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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: AR58/2024P

In the matter between:

SIKHONA DAYI

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Regional Court, Port Shepstone (Ms V Dube sitting as court of first instance):

The appeal against conviction and sentence is dismissed.

JUDGMENT

Marion AJ (Nkosi AJP concurring):

Introduction

[1] On 1 March 2023, the appellant, Mr Sikhona Dayi, was convicted of three counts of rape by the Regional Court sitting in Port Shepstone. The appellant was sentenced to life imprisonment on each count in terms of the prescribed minimum sentence set out in s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA), which provides that a prescribed sentence of life imprisonment to be imposed for a conviction of rape where the complainant is raped more than once or where the complainant is a child under the age of 16 years, unless in terms of s 51(3)(a) of the CLAA, substantial and compelling circumstances exist that justify a lesser sentence. In terms of s 280(2) of the Criminal Procedure Act 51 of 1977 (the CPA) the sentences imposed on counts 2 and 3 were to run concurrently with the sentence imposed on count 1. The appellant exercised his automatic right of appeal as provided for in s 309 of the CPA. The appellant was initially represented by Legal Aid South Africa who subsequently withdrew as his attorneys of record. Mr *Dlamini* represented the appellant at the hearing of this matter, and the State was represented by Ms *Latchman*. Mr *Dlamini* filed new heads of argument raising new grounds of appeal to which the State responded by filing supplementary heads of argument. The State submitted that for purposes of this appeal both their previous heads of argument and their supplementary heads of argument should be read concurrently. The appellant seeks leave to appeal his conviction and sentence. The State requested that the appellant's appeal against both conviction and sentence should be dismissed. The complainant was 14 years old at the time of the rapes. She was 18 years old at the time she testified as the case had to start *de novo*.

[2] **Ad conviction: the appellant's grounds of appeal**

The appellant sets out extensive grounds of appeal, as prepared by Mr *Dlamini* on 17 October 2025, which reads as follows:

- 4.1 the Learned Magistrate failed to approach the evidence of the complainant with caution, as it was the evidence of a single witness.
- 4.2 the Learned Magistrate erred in finding that the evidence of the Complainant's mother, NV Ntuli, corroborated the evidence of the complainant as a single witness.
- 4.3 the Learned Magistrate erred in finding that the medical report (J88) corroborated the evidence of the complainant as a single witness.
- 4.4 the Learned Magistrate misdirected herself and misconstrued the requirements of the first report, and thereby finding that the first report witness' evidence was not contradicted.

4.5 the Learned Magistrate misdirected herself when it erroneously found that the photographic evidence, in respect of count 1, corroborated [the complainant's] evidence.

4.6 the Learned Magistrate erred and misdirected herself in finding that the Appellant raised a bare denial in all three alleged incidents of rape and failed to consider *alibi* as the Appellant's defence.

4.7 the Learned Magistrate erred in not considering the Appellant's version in its entirety, and also failed to give reasons for preferring the evidence of the complainant over that of the Appellant and his witnesses.

4.8 the Learned Magistrate failed to state why she found the appellant's version and his witnesses' version to be so improbable that it could not have been reasonably possibly true.

4.9 the Learned Magistrate erred in finding that the state proved its case against the Appellant beyond a reasonable doubt.

4.10 the Learned Magistrate committed gross misdirection when she misconstrued the threshold of the asserted allegations and accepted them as evidence. The Learned Magistrate erred in accepting allegations by [ZJ] (the complainant) against the Appellant as evidence on their own. The Learned Magistrate erroneously accepted the allegations by [the complainant] as the gospel truth without any evidence supporting the allegations.'

I will deal with the grounds of appeal under broad headings to avoid repetition later in this judgment.

Preliminary grounds of appeal

[3] Before dealing with the main grounds of appeal, as set out above, the appellant raised a preliminary ground of appeal which is procedural in nature, and I will deal with this first before continuing with the grounds against the merits. The complainant was 18 years old at the time of testifying, at the re- commencement of the trial. The appellant stated that

'the learned magistrate erred and misdirected herself when she granted an application in terms of section 170A of [the Criminal Procedure] Act 51 of 1977¹ in favour of the state without being

¹ Section 170A of the CPA provides for evidence to be received by the court through as intermediary, and reads:

'(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness-

(a) under the biological or mental age of eighteen years;

(b) who suffers from a physical, psychological, mental or emotional condition; or

(c) who is an older person as defined in section 1 of the Older Persons Act, 2006 (Act 13 of 2006), to undue psychological, mental or emotional stress, trauma or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.'

provided with a birth certificate or a psychologist's report to determine whether the complainant was protected by the section.'

Mr *Dlamini* stated that 'the learned magistrate contravened the provisions of section 170A of Act 51 of 1977 in their entirety and thereby committed an error of law.' The appellant stated that this 'misdirection adversely prejudiced the appellant in that during cross-examination he could not observe the witness's demeanour.' He went on to state that 'the learned magistrate misinterpreted and misapplied the provisions of ss 153(5) and 170A of Act 51 of 1977 when she failed to realise that a child witness loses the protection of testifying through the intermediary when he or she reaches the age of majority.'

[4] The State argued that the appellant did not object to the application brought by them to invoke the provisions of s 170A, to adduce the evidence of the complainant.² The State submitted that in the application for an intermediary to be used it drew the court's attention to the fact that the complainant stuttered and that this was the second time that the complainant had to testify in this matter as the previous presiding officer had passed away. It was submitted by the State that the complainant had to relive this traumatic experience by testifying for the second time.

