Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal number: A112/2021

In the Appeal between:

J N Appellant

And

THE STATE Respondent

CORAM: NAIDOO, J *et* DANISO, J

HEARD ON: 14 FEBRUARY 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: 13 MAY 2022

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[1] This is an appeal against the conviction and sentence of life imprisonment imposed on the appellant by the Regional Court

sitting in Welkom for the rape of his twelve (12) year old step daughter on 19th January 2021 at the appellant's residence.

[2] The appeal is by virtue of the appellant's right to automatic appeal as provided for in section 309 (1)(a) of the Criminal Procedure Act, 51 of 1977 ("the Act").

[3] The appellant challenges his conviction and sentence on the grounds that in convicting the appellant, the court erred in:

3.1. not properly analysing or evaluating the evidence of the state witnesses, and therefore finding that the state witnesses gave their evidence in a satisfactory manner, with no improbabilities in their version;

3.2. finding that the evidence of the state witnesses can only be criticised in matters of detail, whereas their evidence was contradictory in material respects; and

3.3. failing to properly consider the improbabilities in the state's version, resulting in the court not considering the totality of evidence when rejecting the appellant's version and finding that the state proved its case beyond reasonable doubt.

4. As regards the sentence, the appellant contends that the court erred in:

4.1. imposing a term of life imprisonment without having regard to all the circumstances of the case which is inappropriate,

disproportionate to the facts of the case, excessive and induces a sense of shock; and

4.2. over-emphasizing the seriousness of the offence, the interests of society, the deterrent effect of the sentence and the retributive element of sentencing.

[5] From the record of the proceedings it is clear that it is not in dispute that the complainant was raped on 19 January 2021. The issue which had to be determined by the trial court was the identity of the perpetrator.

[6] On that evening, at about 7pm the complainant went to the appellant's residence to visit her mother Ms M M who is the appellant's wife and the mother of his two children. Her mother was not home as a result the appellant suggested that she wait for her to return. The appellant prepared a meal for the complainant and when it became late the complainant decided to rather sleep over as she was afraid to walk back to her grandmother's place at night. At about 8pm the complainant was fast asleep on the appellant's bed when she was woken up by the appellant touching her. At first she thought it was her mother but then the appellant got on top of her. He undressed her by removing her tights, inserted his penis into her vagina and had sexual intercourse with her. In the morning, he gave her a cell phone and said she must use it to call him and a spare key for his shack. He told her that she must use the key to enter whenever she comes to visit him. She must not tell her grandmother when she is coming and must leave her grandmother's house through a window.

[7] The complainant's adopted sister A T ("A") corroborated the complainant's first report of the rape incident and stated that the complainant arrived home walking with difficulty and in pain. She told A that she spent the previous night with the appellant who had sexual intercourse with her and also gave her a cell phone and a key to his residence.

[8] B M ("B") is the complainant's cousin. At the time of the incident she was also residing at their grandmother's house. She questioned the complainant about her whereabouts the previous night. The complainant who was at first reluctant to provide an explanation ultimately divulged that she had slept at her mother's place. Knowing that the complainant's mother was no longer staying with the appellant B became very concerned that the complainant had spent a night away from home at that young age. She then decided to take the complainant to the police station so that the truth about her previous night's whereabouts can be determined. At the police station the complainant told the police in her presence that she spent the night with the appellant and that he had sexual intercourse with her. She also showed the police a cellular phone and the key that the appellant had given her.[1] The state's version is that after the cellular phone and the key were handed to the police the appellant continued to gift the complainant with more cellular phones while she innocently boasted to A, B and even her school teachers that she was the

[1] The cell phone and the key were handed in as Exhibit "1" and "2", respectively and Exhibit "B" and "C" are the copies of the SAPS13 register in that regard.

appellant's wife. The complainant was thereafter taken to hospital for medical examination.

