerged. Importantly she alleged that the appellant was aware of his HIV- positive status. She also indicated in the report that CR had informed her that he had contracted HIV as a result of the rape. Mrs Vergeer stated in her report that, given the appellant's HIV-positive status, the rapes he committed amounted to a 'death sentence' for the complainants.

[3] The regional court sentenced the appellant to life imprisonment in respect of count one. It took into account, inter alia, the HIV-positive status of the appellant, as contained in the report, as an aggravating factor which warranted the imposition of life imprisonment. It sentenced the appellant to ten years' imprisonment in respect of the second count. Both sentences were ordered to run concurrently. The appellant was thus effectively sentenced to life imprisonment.

[4] The appellant exercised his automatic right of appeal in terms of s 309(1)(*a*) of the Criminal Procedure Act 51 of 1977 (the CPA), to appeal only against the sentence of life imprisonment. The appeal, against sentence only, served before the full bench of the Gauteng Division of the High Court (full bench). On 8 August 2022, the full bench relied on his alleged knowledge of his HIV-status to dismiss the appeal against sentence. This appeal, against the sentence of life imprisonment, is with special leave of this Court.

The full bench findings

[5] The full bench found that the appellant had showed no remorse; he had suffered abuse as a child; he knew that he was HIV-positive and 'had transmitted the HIV virus on his two victims'; the complainants were younger than him and they, too, had troubled backgrounds. After balancing all these factors, the full bench was satisfied that the regional magistrate exercised his discretion judiciously and dismissed the appeal.

Issues before this Court

[6] There are two issues for determination before this Court, first whether the appellant has satisfied the requirements for leading further evidence on appeal as envisaged in s 19(*b*) of the Superior Courts Act 10 of 2013 (the SCA Act); second whether this Court should interfere with the decision of the full bench which confirmed the sentence of life imprisonment imposed by the regional court. The two issues are intertwined.

Application to lead further evidence on appeal

[7] The appellant brought an application in terms of s 19 of the SCA Act for this Court to receive further evidence on appeal. The nature of the evidence is to confirm that the appellant is not HIV-positive. The application is not opposed by

the State. The State submitted that the HIV-negative status of the appellant was not disputed.

[8] The further evidence is in the form of affidavits deposed to by various employees of Lancet Laboratories (Lancet) who are mentioned below, the roles they played up to the production of a medical report, and its authentication. Mr Sabelo Robert Tango, a phlebotomist, stated that he drew blood from the patient and collected a sample labelled with reference number 313128427 (the sample). He handed over the sample to Miss Lerato Mahlangu (Ms Mahlangu), an administrator, in a sealed specimen bag. After Ms Mahlangu verified all the information, she then loaded it on the computer information system. She further captured the appellant's details on the computer system and the results of the relevant tests.

[9] Upon completion, she handed the sample and a request form to Miss Nikiwe Garekoe (Ms Garekoe) for dual control and double-checking purposes. Ms Garekoe verified all the information contained therein. After satisfying herself that the information that was captured on the system matched the information contained on the form, she confirmed the accuracy thereof on the Meditech system. Thereafter, the sample was couriered to Lancet’s main laboratory for testing, whereafter a medical report was generated. Miss Amanda Lamprecht, a forensic auditor manager, stated that she performed the validation of the patient’s medical report and confirmed that the medical report was authentic and was a true version according to the Lancet records.

[10] The Lancet report dated 22 January 2024 was also attached to the application. The following information appears thereon: it reflects that the sample

was collected and received on 5 December 2023; it bears the name of the appellant; and it records in part:

'Immunology
HIV-1/2 (4th Gen),
Comment: HIV Profile non-reactive
This sample is non – reactive for HIV-1 and -2. . .'