[5] The defence and State had acknowledged these 'special circumstances.' On this basis the State made an application in terms of s 153(2) and (3) for the matter to be heard in camera in the likelihood that proceedings may result in harm to the complainant and more so that this was a sexual offence matter relating to three counts of rape. The State argued that the complainant would have to testify about an invasion of her person, her body and her dignity. The appellant did not raise any objections to these submissions at the outset of the trial and the application for the matter to be held in camera was granted. The State submitted that the proceedings are not vitiated and that the learned magistrate did not err in granting the applications for the complainant to testify via an intermediary or in camera.

[6] In *casu*, the appellant argued that the complainant was 18 years old at the time she testified and that he was prejudiced as he could not observe the complainant's

² Record, vol 1, page 10 line 25.

demeanour whilst she was being cross-examined. The appellant was represented by an attorney during the trial. His attorney consented to the appointment of an intermediary on his behalf. The learned magistrate looked at the circumstances of the matter namely, the complainant was testifying for a second time, the nature of evidence in rape matters, the complainant had a stutter, and that these factors would cause her 'undue stress and trauma' and granted the s 170A application. The issue of an intermediary did not arise during the trial.

[7] In *S v Lenting and Others*³ the court stated:

'[31] ... The amendment brought about by the Criminal Law Amendment Act 12 of 2021 significantly increased the power of the courts to appoint intermediaries in two respects. The list of witnesses who may qualify for this purpose now goes beyond young persons. It includes two other classes of witnesses: namely, any person 'who suffers from a physical, psychological, mental or emotional condition'. This category of witnesses is not age-bound or limited. In other words, regardless of age, an intermediary can still be appointed for witnesses who suffer from a psychological, mental or emotional condition, even if that witness is older than 18 years.

[32] The second category introduced by the recent amendments is a witness who is an older person as defined in s 1 of the Older Persons Act 13 of 2006. In terms of s 1 of the Older Persons Act, an older person is a person who, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older. Furthermore, before August 2022, an appointment for an intermediary for a witness under the biological or mental age of 18 years could be made only if it appeared that testifying in an open court would expose the witness to 'undue stress or suffering'. The amended section now provides that the court may order the use of intermediary service if it appears to the court that the proceedings would expose such a witness to undue psychological or emotional stress, trauma or suffering if he or she testifies at such proceedings. This is in addition to undue 'mental stress or suffering', which was provided for in the section before it was amended. I pause to mention that the amendment also introduced the services of intermediaries to proceedings other than criminal matters. Witnesses in civil matters who meet the threshold set out in the respective sections may testify through the assistance of an intermediary.' (Footnotes omitted.)

[8] The learned magistrate looked at the circumstances of the matter namely, the complainant was testifying for a second time, the nature of evidence in rape matters, the

³ *S v Lenting and Others* 2024 (2) SACR 157 (WCC).

complainant had a stutter, and that these factors would cause her 'undue stress and trauma' and granted the s 170A application. The issue of objecting to the use of an intermediary, did not arise during the course of the trial. The learned magistrate did not err, when she ruled that an intermediary was necessary to assist the complainant. She complied with the prescripts of the amended CLAA in making the ruling in terms of s 170A, to allow the complainant to testify via the intermediary.

[9] Section 153 of the CPA provides for circumstances in which criminal proceedings will not take place in open court. However, in this matter, the appellant incorrectly cites s 153(5) of the CPA in his heads of argument as a ground of appeal. In light of the circumstances herein, the relevant parts are s 153(2) and (3), which state:

'(2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct-

(a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorized by the court;

(b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court.

(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit-

...

(c) any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person;

(d) any act for the purpose of furthering the commission of a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person; or

(e) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage, the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.'

The appellant did not object to the proceedings being held in camera. I am of the view that the magistrate considered the sensitive nature of the evidence and correctly granted the application for the matter to proceed in camera in terms of s 153. The preliminary grounds of appeal fall to be dismissed.

The facts

[10] The following will briefly describe the facts in each of the three counts that the appellant faced at trial.

Count 1

[11] At approximately 19h00 the complainant was sent by her grandmother to the shop to purchase Grandpa headache medication for her brother who was ill. She went into the shop and saw 'Mbobo' and the appellant inside the shop. Mbobo bought cigarettes and then went outside to smoke. The appellant stated that he was going home, and the complainant did not see which direction he took. Whilst she was on her way home, she sensed someone behind her. She identified the appellant as the person who approached her. She recognised him by the clothes he wore as she saw him earlier in the shop. He was wearing a denim jean, striped blue and white T-shirt and flip flops. The area where the complainant encountered the appellant was bushy. It was dusk and not fully dark however, a house close by illuminated some light on the area as well. She identified the appellant in terms of her prior knowledge of him and his height, shaved hair, light complexion and the sound of his voice.

[12] The appellant grabbed the complainant and flipped open an okapi knife and threatened her. The blunt end (butt) of the knife was placed on the complainant's neck, with the sharp edge facing her, and the knife was opened. The appellant blocked the complainant's mouth when grabbing her. The complainant was wearing a pink skirt, a brownish dotted vest, a long-sleeved T-shirt, and plastic shoes. The appellant removed the complainant's panty and lay her down on the grass. The appellant opened her legs and moved her skirt up to her waist. The appellant lowered his pants, took out his penis, and inserted it into the complainant's vagina, making downward moves. The complainant experienced pain even after the rape but she did not know what was being done to her because she had never had sexual intercourse before.

[13] After the appellant removed his penis from her vagina, the complainant testified that she saw a whitish substance come out of his penis. As the appellant pulled up his pants, he told the complainant he was afraid of her getting pregnant. The appellant instructed the complainant not to tell anyone; he threatened to kill her if she did. The appellant slapped the complainant on her face. The complainant was afraid of the threat of being killed. The complainant did not tell anyone and gave her mother the Grandpa headache medication, and went to her room and slept.

