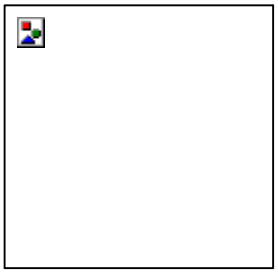

Reportable:	*Yes/No*
Circulate to Judges:	*Yes/No*
Circulate to Magistrates:	*Yes/No*

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO.: CA&R 30/2022
Date heard: 05-09-2022
Date delivered: 27-10-2023

In the matter between:

Jacobus Kobus Rooibaardt **Appellant**

And

The State **Respondent**

CORAM: WILLIAMS J et NXUMALO J

JUDGMENT

WILLIAMS J:

1. The appellant, Mr Jacobus Rooibaardt, was convicted in the Regional Court held at Prieska on a count of rape read with the provisions of s51 (1) of Act 105 of 1997 (the Act). He was sentenced on 11 December 2014 to life imprisonment. This appeal lies against the sentence imposed.

2. The appeal is accompanied with an application for condonation for the late filing of the notice of appeal, some 5 years after the

appellant was sentenced. The explanation for the lengthy delay is that; shortly after he was sentenced the appellant expressed his wish to appeal the sentence to officials at the Douglas Correctional Centre but he was thereafter transferred to Kimberley Correctional Centre; there he consulted with a paralegal from Legal Aid but there appeared to be some confusion as to whether Legal Aid Kimberley or Legal Aid Upington would be responsible for this matter; before this issue was sorted out the appellant was transferred to Mangaung Correctional Centre where he eventually made contact with his current legal representative during July 2019. It was only thereafter that the notice of appeal was filed. A further delay of 2 and a half years is attributed to obtaining the record of the trial proceedings.

3. Having taken into account the reality of the challenges incarcerated persons face when trying to obtain legal services while in prison, Ms Weyers–Gericke who appeared for the State did not oppose the application for condonation. I am of the view that it would be in the interest of justice that this appeal be finalised.

4. The grounds of appeal in a nutshell are that the trial court erred in not finding that there were substantial and compelling circumstances present which would justify a deviation from the prescribed minimum sentence of life imprisonment and that the sentence imposed is in any event disproportionate to the seriousness of the offence.

5. The approach to appeals against sentences imposed under the Act has been held in S v PB 2013 (2) SACR 533 (SCA) to be different to other sentences imposed under the ordinary sentencing regime because the minimum sentences are ordained by the Act and cannot be departed from lightly or for flimsy reasons. A proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not (paragraph 20).

6. The complainant in this matter was 8 years old when this incident occurred. During the evening of 9 October 2011, while playing with her friends outside, the appellant approached her and asked her to go the shop with him. The complainant knew the appellant as a friend of her mother. Along the way the appellant pulled the complainant into the veld, removed her jeans and her pants, covered her mouth with his hand to stop her from screaming and raped her. Afterwards, when they were both dressed again, the appellant took the complainant by the hand and walked back along the road with her.

7. A passer-by, Ms Monsigner, saw the two of them and found it odd that the complaint's hair was covered in grass. She approached them and asked the complainant what they had been doing. The complainant spontaneously answered that the appellant had sexual intercourse with her, at which stage the appellant turned and walked away. Ms Monsigner took the complainant with her, contacted the police and the appellant was arrested later that night.

8. On that same night, the complainant was examined by a medical practitioner, Dr Smit, who entered his findings on a J88 medical report. The report which was handed in by consent, without the doctor testifying, indicates his findings as to the general body build of the complainant as *"lean, underweight for age".* On a clinical examination he found no bodily physical trauma but on examination of the complainant's genitalia he found bilateral tears of the vulva and redness and swelling on both sides of the vagina. The doctor concluded that there was *"superficial penetration of the introitus and vulva".*

9. The appellant did not testify during the sentencing proceedings but his legal representative addressed the trial court on his personal circumstances as follows:

9.1 He was 38 years old when sentenced (according to my calculations he would have been about 35 years old when the offence was committed);

9.2 He is not married but has 3 minor children who live with and are maintained by their respective mothers. He assists when he is able to;

9.3 The appellant attended school until grade 9;

9.4 Prior to being sentenced he worked on a farm.

10. The appellant has 11 previous convictions spanning a period from 1991 when he would have been about 14 years old until 2006. Of the previous convictions 4 are for theft, and 6 are for housebreaking with intent to steal and theft. He was also convicted of attempted rape in November 2006 and sentenced to 6 years imprisonment of which 2 years where suspended on certain conditions.