[11] An affidavit from one Professor Eftyhia Vardas (Professor Vardas), who is employed by Lancet as the Head of Clinical Virology, was also attached to the application. She states that she holds the title of Professor in Clinical Virology and lists all her qualifications which she obtained from the University of Witwatersrand and the Colleges of Medicine of South Africa. She is a qualified specialist Clinical Virologist and has 26 years' experience. As the Head of Clinical Virology, her duties entail clinical consultations with her colleagues telephonically or at multidisciplinary ward rounds at various private health facilities, identifying appropriate tests that can be applied to patient samples, and ensuring that the best quality diagnostic test result is obtained for infectious diseases as well as immunology and allergy.

[12] Professor Vardas confirms that she reviewed and compiled the report of 26 January 2024, which relates to the HIV test of the appellant's sample. In her report she explains that the HIV testing at Lancet is automated on a robotic instrument and HIV non-reactive (negative) results are automatically released and not reviewed by a pathologist. She states that the result obtained on the appellant's sample was non-reactive, indicating that antibodies to HIV 1 and 2 viruses were not detected. She further records: 'It is not possible for an HIV reactive, HIV immunoassay test to become non-reactive unless in the rare instance the person has had a stem cell transplant. Alternatively, the initial test used that indicated that the

patient was reactive was overly sensitive and produced a false positive result.' She confirms that the contents of the report are true and correct.

[13] The gist of the appellant's case is that the new evidence is relevant and necessary to demonstrate that the trial court and, subsequently, the full bench, incorrectly relied on the averment in Mrs Vergeer's report that he was HIV-positive at the time he committed the offences as an aggravating factor. In explaining why he did not raise this at the time of his trial, the appellant contended that he was afforded only five minutes to go through Mrs Vergeer's report by his legal representative and could not read through the entire report. He told his legal representative that the report was correct because the portion he read appeared to be correct. It was during the address by his legal representative and the prosecutor that he, for the first time, heard reference to him being HIV-positive. He denied that he ever instructed his legal representative that he was HIV-positive when he committed the offences.

[14] It was submitted on behalf of the appellant that the evidence from Lancet proved conclusively that the appellant was not HIV-positive when the blood samples were taken from him by Lancet on 05 December 2023. It was also not possible that he had previously been HIV-positive, as he had never undergone a stem cell transplant. Therefore, he could not have infected any of his victims with the HIV-virus at the time of the commission of the offences. It was submitted that the witnesses from Lancet are all independent and have no reason to fabricate, manufacture or shape the evidence they tendered. Further, that the evidence is relevant to the outcome of the appeal and it is prima facie true.

Discussion on the s 19(b) application

[15] In *S v De Jager*[1] it was held that, in applications to adduce further evidence on appeal, the court must be satisfied that the evidence is *prima facie* true, that there is a reasonably acceptable explanation for the failure to lead it at trial, and that it is materially relevant to the outcome.

[16] In *Mulula v The State (Mulula),*[2] this Court faced with a similar application stated:

'In addition, the general rule is that an appeal court will decide whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given, not in accordance with new facts or circumstances subsequently coming into existence. Nonetheless, this court has previously indicated that the rule is not written in stone. Evidence of facts subsequently arising will be allowed in circumstances that can be described as exceptional and peculiar (see e.g S v EB 2010 (2) SACR 524 (SCA) para 5). Whether or not this test is met, I venture to suggest, will be dictated by what the interests of justice demand in a particular case. Of course, in a sense, the evidence that the appellant did not suffer from herpes 2 at the time when PZ was raped, was available before his conviction, albeit unknown. Nonetheless I will accept for the sake of argument that the appellant must pass the more stringent interests of justice test.'

[17] Mrs Vergeer's report recorded, amongst others: 'HIV-positive with coupled consequences.' It was further recorded in the report:

'(a) Concerning this matter the accused pleaded guilty.

(b) The accused was HIV-positive when he raped both victims.

(c) One of his victims confirmed his positive status because of the rape.

(d) The detail of the other victims status was not made available.

(e) HIV-status – this in itself is a death sentence to the complainants.'

