

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



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

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

CASE NO.: CA 64/2019

REGIONAL COURT CASE NO.: CA F 22/2015

IN THE APPEAL OF:

HAPPY THABANG MODISE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

CORAM: REID J *et* LAUBSCHER AJ:

LAUBSCHER AJ

BACKGROUND RELEVANT TO THIS APPEAL:

[1] This is an appeal against both the conviction and the sentence imposed upon the Appellant on a charge of rape in the Temba Regional Court in the North-West Province on 2 November 2017.

[2] According to the record availed to this Court the Appellant was charged with the following count: That the Appellant is guilty of the crime of rape in contravention of the provisions of section 3 read with section 1, 56(1), 57, 58, 59, 60 and 61 of the **Criminal Law Amendment Act (Sexual Offence and Related Matters), Act 32 of 2007** (hereafter “the SORM Criminal Law Amendment Act”) read with sections 256 and 261 of the **Criminal Procedure Act, Act 51 of 1977** (hereafter “the Criminal Procedure Act”) and the provisions of section 51(1) and Schedule 2 of the **Criminal Law Amendment Act, Act 105 of 1997** (hereafter “the Criminal Law Amendment Act”) as amended, in that on or about 16 June 2014 and at or near Ramotse in the district/regional division of the North West Province the Appellant did unlawfully and intentionally commit an act of a sexual penetration with a female person to wit BN, 7 years of age by inserting his penis into her anus “...without her consent.”¹

[3] The Appellant pleaded not guilty to the charges levied against him and the matter proceeded to trial. The court *a quo* correctly advised the Appellant at the outset of the trial that if he is found guilty of the charge levied against him that “...in the absence of substantial and compelling circumstances...” the

¹ A child of the age of seven years of course cannot give “consent” to sexual intercourse in any event and the chargesheet in this matter should have been amended provided for this fact accordingly.

minimum sentence of life imprisonment will find application. The court *a quo* also dealt with competent verdicts prior to the commencement of the trial. At the trial the Appellant was represented by an attorney, Mr Modise.

[4] The Respondent adduced the evidence of the victim BN, the mother of the victim E[...] N[...], the medical examiner Dr Adolphina Malebe Matlebyane who examined the victim on 17 June 2014 at the Jubilee Medical Centre and who authored the J88 medical report, which was handed in as Exhibit "A" during the trial. The age of the victim was placed in evidence by the Respondent by means of the birth certificate of the victim, which was handed in as Exhibit "B" during the trial.

[5] The Appellant testified in his own defence during the trial proceedings as the only witness for the defence.

[6] On the evidence before the court *a quo* the court *a quo* found the Appellant guilty on the charge levied against him.

[7] The Appellant was sentenced by the court *a quo* to:

(a) life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act;

(b) have his name entered into the register of sex offenders in terms of section 50(2) of the Criminal Law Amendment Act; and

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

[8] In terms of the provisions of section 309(1)(a) of the Criminal Procedure Act as amended by the provisions of section 10 of the **Judicial Matters Amendment Act, Act 42 of 2023** the Appellant is entitled to an automatic right of appeal once the court *a quo* has imposed a sentence of life imprisonment. This appeal accordingly emanates as such.

[9] The Appellant's appeal to this Court against his conviction is premised upon the following grounds, that the court *a quo* erred in:

(a) finding that the Respondent has proved its case beyond reasonable doubt;

(b) accepting the version of the victim as credible if one considers that (i) the victim could not point out the Appellant in court and (ii) could not described the Appellant's clothes on the day of the incident;

(c) finding that the Applicant was introduced to the victim by her mother;

(d) that the contradictions in the Respondent's case were immaterial;

- (e) finding that the Respondent has proved that the victim was penetrated;
- (f) not properly applying the cautionary approach as this is the evidence of a child witness;
- (g) in find the Appellant guilty in the absence of DNA evidence;
- (h) that the Appellant's version was not only not reasonably possibly true but ii was beyond reasonable doubt false.

[10] The Appellant's appeal to this Court against his sentence is premised upon the following grounds, that the court *a quo* erred in:

- (a) in not finding that the following factors cumulatively constitutes compelling and substantial circumstances: (i) the period of about 3 (three) years in custody awaiting the finalization of this matter, (ii) the fact that the Appellant consumed alcohol which may have contributed in reducing the Appellant's moral blameworthiness and (iii) the Appellant's other personal circumstances;
- (b) in overemphasized the following factors: (i) the prevalence of the offence, (ii) the Appellant did sow remorse (iii) the injuries suffered by the complainant, (iv) the seriousness of the offence and (v) the interest of the society.