Count 2

[14] A second incident occurred on a Sunday, reportedly 12 August 2018 the same month as the first incident. The complainant recalled the day as her brothers were plastering at home and her mother was washing. The complainant was asked to fetch water while her family was plastering; she took a bucket and went to get water from the river. She found a water-filled bucket by the river in a secluded, bushy area and didn't know whose it was. While filling her own bucket, a man appeared from a pathway. Recognising him as the appellant, she fled, leaving her bucket; he chased, grabbed, and pushed her backwards with both hands, forcing her to sit on a flat rock. She feared the appellant would repeat the previous rape. He then asked the complainant why they were not in a relationship. She responded by saying that he was old and did bad things in the community. The appellant began kissing her below her ear and on the side of her neck. The complainant was wearing a track pants. He then took his two fingers, the middle and index fingers and inserted them into her vagina. The appellant moved his fingers inside her vagina. He then removed his fingers covered her mouth and pulled her tracksuit to her knees. The appellant then took out his penis and inserted it into the complainant's vagina whilst making up and down movements. The complainant testified that it was very painful when the appellant inserted his penis into her vagina. As he was raping the complainant his phone rang and he became distracted. The appellant then slapped the complainant on her face and told her not to say anything.

[15] The appellant thereafter pulled out his penis from her vagina and fastened his pants. He once again told the complainant not to say anything. This time the complainant did not see any whitish substance. She took her bucket and returned to her

home. She bathed and did not tell anyone about the incident as she believed that the appellant would kill her. On her arrival at home her brother noticed that something was wrong and questioned her about why she was walking in an abnormal manner. She told her brother that it was because of the new shoes she was wearing.

Count 3

[16] The third incident of rape occurred on a Monday after the complainant was being dropped off by bus from school. She was the last person to be dropped off. She saw the appellant, Ntsontso and Zwe. She had to pass them to get on the path to her home. One of them was carrying a bottle of Smirnoff vodka. The appellant whistled and gestured for her to stop. She continued walking and the appellant followed her. At one stage the complainant thought she was going to be safe as she saw Buhle and Jabulani on the path. The appellant continued to follow her, and she began running. The appellant chased the complainant and caught up with her and took her Billabong bag with books from her.

[17] The appellant held the complainant's hand to stop her from running away. He began hitting the complainant's back as they walked together. Zwe joined the appellant and complainant whilst they were walking. The appellant continued hitting the complainant's back. The complainant could not get help as the appellant continued holding her hand. Zwe took a different path to his home. The appellant then said that they need to go to Bho's (friend) place. The complainant refused and the appellant pulled her. He locked the door when they were in the room.

[18] The appellant placed the complainant's bag on the floor. He made her lie on the bed and removed her tights and panty. The appellant took off his trouser and inserted his penis into the complainant's vagina. He covered her mouth and said that he would do it slowly and not fast. When the appellant was done, he got dressed and left the complainant in the room. The complainant got off the bed and got dressed. She went back home and did not tell anyone as she was afraid.

[19] The rape was first reported by one Mandlekosi to Kehla. Mandlekosi was deceased and did not testify in the trial. Kehla then reported what he was told to the

complainant's mother (Mrs N[...] N[...]). On her mother questioning the complainant, she reported the rapes to her mother and told her that she was afraid to speak as the appellant had threatened to kill her.

[20] The appellant disputed all three incidents of rape against the complainant. The appellant raised a motive of bad blood against the complainant's family. He averred that there were allegations that he stole the complainant's brother's money.

Submissions

[21] The grounds of appeal, as quoted above, will be discussed here, however, as also referred to above, these will be discussed under broad headings.

Cautionary rule

[22] The appellant raised, in his grounds of appeal, that the learned magistrate failed to approach the evidence of the complainant with caution as she was a single witness in respect of the rapes. The State submitted that the learned magistrate applied the cautionary rule in assessing that the complainant was a single witness when testifying about the rapes. The State argued that the appellant was known to the complainant before the first count of rape as he was from the area and was well known to her brothers. The State submitted that the learned magistrate considered in her judgment that the complainant was 14 years old at the time of the rapes and that she was a single witness. The State averred further that s 208 of the CPA makes provision for an accused to be convicted of any offence on the single evidence of any competent witness.

[23] The State submitted that while the complainant is a single witness regarding the rapes, there is corroboration regarding the surrounding facts. This came from the first report and the medical evidence indicative of vaginal penetration. Ms *Latchman* stated that the medical evidence proved that there was forceful penetration and that the only question the trial court had to decide upon was the identity of the appellant.

First report.

[24] The next ground of appeal argued by the appellant was that the complainant's mother's evidence did not corroborate the complainant's evidence. The State argued that the complainant had eventually reported the three incidents of rape to her mother. The State went on to argue that this negated any consent and corroborated the complainant's version of events.

[25] The appellant submitted that learned magistrate grossly erred and misdirected herself when she found that evidence of the first report, which the complainant made to her mother, corroborated the evidence of the complainant.

[26] The appellant stated that the complainant's reaction of crying when the matter was reported to her mother was out of fear of being evicted and not that she was traumatised reliving the events. Mr *Dlamini* argued that the first report to the mother was extracted under threat and duress and that the learned magistrate should not have attached any weight to it when evaluating the evidence and corroboration. He went on to state that the way the first report was made, made it inadmissible, as it was not made at the first opportunity and was made under duress.

[27] Ms *Latchman* argued that the court found nothing askance in how the matter came to be reported to the complainant's mother. The complainant was afraid and emotional to report the incidents immediately when they occurred. The State disputed the appellant's arguments that rumours were circulating regarding a romantic relationship between the complainant and himself. The State went on to say that the rumours appeared to be more about the alleged rapes by the appellant on the complainant. The State argued that there is no set manner in which a complainant must report a rape matter. They argued further that the trial court considered the evidence that the appellant threatened the complainant with a knife and assaulted her. On the second incident there was a car full of males driving slowly and there was a firearm. The complainant hid. The State argued that the appellant discounted the multiple rapes the complainant had to endure and being threatened by the same appellant, who did not have a good reputation in the community.