[9] The gynaecological clinical findings recorded on the medical report (J88) handed in by consent as Exhibit "A" indicate that there was semen and some discharge resembling menstruation present in the vaginal area and vaginal penetration could not be ruled out.

[10] The appellant's version was that he was falsely accused by the complainant for the rape which was committed by A's boyfriend. He denied that he raped the complainant and that he gave her the cell phone and a key to his residence because on the day of the incident he did not even see the complainant. He was away at work till late. His version was that the complainant had continued to visit his residence even after the rape charge was laid.

[11] The appellant's wife testified that the appellant could not have raped the complainant and in corroborating the appellant's version of the false accusation by the State witnesses, she alleged that the complainant was a liar and an uncontrollable child who spent her nights out at the taverns drinking with A. Therefore, she should not be believed.

[12] In support of his challenge to the conviction and sentence, the appellant alleged that the complainant was a child and also a single witness to the crime and her evidence was not satisfactory in all material respects.

[13] The appellant raised a number of discrepancies and contradictions in the evidence of the complainant and the State, namely that:

13.1. The complainant was not forthcoming when she was questioned by B about where she slept the previous night. She told B that she spent the night at the appellant's place while B said the complainant told her she was at her mother's place;

13.2. Her evidence also contradicted the other witnesses in that she testified that she made the first report to the police while A said it was made to her;

13.3. She said at the police station it was A who relayed the rape incident to the police but B said it was the complainant; and

13.4. There were also discrepancies with regard to where exactly the complainant was sleeping immediately before the rape. Her testimony was that she was sleeping on the bed B said the complainant was sleeping on the floor. It is on that basis that it was contended on behalf of the appellant that these discrepancies in the evidence of the State witnesses are material and affected their credibility, the trial court erred in accepting the evidence as proof of the appellant's guilt beyond a reasonable doubt.

[14] It is trite that a court of appeal will not interfere with or tamper with the trial court's judgment or decision regarding either conviction or

sentence unless it (the court of appeal) finds that the trial court misdirected itself as regards its findings of facts or the law. See *R v Dhlumayo & Another* **1948 (2) SA 677** (A). The principle was also restated in *AM & Another v MEC Health, Western Cape* **2021(3) SA 337** *(SCA)* at paragraph 8 as follows:

> "*It is trite that an appeal court is reluctant to disturb findings of that character by a trial judge, who was steeped in the atmosphere of a lengthy trial and had the advantage of seeing and hearing the witnesses. Such findings are only overturned if there is a clear misdirection or the trial court's findings are clearly erroneous. That has consistently been the approach of this court*…."

[15] The trial court undertook a thorough analysis of the evidence and from the record, it is clear that the trial court was alive to the cautionary rules applicable to the complainant's evidence as both a child witness and also a single witness implicating the appellant in the rape. The trial court was impressed by the complainant's ability to recollect and narrate what the appellant did to her despite her young age and that as a single witness to the crime. The court found that her version regarding the rape was succinct and remained intact even after cross-examination. Her evidence was also corroborated by the J88 (Exhibit "A"), as well as the evidence relating to the confiscated cellular phone and the key, which the appellant had given to the complainant (Exhibit "1" and "2") after raping her. Consequently, the trial court's finding that the complainant's veracity and ability to give a succinct version of the events justified it in accepting her version as a trustworthy and reliable account of what had happened.

[16] With regard to the inconsistencies and differences in the State's evidence, which I have set out above, I agree with the trial court's conclusion that they are immaterial for the determination of the question of the accused's guilt. The contradictions are insignificant and are to be expected from an honest but imperfect recollection, observation and reconstruction of the evidence.[2] They actually militate against the conspiracy between the complainant and the state witnesses, which the appellant relied upon.