[18] There are two difficulties with these aspects of the report. First, it appears that the HIV-status of the appellant was not established for the purposes of

[1] *S v De Jager* 1965 (2) SA 612 (A) at 613A–C.
[2] *Mulula v The State* [2014] ZASCA 103 para 11.

sentence. Second, the HIV-status of CR was also not established. Instead, it appears from the record that according to Mrs Vergeer, she obtained verbal information from both the appellant and the complainant (CR) about their HIV-statuses. The State did not take any steps to verify the HIV-status of the appellant, despite seeking to rely on it as an aggravating factor. There are no documents on record confirming the HIV-statuses of either the appellant or CR.

[19] While an accused or a complainant may disclose their HIV-status when consulting with a probation officer, such information remains hearsay if conveyed by the probation officer to the State or the court. In *S v Ndhlovu*,[3] Cameron JA held that:

'. . . the literal reading entails that a hearsay statement automatically becomes admissible simply because the extra-curial declarant happens to testify, regardless of the content of his or her testimony, and regardless of the interests of justice. It is hardly conceivable that the legislation intended this result. When hearsay evidence is tendered, the person on whose credibility the probative value of the hearsay depends may (i) testify and confirm its correctness; (ii) not testify; (iii) testify but deny ever making the hearsay statement; (iv) testify and admit making the statement but deny its correctness; (v) testify but neither confirm nor deny making the statement.'

In such circumstances, both the admissibility and weight of the hearsay must be assessed in light of fairness and the interests of justice, particularly where the evidence could materially affect sentence.

[20] It is incumbent on the State to satisfy itself that indeed the accused person and/or the victim are HIV-positive. The only manner of achieving this certainty is through medical evidence. Whatever method is employed to bring such evidence

[3] *S v Ndhlovu and Others* [2002] ZASCA 70; [2002] 3 All SA 760 (SCA); 2002 (6) SA 305 (SCA); 2002 (2) SACR 325 (SCA) para 29.

before a court must not affect the rights of the affected parties, which is entrenched in ss 10 and 12 of the Constitution, Act 108 of 1996 (the Constitution).[4]

[21] Consequently, medical evidence was necessary to determine whether, prior to the rape incident, CR was HIV-negative and whether, at the time of the rape, the appellant was HIV-positive. To rely solely on Mrs Vergeer's report is not only impermissible but amounts to an abdication of the State's primary responsibility of assisting the court in establishing the truth. Most importantly, the establishment of an HIV-positive status in respect of an accused person convicted of rape charges may lead to the imposition of a sentence of life imprisonment.[5] Given the possibly dire consequences, courts cannot afford to rely on hearsay evidence in relation to such an important factor which the Legislature categorised as warranting the imposition of life imprisonment.

[22] The Act sets out its objects as, inter alia, to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide; to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and ultimately eradicate the relatively high incidence of sexual offences committed in the Republic.[6]

[23] Section 51 (1) of the Act provides:

'Discretionary minimum sentences for certain serious offences

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[4] Section 10 of the Constitution provides: Human Dignity
'Everyone has inherent dignity and the right to have their dignity respected and protected.'
Section 12 of the Constitution provides:
'12 Freedom and security of the person
(1) Everyone has the right to freedom and security of the person, which includes the right-
(2) Everyone has the right to bodily and psychological integrity, which includes the right-
(a)…
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent.'

[5] Section 51(1) of the Criminal Law Amendment Act 105 of 1997, read with Part I of Schedule 2, prescribes a minimum sentence of imprisonment for life for certain listed offences including rape.

[6] Section 2 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.'

[24] In Schedule 2 of the Act provides:

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

(a) when committed –

(i)...

(ii)...

(iii)...

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b)....

(c) involving the infliction of grievous bodily harm.'