Contradictions

[28] Under this heading, various aspects of the complainant's evidence were attacked as being contradictory: Mr *Dlamini* stated that the complainant contradicted herself in her evidence regarding the first rape in stating that it was very dark and then saying it was slightly illuminated. He averred that this was a material contradiction that vitiated the entire count 1 against the appellant. The State argued that the trial court found the complainant to be a truthful witness and sought and dealt with contradictions as prescribed by case law.

[29] The complainant testified that when the appellant was done raping her in count 1, he pulled out his penis and ejaculated a whitish substance from his penis. She testified that she saw this because he was next to her. Mr *Dlamini* contended that the learned magistrate erred in not finding this evidence false and improbable because the complainant had testified that the place was very dark.

[30] Mr *Dlamini* drew the courts' attention to contradictions in the evidence of the complainant in comparison to that of her mother. The first being that the complainant testified in the first incident that the appellant put his hand over her mouth and the first report testified that the appellant grabbed the complainant by the arm. Secondly, the appellant stated that there were inconsistencies between the complainant's mother's evidence and that of the complainant in respect of photograph 6, which depicted a footpath. The complainant testified that it led to their home, whilst her mother stated that it was an unused footpath that did not lead to their home. The appellant also testified that it was an unused footpath. The trial court ought to have found, that the complainant's version that the first incident of rape took place along the footpath to her home, as false.

[31] Mr *Dlamini* criticised the learned magistrate for not finding that when the complainant arrived at home after the first incident, she did not behave like a person who had just been raped. He argued that the learned magistrate should have considered the evidence that the complainant had no intention to report the alleged incident of rape to her mother but only wanted to sleep. In light of this, the learned

magistrate should have found the allegation of rape to be false and improbable. The State argued that there is no prescribed way a rape victim should behave after a rape.

The medical evidence and the J88

[32] A further ground of appeal was that the appellant disputed that the J88 corroborated the complainant's version of the rapes. Mr *Dlamini* submitted that the learned magistrate erred and misdirected when she failed to consider the fact that the State had given two different dates for counts 2 and 3, respectively. He stated that the charge sheet indicated that count 2 and 3 took place on 12 August 2018 and 13 August 2018, respectively; whereas the J88 indicated that the two counts took place on 15 and 20 August 2018. The learned magistrate elected to consider the dates that appeared in the charge sheet, and failed to give reasons why she did not consider the dates in the J88 form. The State submitted that Dr Martinez-Kubelo giving evidence in respect of the J88 was reading her private notes. There were no dates reflected in the J88. The State contended that the complainant ought not to be prejudiced by the inconsistent dates. The magistrate, the State argued, dealt with the various dates in evaluating the evidence in her judgment.⁴

[33] The appellant submitted that the learned magistrate grossly erred and misdirected herself when she concluded in her judgment that it was not in dispute that the complainant was raped. Mr *Dlamini* in his heads of argument stated that this was the main issue in dispute. The learned magistrate had erred when she accepted the medical evidence of Dr Martinez-Kubelo's and the J88, to confirm the injuries sustained by the complainant resulted from of the rapes. The appellant stated that the medical evidence was inconclusive, and therefore did not prove that the complainant had been raped. The learned magistrate grossly erred and misdirected herself when she found that the evidence of Dr Martinez-Kubelo, corroborated the evidence of the complainant. It was argued that under cross-examination Dr Martinez-Kubelo testified that the clefts were old healed injuries, which could have arisen from any incident in the region of between two weeks or three to six months.

⁴ Record, vol 2 at 377, lines 20-25, and at 378, lines 1-15.

[34] The appellant submitted the learned magistrate grossly misdirected herself when she found in her judgment that the issue of different dates was not in issue, but what was relevant was the medical evidence that the complainant was raped. Mr *Dlamini* stated that the learned magistrate further misdirected herself and demonstrated bias against the appellant when she stated that the issue of different dates was not a material contradiction to reject the complainant's evidence. The appellant concluded that this misdirection was material since the appellant relied on his alibi as defence, and therefore the issue of the dates on which the alleged incidents of rape occurred was essential in this matter. Mr *Dlamini* was of the view that on these grounds alone, the learned magistrate should have found that the State failed to prove its case beyond any reasonable doubt and acquitted the appellant.

Complainant's evidence

[35] Mr Dlamini submitted that the prosecutor asked the complainant leading questions which caused her to implicate the appellant. He further stated that the learned magistrate should have intervened and stopped such leading questions like:

'PROSECUTOR: "now how do you feel about him this Sikho (appellant) person?"

"What did Sikho do to you?"

"right, now we interrupted you last week Wednesday when you were telling us about [how Sikho had raped] and you said it was for three times, you recall?"

[36] Mr Dlamini submitted in his heads of argument that the complainant had not made any mention of the word 'rape' before the prosecutor mentioned it. The complainant had testified the appellant sexually abused her, after being led to say so by the prosecutor. The State argued that the appellant was legally represented and that his attorney did not object to the prosecutor's line of questioning. These questions that were asked did not vitiate the proceedings as alleged by the appellant.

[37] Further aspects of the complainant's evidence that the appellant has argued to be improbable in the circumstances of this case, are set out here: Mr *Dlamini* argued that the learned magistrate should have found the version of the complainant to be false and improbable. This argument was based on the question of the probability that the appellant could not have raped the complainant in broad daylight at a public place like

at the river, this is in reference to the second incident or count 2. He went on to say that the learned magistrate should have also found it improbable that the complainant did not scream and ask for help from the neighbours when the appellant chased her or during and after the alleged rape incident itself. The complainant's behaviour in continuing as normal, to take the bucket of water home, was criticised by the appellant. Mr *Dlamini* argued that the complainant failed to report the second incident of rape to her mother and that this conduct was not 'akin to that of a person who had been raped.' He argued that the complainant was unable to explain why she did not report. Mr *Dlamini* argued that the learned magistrate should have rejected the complainant's version because she had bathed after the second incident of rape and that this is 'uncharacteristic' of a rape victim.