[17] The trial court correctly rejected, as false, the evidence of the appellant's wife, pointing out that she corroborated the appellant's version that he did not rape the complainant, yet she was away from home at the time of the incident. She was living somewhere else after she had quarrelled with the appellant. The trial court found that her evidence was simply an attempt to protect the appellant who is her husband and a provider for her and their two children. I cannot fault the conclusion of trial court that this witness's testimony was fabricated. It is also important to note that the appellant's version that he could not have raped the complainant on that day as he was not at home but at work, was not put to any of the State witnesses to give them an opportunity to explain this contradiction. The appellant could not have been in two places at the same time, justifying the trial court's finding that the appellant's version was clearly fabricated[3] and its rejecting it as false.

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[2] *See S v Oosthuizen* **1982 (3) SA 571** (T) at page 576 para G-H.

[3] *Small v Smith* **1954 (3) SA 434** (SWA) at 438E-G and *S v Van As* **1991 (2) SACR 74** (W) at 108c-h.

[18] On the available evidence, I am satisfied that the trial court correctly found that the State proved the guilt of the appellant beyond a reasonable doubt. The appellant was correctly convicted.

[19] As regards the sentence, the trial court is criticized for disregarding the time the appellant spent in custody awaiting trial and for failing to attach more weight to his personal circumstances as substantial and compelling factors justifying a deviation from the prescribed minimum sentence of life imprisonment. According to the record of the proceedings, the appellant was released on warning upon being arrested. It is therefore incorrect that he was incarcerated pending trial.

[20] The appellant's personal circumstances placed on record are that he is a 47 year-old married man with two children, self-employed and the bread winner for his family. He has one related previous conviction, which was approximately ten years old at the time of the conviction and sentence in this matter. The trial court found the appellant's personal circumstances cannot be regarded as exceptional, to warrant a consideration as substantial and compelling circumstances, and justifying a deviation from the prescribed minimum sentence. The trial court found further the appellant's personal circumstances were also outweighed by the gravity of the offence, the complainant's palpable trauma and the fact that the appellant was not a first offender in relation to this offence.

[21] It is trite that the traditional mitigating factors such as an accused's personal circumstances, cumulatively can be taken into account as

factors to be considered as substantial and compelling reasons however, they must be weighed against the aggravating factors. On their own, they constitute those flimsy reasons which Malgas[4] warned should not be elevated to the status of substantial and compelling reasons warranting a deviation from the prescribed minimum sentence.

[22] In *S v D* **1995(1) SACR 259**(A) it was held that:

> "*Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and all too often do. …*" *Appellant's conduct in my view was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the courts disapproval and hopefully acting as a deterrent to others minded to satisfy their carnal desires with helpless children.*[5]

[23] The gravity of sexual violations of children in the domestic sphere was succinctly summed up by Cameron JA in *S v Abrahams* **2002 (1) SACR 116** (SCA) as follows:

> *"of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter's best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense."* [6]

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[4] S v Malgas 2001 (1) SACR 469 (SCA) paragraph 9.
[5] At page 260 f-g.
[6] Page 123 at para 17.

[24] In imposing sentence for serious, endemic and outrageous crimes such as the present, the elements of retribution and deterrence must come to the fore.[7] It is aggravating that the appellant has a propensity to commit these heinous crimes. On 16 May 2011 he was convicted of a similar offence (rape as contemplated in section 51 (1) of the Criminal Law Amendment Act 105 of 1997). He was sentenced to five years' imprisonment. That period of imprisonment did not deter him nor rehabilitate him.

[25] Having regard to the circumstances of this matter, I am of the view that the trial court exercised its discretion properly and judicially. The sentence of life imprisonment is appropriate under these circumstances, it reflects the gravity of the crime and speaks to the plight of the victims and the indignation of the society.

[26] It is for these reasons, that the following order is made:

1. The appeal against the conviction and sentence is dismissed.

2. The conviction and sentence are confirmed.

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N.S. DANISO, J

I concur

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S. NAIDOO, J

[7] *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 519d-e.

APPEARANCES:

On behalf of appellant:	Adv. L Smit
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On behalf of the State:	Adv. A. Busakwe
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