[25] Chapter 5 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act) deals specifically with services for victims of sexual offences and compulsory HIV testing of alleged sex offenders. Section 28 provides, in relevant part:

'Services for victims relating to Post Exposure Prophylaxis and compulsory HIV testing of alleged sex offenders

(1) If a victim has been exposed to the risk of being infected with HIV as the result of a sexual offence having been committed against him or her, he or she may-

(a) subject to subsection (2)-

(i) receive PEP for HIV infection, at a public health establishment designated from time to time by the cabinet member responsible for health by notice in the Gazette for that purpose under section 29, at State expense and in accordance with the State's prevailing treatment norms and protocols;

(ii) be given free medical advice surrounding the administering of PEP prior to the administering thereof; and

(iii) be supplied with a prescribed list, containing the names, addresses and contact particulars of accessible public health establishments contemplated in section 29 (1) (a); and

(b) subject to section 30, apply to a magistrate for an order that the alleged offender be tested for HIV, at State expense.'

[26] Section 32 gives an investigating officer the right to apply for HIV testing of an alleged offender.[7] Sections 36 and 37 of Act 32 of 2007, entrench the confidentiality of the HIV test results.[8] Section 37 (2) provides:

'A presiding officer, in any proceedings contemplated in this Chapter, or in any ensuing criminal or civil proceedings, may make any order he or she deems appropriate in order to give effect to this section, including the manner in which such results are to be kept confidential and the manner in which the court record in question is to be dealt with.'[9]

[27] Without reliable evidence in relation to the HIV-status of an accused person, a court will not be able to determine realistically, knowledge on his part of his

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[7] '**32 Application by investigating officer for HIV testing of alleged offender**

(1) An investigating officer may, subject to subsection (2), for purposes of investigating a sexual offence or offence apply in the prescribed form to a magistrate of the magisterial district in which the sexual offence or offence is alleged to have occurred, in chambers, for an order that-

(a) the alleged offender be tested for HIV; or

(b) the HIV test results in respect of the alleged offender, already obtained on application by a victim or any interested person on behalf of a victim as contemplated in section 30 (1) (a) (i), be made available to the investigating officer or, where applicable, to a prosecutor who needs to know the results for purposes of the prosecution of the matter in question or any other court proceedings'

[8] '36 Confidentiality of outcome of application

The fact that an order for HIV testing of an alleged offender has been granted as contemplated in section 31 or section 32 may not be communicated to any person other than-

(a) the victim or an interested person referred to in section 30;

(b) the alleged offender;

(c) the investigating officer and, where applicable, to-

(i) a prosecutor; or

(ii) subject to section 35 (2), any other person who needs to know the test results for purposes of any criminal investigations or proceedings or any civil proceedings; and

(d) the persons who are required to execute the order as contemplated in section 33.'

[9] Section 37 Confidentiality of HIV test results obtained

'(1) The results of the HIV tests performed on an alleged offender in terms of this Chapter may, subject to subsection (2), be communicated only to-

(a) the victim or the interested person referred to in section 30;

(b) the alleged offender; and

(c) the investigating officer and, where applicable, to-

(i) a prosecutor if the alleged offender is tested as contemplated in section 32; or

(ii) any other person who needs to know the test results for purposes of any civil proceedings or an order of a court...'

HIV- status for the purposes of s 51(1) of the Act, or establish the risk of exposure and transmission of the HIV-virus to the complainants. The risk of exposure and transmission of the HIV- virus are matters that are central in Chapter 5 of the Sexual Offences Act, as is evident, among others, in s 28, referred to above. Part 1 of the Criminal Law (Sexual Offences and Related Matters) Regulations (the Regulations),[10] to the Sexual Offences Act, provides in relevant part:

'2. Reporting of an alleged sexual offence and services for victims

(1) A medical practitioner or nurse to whom a sexual offence, where the victim may have been exposed to the risk of being infected with HIV as a result of that offence, is reported by a victim or an interested person must complete the J88 form.' (my emphasis)

[28] The State did not allege that the appellant was HIV-positive at the time of the alleged sexual conduct. Mrs Vergeer, however, noted that CR indicated that he subsequently tested positive for the HIV.

[29] Having regard to the above considerations, it seems to me that there must be medical evidence to prove, that an accused person was HIV-positive. There must also be reliable evidence that he knew that he is HIV-positive. Evidence that the accused has received counselling from a medical practitioner or treatment about his status and about the risks, may be sufficient to show knowledge of his HIV-positive status.