- (c) imposing a sentence which is shockingly severe, disturbingly inappropriate and totally out of proportion to the offence on which the Appellant is convicted.

[11] The State, the Respondent in this appeal is opposing the Appellant's appeal.

[12] The Appellant in this appeal was represented by Adv Hugo and the Respondent was represented by Adv Mosegedi of the office of the Director of Public Prosecutions. Written heads of argument were submitted to this Court on behalf of both the Appellant and the Respondent, the contents of which assisted this Court in the adjudication of this appeal. This appeal is adjudicated in terms of section 19(a) of the **Superior Court Act, Act 10 of 2013**, by agreement between the parties on the documents filed in the court file without the presentation of oral argument.

THE GENERAL PRINCIPLES APPLICABLE TO AN APPEAL ON CONVICTION:

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

- (a) In the matter of R v Dhlumayo and Another² the Appeal Court (as it was then known) stated:

“The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness being steeped in the

² 1948 (2) SA 677 (A) at 705.

atmosphere of the trial. Not only has the trial court the opportunity of observing the demeanor, but also their appearances and whole personality. This should not be overlooked”.

- (b) In the matter of A M and Another v MEC Health, Western Cape³ the court referred to the matter of ST v CT⁴ and reiterated the following “trite principles” as reaffirmed by the Constitutional Court:

*“In Makate v Vodacom (Pty) Ltd⁵ the Constitutional Court, reaffirmed the trite principles outlined in Dhlumayo, quoting the following dictum of Lord Wright in Powell and Wife v Streatham Nursing Home”: **‘Not having seen the witnesses puts the appellant judges in a permanent position of disadvantage against the trial judges, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the Higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case’.** (own emphasis)*

- (c) A court of appeal can only reject the trial court’s assessment of the evidence if the court of appeal is convinced that the trial

³ 2021 (3) SA 337 (SCA) at para [8].

⁴ 2018 (5) SA 479 (SCA) para [26].

⁵ 2016 (4) SA 121 (CC).

court's assessment of the evidence was wrong. If the appeal court is in doubt, the trial court's judgment must remain in place.⁶

(d) The appeal court must be careful in making decisions, which are purely based on paper and representations in court without the presence of the parties in the actual case.⁷

(e) The above referred to principles were stated in a similar vein in the matter of S v Kebana⁸ as follows:

"It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings".

(f) In Khoza v S⁹ it was confirmed that a "...court of appeal is not at liberty to depart from the trial court's findings of fact and credibility unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong."

⁶ S v Robinson 1968 (1) SA 666 (A) at 675 H.

⁷ Bernert v ABSA Bank Ltd 2011 (3) SA 92 CC at para [106].

⁸ S v Kebana [2010] 1 All SA 310 (SCA) para [12].

⁹ (A222/2022) [2023] ZAGPPHC 1122 (8 September 2023) at para [16].

- (g) Ponnau JA in the matter of S v Monyane and Others¹⁰ confirmed the following regarding the powers of a court of appeal:

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

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

- (a) It is trite that the onus of proof rests with the Respondent to prove the guilt of the Appellant beyond reasonable doubt.
- (b) If the Appellant’s version might be reasonably possibly true, he or she would be entitled to an acquittal. The Supreme Court of Appeal in the matter of Shackle v S¹¹ stated:

“The court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably

¹⁰ 2001 (1) SACR 543 (SCA) at para 15 and also see S v Francis 1991 (1) SACR 198 (A) at 198 J – 199 A.

¹¹ 2001 (1) SACR 279 (SCA) at 288 E-F.

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

(c) In the matter of S v Munyai¹² the court stated:

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

(d) The Supreme Court of Appeal in the matter of S v Chabalala¹³ stated:

"The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either

¹² 1988 (4) SA 712 at 915 G.

¹³ 2003 (1) SACR 134 (SCA) at page 140 A-B.

party (such as failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture in evidence.”

(e) In the matter of S v Sithole and Others¹⁴ it was succinctly stated:

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

(f) In S v Molaza¹⁵ the court stated and confirmed the following test:

“The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence that the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit)

¹⁴ 1999 (1) SACR 585 W at 590.