11. If the appellant had fully served the sentences previously imposed on him he would have spent half his life in prison before committing the offence *in casu*.

12. Not much about the background and family structure of the complainant can be gleaned from the record except that she was 11 years old when she testified and in grade 3. Before the incident she lived with her grandmother in Prieska and thereafter at a children's home in Barkly West. Regrettably there is no social worker's report on the impact the incident had on the complainant. However, I think there can be no doubt that the rape would have a very serious emotional and traumatic effect on the complainant. The fact that she had been placed in a children's home subsequent to the rape would only have added to the emotional upheaval experienced by the complainant.

13. As far as the physical injuries incurred, Mr Steynberg has argued that this was not one of the worst cases of rape to come before our courts and that the trial court had erred in finding

that the absence of serious injuries was not a mitigating factor to be taken into account in the determination of an appropriate sentence. We were referred to *inter alia S v SMM* 2013 (2) SACR 292 (SCA) *S v MN* 2011 (1) SACR 286 (ECG) and *Stuurman v S* CA&R 115/16 (Northern Cape Division) in this regard.

14. It is correct that the rape *in casu* is not the worst our courts have seen. It is also so that the trial court had erred in finding that the lack of physical injuries is not a mitigation circumstance. S 51(3) (aA) of the Act states that an apparent lack of physical injury to the complainant shall not constitute *"substantial and compelling circumstances",* which differs from mitigating circumstances. In determining whether substantial and compelling circumstances exist no factors are excluded from consideration and the court should look at the ultimate cumulative effect of all the circumstances to determine whether a departure from the prescribed sentence is justified (see *S vs Malgas* 2001(1) SACR 469 (SCA), paragraphs 9 and 10).

15. Does this mean that substantial and compelling circumstances do in fact exist? Of course not. All it means is that a reassessment of all the relevant circumstances is required.

16. Keeping in mind that the benchmark set by the Act for this type of offence is life imprisonment and that courts may not depart from the specified sentence lightly and for flimsy reasons (S v Malgas, para 9), comparative sentences may serve as a

guideline in determining a proper sentence, though each matter should be determined on its own unique set of circumstances.

17. In *S v SMM*, *supra*, Majiedt JA gave a useful exposition of the SCA's approach to sentencing where the rape of a minor took place mainly in a familial setting. The circumstances relevant in *SMM* itself were as follows. The appellant was the uncle of the 13 year old complainant. He and his wife were both employed and had four children, all dependant on them for financial support; the appellant had one previous conviction for assault with intent to do grievous bodily harm, committed some 13 years before he was sentenced for the rape; there was no evidence that the complainant suffered any ongoing trauma; the complainant did not suffer any serious physical injuries other than that associated with the rape; and the appellant's prospects for rehabilitation were favourable. The sentence of life imprisonment imposed by the trial court was set aside and replaced with a sentence of 15 years imprisonment.

18. In *S v MN*, *supra*, the appellant had raped his 10 year old neighbour. He was sentenced to life imprisonment. On appeal it was held that the sentence imposed was disproportionate to the seriousness of the crime based on the following: the complainant suffered no serious physical injury other than that produced by the act of rape; there was no evidence of serious emotional trauma; the appellant was a mature family man of 47 years and a first offender; he had stable employment and made a positive contribution, not only to his family, but to the

community as well; and he was a good candidate for rehabilitation. His sentence was reduced to 15 years imprisonment.

19. In *Stuurman v The State*, *supra,* the appellant had been convicted of the rape of a 9 year old child. He was sentenced to life imprisonment. On appeal his sentence was reduced to 16 years imprisonment. The court of appeal took into account the fact that the complainant did not suffer any serious physical injuries and that the appellant, who was 39 years old, was a first offender with good prospects of rehabilitation.

20. In *casu*, unlike the cases mentioned above, the appellant's personal circumstances paint an alarming picture of a person who has no respect for the property or the physical integrity of another. His previous sentences have not deterred him from continuously reoffending. This current offence was in fact committed while the appellant was out on parole. Based on his record of previous convictions the appellant shows no prospects for rehabilitation. The only mitigating factor is that the complainant incurred no serious physical injury, which on its own does not constitute substantial and compelling circumstances. Taking into account all the relevant circumstances and the objectives of sentencing it can not be said that the sentence impose is disproportionate to the offence. In the result the appeal must fail.

21. The following order is made:

The appeal against the sentence imposed is dismissed.

_____

CC WILLIAMS

JUDGE

I concur:

_____

APS NXUMALO

JUDGE

For Appellant:	Mr H Steynberg Legal Aid SA
For Respondent:	Adv Weyers-Gericke Office of the DPP