[30] The Sexual Offences Act, and its purpose does not only address the criminal exposure of victims to HIV, but it has infused in itself the socio-therapeutic mechanisms for the better good of the public as provided in s 28 of the Act, above. Therefore, it must follow that a bare allegation that a victim contracted HIV and the accused is HIV-positive, without medical evidence, would not justify a finding

[10] Criminal Law (Sexual Offences and Related Matters) Regulations GN R561 in GG 31076 of 22 May 2008

that his HIV-status constitutes aggravating circumstances to warrant imposition of life imprisonment. The Legislature provides clear processes for determining an accused's HIV-positive status, including the mechanisms and confidentiality protections set out in ss 28, 32, 36 and 37, referred to above. Absent evidence not only of the appellant's knowledge of his status, facts establishing the risk of transmission and any resulting infection of the victims, a court would be forced to rely on mere assumptions in imposing a sentence of life imprisonment. That would not serve the overall interests of justice to do so. The regional court erred in accepting, without question, the hearsay evidence of the appellant's HIV-status.

[31] The nature of the evidence that the appellant seeks to introduce is highly scientific. It is tendered by an expert in the field of Clinical Virology. A complete chain of how the blood sample was taken, kept, registered, tested, audited until a report was produced has all been placed before this Court. It is that medical evidence that negates the aggravating factor relied upon by the regional court in sentencing the appellant, namely, that he was HIV-positive and knowingly exposed the victims to the virus. It puts into question the assertions contained in the pre-sentence report about his HIV-positive status. It shows that those assertions were unverified and potentially erroneous. It puts it beyond doubt that the probation officer was wrong.

[32] The evidence relating to the appellant's HIV-status is *prima facie* credible and directly material to sentence, particularly in light of the State's reliance on his alleged knowledge of being HIV-positive as an aggravating factor. It is not surprising that the appellant confirmed the probationer's report because with his level of intellectual functioning he could not have alerted the regional court to the fact that he was HIV-negative. This Court retains a discretion to admit such evidence where the interests of justice so demand.

[33] I am satisfied that the evidence is weighty, material and there is a likelihood of truth in it. It is scientific, objective, and unbiased, with no reason for fabrication, and, as noted in *Mulula*,[11] it cannot be seen as manufactured to undermine his conviction or sentence. It is relevant to the outcome because the full bench found that the appellant's knowledge of his HIV-positive status negated the mitigating circumstances and justified the imposition of the prescribed minimum sentence. It is evidence that is peculiar and exceptional in that it could only come through the automated robotic machinery that Lancet employed. I am satisfied that the appellant could not have obtained this evidence prior to the imposition of sentence. The evidence is directly relevant to the outcome of this appeal. There will be a miscarriage of justice were the evidence to be excluded, I accordingly accept it.

[34] I find that the appellant has met the threshold set in s 19 of the SCA Act.[12] It is in the interests of justice that a wrong that has been inadvertently committed by the full bench be corrected by this Court. The admission of the evidence will hopefully assist the complainants and encourage them to have their HIV-status tested. More importantly, it will assist prosecutors to appreciate the importance of medical evidence where they seek to rely on the HIV-status of an accused for sentencing purposes. They must take steps to obtain reliable medical evidence. This Court sounded caution in this regard way back in 2014, in *Mulula*.

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[11] *Mulula* para 13.

[12] Section 19*(b)* of the Superior Courts Act 10 of 2023 provides-

'Powers of court on hearing of appeals

The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law—

(a) dispose of an appeal without the hearing of oral argument;

(b) receive further evidence;

(c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or

(d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.'

[35] This Court has a discretion to either hear the evidence on appeal or set aside the sentence and refer the matter back to the regional court. The latter option would not be in the interests of justice as it would delay the matter further when this Court is in possession of all the material it needs to dispose of the appeal.[13] I now proceed to deal with the grounds of appeal advanced.