[38] The appellant submitted that the magistrate erred by accepting the complainant's evidence that two alleged incidents of rape occurred on consecutive days. Such conduct is improbable, as she neither reported the incidents to her mother or friends nor provided a credible explanation for remaining silent. He stated further that the alleged threat from the appellant was implausible since he did not live with her family.

[39] Mr *Dlamini* submitted that the complainant's failure to alert Buhle and Jabulani prior to the third incident, that the appellant was chasing her or that she needed help was highly improbable. He went on to state, that the learned magistrate should have rejected as false and improbable the complainant's response that, she was afraid. The appellant submitted that the complainant should have run home when the appellant was talking to Buhle and Jabulani. Mr *Dlamini* also argued that the complainant's version that the appellant took her school bag, then held her hand and walked with her is false and improbable in all material respects. He stated that was improbable for a person who had been raped twice by the same perpetrator to be walking with that person, as if nothing had happened. The complainant testified that, whilst she was walking with the appellant, Zwe shouted and asked them to wait for him. When questioned the complainant testified that she did not ask for help from Zwe because he was a friend to the appellant. Mr *Dlamini* stated that the learned magistrate should have rejected such evidence as improbable and false.

Alibi

[40] The appellant stated that the learned magistrate disregarded his alibi on all three counts. The learned magistrate erred and misdirected herself in finding that the appellant raised a bare denial in all three alleged incidents of rape. On count 3, two witnesses, Mr Thamsanqa Nzimakwe and Mr Ntosntso Cele testified on behalf of the appellant to confirm his alibi. Mr *Dlamini* submitted that the learned magistrate disregarded their evidence without giving reasons for doing so. By doing so, he stated that, she showed an actual bias against the appellant. The learned magistrate erred and misdirected herself in finding that the appellant's evidence was inconsistent and improbable. The learned magistrate erred and misdirected herself in finding that the appellant was untrustworthy and unreliable. The appellant stated that such personal attacks on the appellant were baseless and not supported by facts.

[41] The State argued that the trial court had considered the appellant's alibi, which was initially touted as a bare denial. The State submitted that the learned magistrate was thorough in her evaluation of the law to the facts. The State submitted further that the trial court dealt with the law where there are two mutually destructive versions and correctly concluded that the State had proved its case beyond a reasonable doubt against the appellant. The State submitted that the trial court found that the appellant's evidence contained improbabilities and inconsistencies. This evidence showed the falsehood he had placed before the trial court in his version of events during his testimony. The State averred that the learned magistrate had looked at the evidence as a whole and that no bias could be found on her part, either in her summation or application of the legal principles.

The law and analysis: ad conviction

[42] In *S v Dyira*,⁵ the court held that:

'The requirement in such a case is, as always, proof of guilt beyond reasonable doubt, and, to assist the courts in determining whether the onus is discharged, they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution (*R v Mokoena* 1956 (3) SA 81 (A) at 85, 86). This means that the courts must be alive to the

⁵ *S v Dyira* 2010 (1) SACR 78 (ECG) para 6.

danger of relying on the evidence of only one witness, because it cannot be checked against other evidence.’

[43] In assessing the applicability of the cautionary rule, the Supreme Court of Appeal in *Maila v S*,⁶ referring with approval to *Woji v Santam Insurance Co Ltd*,⁷ in terms of its discussion on s 208 of the CPA stated

‘[17] . . . To ensure that the evidence of a child witness can be relied upon as provided in s 208 of the CPA, this Court stated in *Woji v Santam Insurance Co Ltd*, that a court must be satisfied that their evidence is trustworthy. It noted factors which courts must take into account to come to the conclusion that the evidence is trustworthy, without creating a closed list. In this regard, the court held:

“*Trustworthiness* . . . depends on factors such as *the child’s power of observation*, his power of recollection, and his power of narration on the specific matter to be testified. . . . His capacity of observation will depend on whether he appears “intelligent enough to observe”. Whether he has the *capacity of recollection* will depend again on whether he has *sufficient years of discretion* “to remember what occurs” while the *capacity of narration or communication* raises the question whether the child has the “*capacity to understand the questions put, and to frame and express intelligent answers.*” (Emphasis added.)

[18] This Court has, since *Woji*, cautioned against what is now commonly known as the double cautionary rule. It has stated that the double cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single child witness’s evidence, tested through (in most cases, rigorous) cross-examination, should be ‘trustworthy’. This is dependent on whether the child witness could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers. Furthermore, the child witness’s evidence must not have changed dramatically, the essence of their allegations should still stand. Once this is the case, a court is bound to accept the evidence as satisfactory in all respects; having considered it against that of an accused person. ‘Satisfactory in all respects’ should not mean the evidence line-by-line. But, in the overall scheme of things, accepting the discrepancies that may have crept in, the evidence can be relied upon to decide upon the guilt of an accused person.’ (Emphasis in original.)

⁶ *Maila v S* [2023] ZASCA 3 (*Maila*).

⁷ *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028B-D.

[44] In my view, the court *a quo* carefully considered the cautionary rule in evaluating the evidence of the complainant. The court found the complainant to be an honest and trustworthy witnesses. In *S v Gentle*⁸ the court stated,

‘It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, *on the issues in dispute* (cf *R v W* 1949 (3) SA 772 (A) at 778 - 9).’ (Emphasis in the original.)