¹⁵ (2020) 4 All SA 167 (GJ) 31 para [45].

must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable, but none of it may be simply ignored."

- (g) Addressing the concept of "reasonable doubt" the Appeal Court (as it was then known) in the matter of R v Mlambo¹⁶ started:

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man after mature consideration comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged. He must in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of the doubt that may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable influences which are not in conflict with, or outweighed by the proved facts of the case."

- (h) The above referred to approach was confirmed by the Supreme Court of Appeal in the matter of S v Phallo and Others¹⁷ referring

¹⁶ 1957 (4) SA 727 (A) at 738 A-C.

¹⁷ (1999) (2) SACR 558 (SCA) at 562g to 563e.

to it as a “classic decision”. The SCA went on to state that the approach of our law as represented by the said judgement corresponds with that adopted and stated by the English Courts. Olivier JA in the SCA went on to quote from *Miller v Minister of Pensions* [1937] 2 All EL 272 (KB) wherein the following was stated:

"The evidence must reach the same degree of cogency as required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man to leave only a remote possibility in his favour, which can be dismissed with a sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice."

- (i) The above referred to measurement must be applied by having regard to the general principle in evaluating evidence in a criminal case. This principle was stated in the matter of S v van der Meyden¹⁸ as follows:

¹⁸ 1999 (1) SACR 447 (WLD) at 448 f-h.

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

- (j) The evaluation of evidence in a criminal trial comprises of the evaluation of the **"mosaic of evidence as whole"** as aptly stated in the matter of Khumalo v S¹⁹ as follows:

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

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

THE GENERAL PRINCIPLES APPLICABLE TO AN APPEAL AGAINST SENTENCE:

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

- (a) An appeal court must be loath to interfere with the sentence of a trial court. As far back as 1920, the Appellate Division (as it was then known) in the case of R v Maphumulo and Others²⁰ stated that:

²⁰ 1920 AD 56 at 57.

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

- (b) In S v Barnard²¹ the Supreme Court of Appeal stated: *"A court sitting on appeal on sentence should always guard against eroding the trial court's discretion ... and should interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably."*
- (c) The above quoted phrase succinctly states the general and overarching principle which must be adopted by this Court in the adjudication of appeals on sentence and hence in this appeal.
- (d) In S v Hewitt,²² Maya DP held that: *"It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other*

²¹ 2004 (1) SACR 191 (SCA) at para [9].

²² 2017 (1) SACR 309 (SCA).

words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a “striking” or “startling” or “disturbing” disparity between the trial court’s sentence and that which the appellate court would have imposed. And in such instances the trial court’s discretion is regarded as having been unreasonably exercised.”²³

- (e) In S v Bogaards,²⁴ Khampepe J in the Constitutional Court held the following, that:

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

²³ At paragraph [8].

²⁴ 2013 (1) SACR 1 (CC) at para [41].

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

[17] This principle was also echoed by and phrased by Du Toit²⁵ as follows: "*The sentence will not be altered unless it is held that no reasonable court ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial judge had not exercised his discretion properly, or that it was in the interest of justice to alter it.*"²⁶

[18] The court *a quo* "...enjoys pre-eminent discretion and the court of appeal will not lightly interfere with the exercise of same."²⁷ A court of appeal will not interfere lightly with the trial court's exercise of its discretion.²⁸ In S v Singh²⁹ Tshiqi JA held that: "*The task of imposing an appropriate sentence is in the discretion of the trial court. A court of appeal may only interfere if the sentence is shockingly inappropriate.*"

²⁵ Commentary on the Criminal Procedure Act (Jutastat, 31 January 2021) at 30-41.

²⁶ Also see S v Fhetani 2007 (2) SACR 590 (SCA), Director of Public Prosecutions, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA), S v Anderson 1964 (3) SA 494 (A); Nevilimadi v S (545/13) [2014] ZASCA 41 (31 March 2014) and S v Asmal (20465/14) [2015] ZASCA 122 (17 September 2015).

²⁷ Gqika v S (CA&R 112/2021) [2022] ZAECGHC 15 (1 March 2022) at para [20].

²⁸ See S v Rommer 2011 (2) SACR 153 (SCA), S v Hewitt 2017 (1) SACR 309 (SCA) and S v Livanje 2020 (2) SACR 451 (SCA).

²⁹ [2016 \(2\) SACR 443](#) at para [23].