Appeal against sentence

[36] It was submitted on behalf of the appellant that: he had no previous convictions although he was detained at Bosasa for a motor vehicle theft. He was 18 years old when he committed the offences in question and was 20 years old when he was sentenced by the regional court. He attained a Grade 10 level of education. He was single and unemployed before his detention at Bosasa. According to Mrs Vergeer's report, the appellant was a troubled teenager. He had an unhappy and unstable upbringing and was forced to live a nomadic lifestyle. He was subjected to physical, emotional and sexual abuse by his own father who raped him. Both his parents were drug addicts. He also abused drugs from the tender age of 12 years.

[37] A report from Dr Alison, a psychiatrist, which was relied upon by Mrs Vergeer, showed that the appellant functioned clinically at the emotional level of an 8 to 9-year-old child. It was submitted that the regional court relied heavily on Mrs Vergeer's report in finding the presence of aggravating factors, namely the appellant's lack of remorse, his apparent pride in his actions and his lack of empathy. The regional court also placed emphasis on the fact that the appellant was HIV-positive at the time of the offences and that the complainants continued to suffer the consequences long after the rape incidents. It was contended that, in

[13] *P A F v S C F* [2022] ZASCA 101; 2022 (6) SA 162 (SCA) para 9

light of the further evidence proving that the appellant is HIV-negative, the decision of the regional court and its reliance on the alleged HIV- positive status of the appellant as confirmed by the full bench constitutes a misdirection. This Court, it was argued, is entitled to interfere therewith and set it aside.

[38] It was conceded that the complainants suffered severe consequences as a result of the rape incidents. The following factors were relied upon as sufficient to justify a departure from the minimum sentence: the appellant's youth and emotional immaturity; absence of previous sexual convictions; having been a victim of rape by his father; and his guilty plea and honesty regarding his actions. It was further submitted that the assumption that the appellant was HIV-positive at the time of the offences was incorrect. Both the regional court and full bench had relied on this incorrect assumption as a weighty aggravating factor in finding that there were no substantial and compelling circumstances warranting a departure from the prescribed minimum sentence of life imprisonment. Once the incorrect HIV-positive factor was removed from the equation, it was submitted that there were sufficient substantial mitigating factors present to conclude that a sentence of life imprisonment was excessive. In this regard, reliance was placed on *S v Maswanganyi.*[14] It was submitted that this Court should uphold the appeal.

[39] The State made the following submissions: that the HIV-negative status of the appellant does not alter the prescribed minimum sentence to be imposed as mandated by the Act. It does not constitute a substantial and compelling factor for purposes of sentence; the report of Professor Vardas is irrelevant to this appeal, because the State did not allege attempted murder of the victims based on the HIV-status of the appellant; furthermore, the young age of the offender does not, on its own, call for a lesser sentence where a serious crime was committed; that the

[14] *S v Maswanganyi* [2013] ZAGPPHC 318; 2014 (1) SACR 622 (GP) para 28.

imposition of an unduly lenient sentence will erode society's confidence in the criminal justice system and that rape is a humiliating, degrading and brutal invasion of the victim's privacy, dignity, and bodily integrity. In this regard reliance was placed on *S v Chapman.*[15] It was submitted that this Court should therefore not interfere with the decision of the full bench.

[40] Before the regional court the legal representative of the appellant adopted a very supine attitude. She made no effort to place before the regional court facts which would constitute substantial and compelling circumstances. When one reads the record there is a litany of such factors. The appellant's legal representative was required to do no more than place the relevant factors before the regional court, thereby enabling it to determine whether they constituted substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. In this regard, the following exchange between the legal representative and the regional court is apposite. When invited to address the regional court on such factors, her submissions were as follows:

'Q: Has the defence anything else to add or to indicate to the Court with regard to possible substantial or compelling circumstances justifying the Court could possibly consider deviating from the prescribed minimum sentence or not imposing the prescribed minimum sentence in the light of the age of the accused at the time of the commission of the offences.