The learned magistrate looked at the evidence in totality when she accepted the complainant’s version and rejected the appellant’s version. She did not show bias in favour of the complainant. The learned magistrate found, correctly so, that the mother’s evidence corroborated the complainant’s evidence in material respects. The contradictions as highlighted by Mr *Dlamini* were minor and not material. The court *a quo* carefully analysed the appellant’s version and found it to be highly improbable and inconsistent, thereby rejecting it. I agree with the State, that the complainant’s evidence was consistent, and that the complainant and her mother evidence corroborated each other’s in material respects.

[45] Counsel for the State argued that the court *a quo* had not misdirected itself. She stated that in terms of s 208 of the CPA an ‘accused person may be convicted on the evidence of a single competent witness’. She further submitted that the court *a quo* gave a detailed and well-reasoned judgment wherein the magistrate analysed the evidence of the complainant and was alive to the fact that the cautionary rule had to be applied. Ms *Lutchman* submitted that the medical evidence, as recorded in the J88, was strong and corroborated the complainant’s version. The appellant is clearly identified as the perpetrator. The complainant knew the appellant from the area and as a friend of her brothers who visited her homestead. The allegations of rape are supported by the findings recorded in the J88. The discrepancies of the dates given by Dr Martinez-Kubelo are cured by the complainant’s direct evidence. In any event, no dates are recorded in the J88 itself. The findings and conclusions of Dr Martinez-Kubelo are clear that there was evidence of vaginal penetration. The appellant argued that Dr Martinez-Kubelo never linked the appellant to the commission of the rapes on the complainant.

⁸ *S v Gentle* 2005 (1) SACR 420 (SCA) para 18.

This line of reasoning has no merit. The appellant's arguments that the medical evidence was inconclusive lacks merit, and this ground of appeal must fail.

[46] The appellant's arguments that the prosecutor was leading the complainant in her evidence in chief, was unfounded. The prosecutor was not asking leading questions as is evident from the record. This complainant testified about the three counts of rape independently and concisely. There is, accordingly, no merit in this argument.

[47] Milton,⁹ in *South African Criminal Law and Procedure*, wrote:

'It is not mandatory that there should be evidence that the woman has complained that she has been raped. However, if she has, such complaint is admitted in evidence to show consistency and to negative a defence of consent, but not as proof of their contents nor to corroborate the complainant. But it is not essential that consent should be in issue; the complainant may, for instance, be a girl of under 12 years of age.

The purpose of admitting evidence of a complaint is that it serves to rebut any suspicion that the woman has lied about being raped. The corollary is, of course, that should a woman not complain, or not complain timeously, the conclusion may be drawn that she is lying in her evidence that she was raped. The conclusion may well be unfair to the victim, since women may hesitate to complain of rape for reasons of shame, embarrassment or fear.' (Footnotes omitted.)

[48] Section 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) is titled 'Evidence of delay in reporting', and provides that:

'In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.'

[49] In *Monageng v S*,¹⁰ Maya JA stated

'Raising a hue and cry and collapsing in a trembling and sobbing heap is not the benchmark for determining whether or not a woman has been raped. There was thus nothing unusual about the complainant's behaviour and her explanation for not immediately reporting the appellant is plausible.'

⁹ J R L Milton *South African Criminal Law and Procedure: Volume II Common-law Crimes* 3 ed (1996) at 461.

¹⁰ *Monageng v S* [2008] ZASCA 129; [2009] 1 All SA 237 (SCA) para 24.

[50] In *S v Vilakazi*¹¹ the court stated that there is a 'reluctance on the part of rape survivors, or some of them, to report the rape at the first opportunity is a firmly recognised fact. It is also generally accepted that with young children the reluctance is compounded.'

[51] The evidence of the complainant in this matter is clear. She was afraid to report the three counts of rape immediately after they occurred, as the appellant threatened to kill her. When he did so, he used a knife. He also assaulted the complainant by slapping her. The appellant averred that due to the delay in reporting the matter the learned magistrate should have rejected the evidence of the complainant as inconsistent and unreliable. I strongly disagree, and in terms of the case law and s 59 of SORMA there are various reasons why a complainant fails to report a rape at the first opportunity. In *casu*, the complainant had a real fear of being killed or hurt. The appellant also argued that the first report was made under duress and that the learned magistrate erred in relying on such evidence as credible. The evidence of the mother was clear, the complainant told her that she was afraid that the appellant would kill her. At the stage of eventually being questioned about the rapes the complainant cried. After some time, the complainant then told her mother what had happened. Under cross-examination the complainant's mother explained that she told the complainant that 'if you cannot speak to me as your parent, you can go out the gate and tell those people the truth.' The evidence does not point to duress as envisaged in the appellant's arguments. The evidence of the mother in respect of the report to her by the complainant corroborated the complainant's version. The trial court did not err in finding that there were no material contradictions. This ground of appeal lacks substance and must fail.

[52] In this appeal, the appellant argued that the complainant's failure to ask for help from Zwe, a friend of the appellant, Buhle or Jabulani in count 3, should have been viewed in a negative light. The appellant stated that this behaviour was improbable and that the complainant's response that she was afraid, should have been rejected by the learned magistrate. I disagree with this reasoning and in my view the complainant's response was highly probable, considering her fears. The complainant showed honesty

¹¹ *S v Vilakazi* [2016] ZASCA 103; 2016 (2) SACR 365 (SCA) para 19.

when she testified that the appellant took her hand so that they would walk together in the third incident. He hit her back as they walked. She did not want to ask for help from Zwe, when he joined them as he was a friend of the appellant. This again shows that the complainant was a trustworthy and reliable witness. The learned magistrate was correct in not rejecting this evidence.