A. Your Worship, I have had an opportunity to consult with the accused on that aspect as well Your Worship. I did that on the previous occasion. It seems unfortunate that the accused is not able to instruct me on anything that we could use as compelling and substantial circumstances. Apart from the fact that he pleaded guilty Your Worship and not going to waste the court's time.

The magistrate put to the appellant's legal representative:

Q. It would seem from the pre-sentence report that your client was aware of his HIV-status at the time of the commission of this offence. Would those be your instructions from your client as well?

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[15] *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA); [1997] 3 All SA 277 (A) para 20.

A. That is correct, Your Worship.'

[41] It was this response about his 'known HIV-status' that swayed the regional court to find that the appellant's knowledge of his HIV-positive status as an aggravating factor, ultimately resulting in the imposition of a sentence of life imprisonment. The full bench was bound by the record and its decision was based on it. It is only now before this Court that medical evidence relating to his HIV-status was adduced and accepted.

[42] It is important to emphasise that first, there was no allegation that MVW was also infected with the HIV-virus. Second, a perusal of the record reveals that what was put to the legal representative was contained in the pre-sentence report, without being medically verified. Establishing whether the appellant was indeed HIV-positive and knew of his HIV-positive status when he raped the two complainants would necessitate a factual enquiry. As the new evidence was not available to the full bench at the time it made its decision, this Court is therefore entitled to interfere with the sentence of life imprisonment.

[43] The medical evidence tendered and accepted by this Court establishes that it is medically impossible for a person who is truly HIV-positive to later test negative without undergoing a stem cell transplant. The appellant stated that he has never had such transplant. There is a litany of medical interventions in relation to the appellant's mental state as recorded in the pre-sentence report. The appellant is clearly an emotionally troubled young man. He does not have a stable family support and he was a victim of sexual abuse from his father. He abused drugs from an early age and he had no previous convictions at the time he was sentenced. His emotional immaturity is that of an 8 to 9-year-old child. He pleaded guilty to both counts. The State accepted the plea, and the appellant was convicted on his plea.

This is a factor that the full bench failed to take into account. That factor ought to have been considered in favour of the appellant.

[44] The appellant was relatively young when he committed the offences. The offences he committed were very serious and they left the victims traumatised. Nonetheless, there were sufficient factors in favour of the appellant warranting a finding that there were substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. Critically, the regional court committed a serious misdirection in being persuaded by nothing more than hearsay evidence that the appellant was HIV-positive and knew of his status. This misdirection materially contributed to the regional court's finding that there were no substantial and compelling circumstances. It equally played a role in the full bench dismissing the appeal. These material misdirections justify this Court interfering with the sentence.

[45] Taking into account all the evidence, the sentence of life imprisonment in respect of the appellant was excessive. A proper consideration of the appellant's personal circumstances justify imposition of a lesser sentence. The decision of the full bench dismissing the appeal must be set aside. The sentence of life imprisonment imposed by the regional court in count one must be set aside and substituted with a lesser sentence.

[46] I find that a sentence of 15 years' imprisonment in count one, with ten years thereof ordered to run concurrently with the sentence of ten years that he is currently serving in respect of count two, will be appropriate in the circumstances.

[47] In the result, the following order is made:

1 The application for adducing further evidence on appeal is granted.

2 The appeal is upheld.

3 The decision of the full bench dismissing the appeal is set aside and is replaced with the following order:

‘1 The appeal is upheld.

2 The sentence of life imprisonment imposed by the regional court in respect of count 1 is set aside and is replaced with the following:

‘In respect of count one: The accused is sentenced to undergo 15 years imprisonment, ten years of which shall run concurrently with the sentence of ten years in count two. Effectively the accused will serve a term of 15 years imprisonment.

3 The sentence is antedated to 09 November 2021.’

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T V NORMAN
ACTING JUDGE OF APPEAL

Appearances

For the appellant:	E A Guarneri
Instructed by:	Johannesburg Justice Centre
	Justice Centre, Bloemfontein
For the respondent:	S K Mthiyane
Instructed by:	Director of Public Prosecutions, Johannesburg
	Director of Public Prosecutions, Bloemfontein.