[53] In *S v Govender and Others*¹², Nepjen J, cited the case of

'S v Mafaladiso en Andere 2003 (1) SACR 583(SCA) at 593e - 594h. What follows is based on the summary contained in the headnote, although I have taken the liberty of making alterations to such summary for purposes of accuracy:

*"The mere fact that it is evident that there are self-contradictions must be approached with [circumspection] by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what the precise nature thereof [is]. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way [of the correctness] of precisely what was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain [his or her] statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence [must], amongst other factors, be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings."*

[54] In my view, the learned magistrate correctly dealt with the contradictions of the State's case. She did not evaluate them in isolation but looked at the evidence as a

¹² *S v Govender and Others* 2006 (1) SACR 322 (E)

whole. The issue of the contradiction by her mother regarding the direction of the footpath in the photographic evidence (photograph 6), was not material to reject the complainant's evidence. The complainant had testified in detail regarding all three counts of rape and the court correctly found her to be a credible and honest witness.

[55] It has been held that¹³ '[i]t is trite that the onus rests on the state to prove beyond a reasonable doubt that the accused committed the crime accused of. Equally trite is the principle that an accused should be acquitted if his or her exculpatory testimony can be reasonably possibly true.' Furthermore,¹⁴ '[t]he court must evaluate the evidence before it in its totality and judge the probabilities in the light of all the evidence; see *R v Difford* 1937 AD 373, *S v Van der Meyden* 1999 (1) SACR 447 (W) and *S v Toubie* 2004 (1) SACR 530 (W).'

[56] The appellant pleaded a bare denial at the inception of the trial.¹⁵ The submissions that the learned magistrate erred in finding that the appellant raised a bare denial are not correct and stand to be rejected. The alibi defence by the appellant was raised during the trial.¹⁶ In *S v Thebus and Another*¹⁷ the Constitutional Court stated that the late disclosure of an alibi will affect the weight during the evaluation thereof at the end of the trial. Ultimately, meaning that the late disclosure of an alibi affects credibility findings against an accused. The court approved of the approach in *R v Mashelele and Another* 1944 AD 571 at 858. The State remains responsible to prove the guilt of an accused, and provide, where the alibi is disclosed timeously, any evidence that disproves it. The appellant's defence of an alibi was sudden, and he did not give the state an opportunity to disprove it. The trial court was correct in finding that this late disclosure would have adversely affected the appellant's credibility.

[57] It was not in dispute that the complainant and her mother knew the appellant and that they resided in the same area. The appellant did not deny that he knew the complainant's brother and was friends with him. It was also common cause that he and

¹³ *Maduna v S* [2024] ZAFSHC 47 (*Maduna*) para 10.

¹⁴ *Maduna* para 11.

¹⁵ Record, Vol 1, at 8, line 14.

¹⁶ *S v Thebus and Another* [2003] ZACC 12; 2003 (6) SA 505 (CC) paras 63-65. (*Thebus*)

¹⁷ *Thebus* paras 63-65.

his friends met with the complainant on count 3. The appellant however denied raping the complainant on all three counts. The trial court considered the appellant's evidence where he stated that a year before these incidents, he took money from the complainant's brother and that is why they implicated him. The learned magistrate rejected this version when assessing the totality of the evidence. The complainant was unaware that this had happened to her brother and had no reason to lie about the rapes. The learned magistrate stated in her judgment that the two defence witnesses testified about the third incident only. She weighed their evidence against the complainant's. The complainant testified in detail about the room she was raped in. She had never been in that room previously. Mr Thamsanqa Nzimakwe (Bho) testified that his room was always locked. Both witnesses testified that the complainant lied about being taken to Bho's room. The defence witnesses testified that the appellant did go to the river to collect water. The appellant had testified that he never went to the river. The learned magistrate found that the appellant provided no evidence of his alleged alibi. The learned magistrate found inconsistencies and improbabilities in the appellant's case and rejected it after assessing the evidence. In my view, the learned magistrate showed no misdirection in her evaluation of the evidence.

[58] The submissions made by the appellant in his heads of argument do not aid him. Many of these submissions are merely speculative and cannot be accepted in support of an argument that what the appellant says is reasonably and possibly true.¹⁸ For example, why the complainant did not report the rapes at the first opportunity or why she held his hand in count 3. They stand to be rejected.

[59] Having, regard to the totality of the evidence, I am of the view that the court a quo correctly rejected the appellant's version. The appeal against conviction must accordingly fail.

Ad sentence

[60] The appellant contended that the learned magistrate erred when she found that s 51(1), read with Part 1 of Schedule 2 of the CLAA applied to count 1, as the complainant was raped once. He stated that life imprisonment was not applicable on

¹⁸ *R v Mlambo* 1957 (4) SA 727 (A) at 738B-C.

this basis. The State submitted that life imprisonment as prescribed by s 51(1) of the CLAA, applied where a child is raped. The application of this section, according to the State, was correct. This section was explained in detail to the appellant by the learned magistrate at the outset of the trial. In this regard, Mr *Dlamini's* argument lacks merit, and falls to be dismissed. The applicable legislation refers to a sentence of life imprisonment if a rape is committed on a minor.

[61] The appellant submitted that the learned magistrate erred in imposing a sentence which was 'startlingly and disturbingly inappropriate' and created a 'sense of shock.' He argued that the trial court erred in finding that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence. The appellant argued that the following mitigating circumstances cumulatively constituted substantial and compelling circumstances which would justify a deviation from the prescribed minimum sentence namely;

- (a) The appellant was 35 years old, and capable of being rehabilitated.
- (b) The appellant was a bread winner at home.
- (c) The appellant was a father to a 13-year-old scholar and provided maintenance and support to his child.
- (d) The appellant was gainfully self-employed prior to his arrest and made a profit of R2 000.00 per week.
- (e) The appellant spent more than four years in custody awaiting finalisation of the trial.
- (f) The alleged incidents of rape were committed over a short period and were opportunistic and not premeditated.
- (g) The complainant did not suffer substantial injuries.

[62] The appellant stated that considering the above circumstances, the effective sentence of life imprisonment handed down was excessive and inappropriate. The appellant requested that the appeal court uphold the appeal against sentence and reduce the effective term to 10 years imprisonment.

[63] The State referred the court to the principles set out by the Supreme Court of Appeal (SCA) in *S v Malgas*.¹⁹ The SCA has held that the prescribed sentence is not to be departed from 'lightly or for flimsy reasons'. However, if the prescribed sentence would be unjust or disproportionate to the offence it must be departed from. The State argued that it was an aggravating factor that the appellant was known to the complainant and from the same neighbourhood.

[64] The State argued that it is trite law that punishment is pre-eminently for the discretion of the trial court, but that the court of appeal can interfere with the sentence if it is vitiated by irregularity, misdirection or is disturbingly inappropriate.²⁰

[65] The State contended that the sentence imposed was not disproportionate to the crime, neither did it induce a sense of shock. The appellant was charged with serious offences that were executed in a thought out and targeted manner. The complainant being only 14 years old at the time of the offences. The State went on to state that severe punishment is prescribed for serious offences. In *casu*, the complainant was raped three times by the appellant.

[66] The State argued that the court considered aggravating that the appellant had three previous convictions. What was more aggravating was that the appellant committed these three counts of rape on the complainant while he was on parole for another offence, namely murder.

[67] The State submitted that there were no substantial and compelling circumstances submitted by the appellant during the address on mitigation, being the appellant's age, that he is a breadwinner and has been in custody for four years awaiting trial, do not find application when weighed against the number of counts of rape he has been convicted of. Furthermore, that he acted with single minded intent in raping and threatening the complainant three times and all this, while he was on parole for another serious offence.

¹⁹ *S v Malgas* 2001 (1) SACR 469 (SCA) (*Malgas*) para 25.

²⁰ *S v Rabie* 1975 (4) SA 855 (A) at 857D-F.

[68] The State contended that the trial court considered s 28 of the Constitution in arriving at its sentence. The protection afforded to children in terms of this section is one that emphasises that ‘a child’s best interest is paramount.’ The trial court indicated that the sentence must reflect their indignation towards the commission of serious offences against children and other vulnerable members of society.

[69] The State submitted that the trial court after considering all the circumstances found no substantial and compelling factors which would enable it to depart from the prescribed minimum sentence legislation. They submitted that the sentence that was imposed on the appellant is neither shocking nor inappropriate, nor did the court a quo misdirect itself. The State requested that the appeal against sentence should be dismissed.

[70] Section 51(1) of the CLAA prescribes a minimum sentence of life imprisonment to be imposed for a conviction of rape include where the complainant is raped more than once or where the complainant is a child under the age of 18 years, unless in terms of s 51(3)(a), substantial and compelling circumstances exist that justify a lesser sentence. The complainant in this matter was 14 years old and raped three times by the appellant. It is trite that a court of appeal can only interfere with a sentence handed down by the court a quo, if there was a material misdirection by the trial court or if the sentence was shocking or disturbingly inappropriate.²¹

[71] *Malgas*²² is the *locus classicus* of what constitutes substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence. The court stated the following:

‘If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.’

[72] In *Malgas*²³ the court further stated:

²¹ *Malgas* para 12.

²² *Ibid* para 25.

²³ *Ibid* para 8 and 9.

[8] ... 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 ...

[9] ... 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.'

[73] In *S v Jansen*²⁴ the court stated

'Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society ... It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which A aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution.'

In this matter the complainant was 14 years old and raped more than once. The appellant is someone she knew and feared in the community. There is no merit in the argument by the appellant that the rapes were 'committed over a short period and were opportunistic and not premeditated.'

[74] In *Khoza v S*²⁵ the court stated

²⁴ *S v Jansen* 1999 (2) SACR 368 (C) at 378G-379B.

‘the submission that there are degrees of rape ignores that rape in itself is a most heinous act that equates with the most debasing and invasive attacks on a person's bodily integrity and mental wellbeing. Worst still with child rape.’

The court in the Western Cape Division in *Botsane v S*²⁶ stated

‘Rape on its own is violence. Rape by its very nature is a violent crime as it involves threats or force. I cannot fathom how it can be said that the lack of physical injury in a rape of a six year old is mitigating.’

The averment by the appellant that the complainant did not suffer substantial injuries is shocking to this court. The complainant's evidence illustrated the physical pain she endured, not even being able to walk properly and having to endure the pain in her vagina. That is aside from the mental pain and trauma that she would have to endure for the rest of her life. In my view, rape is a serious offence and the effect that it would have emotionally and psychologically on a defenceless minor is one that the legislature would have taken into account when prescribing the minimum sentence.

[75] I can find no reason to interfere with the sentence imposed by the court *a quo* as there is no misdirection on the learned magistrate's part. The prescribed minimum sentence imposed in this case does not result in an injustice to the appellant. The sentence of life imprisonment in the circumstances of this case is not ‘shocking’, ‘startling’ or ‘disturbingly inappropriate’. I agree with the State's argument that the court further fulfilled the objectives of sentencing namely, retribution, deterrence, prevention and rehabilitation in the evaluation on sentence.

Order

[76] In the result:

The appeal against sentence and conviction is dismissed.

Marion AJ

I agree, and it is so ordered

²⁵ *Khoza v S* [2022] ZAKZPHC 30 para 25.

²⁶ *Botsane v S* [2023] ZAWCHC 131 para 33.

Nkosi DJP

DATE RESERVED: 31 October 2025

DATE DELIVERED:

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