[19] In the matter of Chitumbura and Another v S³⁰ the court quoted the above referred to phrase from du Toit with approval and proceeded to referred to the Supreme Court of Appeal matter of S v Kgosimore³¹ and stated the following: *“Regard may be had also to the judgment of Scott, JA in S v Kgosimore, 1999(2) SACR 238 (SCA), relied on by the State, where his lordship held that if the discretion of the trial court was properly and reasonably exercised, there was no scope at all for interference in the sentence. This collection of expressions of resistance to interference in lower court sentencing underscores just how jealously our judicial hierarchy protects the prerogative below, and it is difficult to add to it.”*

THE EVIDENCE BEFORE THE COURT A QUO

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

[21] At the commencement of the trial the Appellant made the admission that on the date stated in the charge against him he was present in Ramutsse, the place where the Respondent alleged the rape took place.

[22] The victim BN who was 9 years old at the time of the trial testified, pursuant to the Respondent apply for same, in camera and through the intervention of

³⁰ (A190/201) [2017] ZAGPJHC 274 (14 September 2017) at para [9] and [10].

³¹ 1999(2) SACR 238 (SCA).

an intermediary as contemplated in terms of the provisions of sections 153, 258 and 170 of the Criminal Procedure Act.

[23] The record reflects that there was a problem recording the victim's testimony in chief and same was reconstructed. The reconstructed record was part of the record availed to this Court of appeal.

[24] The victim testified that:

- (a) She did not know the Appellant before the day of the incident, and she knew him as her mother's boyfriend.
- (b) She testified that she, her sibling, her mother and the Appellant was in the same room and then her mother and thereafter her sibling left the room.
- (c) The Appellant removed the victim's clothes, and his clothes was removed as well.
- (d) The Appellant then inserted his penis into her anus. It was painful.
- (e) The Appellant told the victim that if she tells her mother what has happened then he is going to kill her.

- (f) Making use of anatomy dolls the victim explained her testimony to convey the fact that the Appellant penetrated her anus with his penis. During the rape the victim's mother were outside at the fire.
- (g) After the rape the Appellant dressed the victim. Her mother saw that she was "angry" and "upset" and she told her mother that the Appellant did "funny things" to her.
- (h) Her mother then phoned the police who found the accused naked in the room and arrested him. The victim was then taken to the hospital.
- (i) The victim could not correctly identify the Appellant in the court room when requested to do so.
- (j) Appellant was place amongst other people in the court room and the victim.

[25] The court *a quo* was satisfied from the questions and answers put by the court *a quo* to the victim before she commences her testimony about the incident that she was a competent witness given her age and that she knew the difference between the truth and a lie.

[26] After the victim, her mother also testified. Her mother testified that:

- (a) The Appellant was her boyfriend. The victim has a brother who was 9 years old at the time of the incident. She confirms that one stage when she went to make a fire and boil water the Appellant was alone in a room with the victim and her brother. The boy then followed her and also left the room.
- (b) The victim's mother talked with her sister outside of the room at the fire. The victim then came out of the room and said that the Appellant is calling the victim's mother, who found the Appellant in the room only wearing his underwear.
- (c) When she went out of the room, she found the victim crying behind the house. She asked the victim what was wrong and BN said she was told not to tell because "...he will kill her...". BN was crying and not standing straight.
- (d) When the victim's mother examined her, she found that she was "*injured behind*" and her panty had "*blood stains*". BN reported to the mother that it was "Happy" who injured her. The victim then told her mother about the Appellant undressing her and raping her.
- (e) She proceeded to call the police.

[27] This Court, like the court *a quo* notes that there were certain contradictions between the evidence of the victim and the evidence of her mother as to

certain facts following the reporting of the rape to the police. The question is does these discrepancies render the testimony of BN or that of her mother not credible? This Court shall deal with this question below.

[28] The medical doctor who examined the victim and authored the J88 medical report (as stated above – Exhibit “A”) also testified. This was Dr Matlebyane. This witness confirmed the correctness of the contents of the J88 which indicates that there was a multiple tears of BN’s anal orifice and swelling, redness and bruising was present at her anus. There was also a “...*fresh tear of plus minus one centimetre ...*” in BN’s perineum. According to the medical doctor these “...*injuries sustained are consistent with blunt object penetration...*”. During the examination BN was tearful. The doctor also testified that she saw what looked like “semen” on the anus of BN – but this substance was not tested to confirm this allegation – as indicated during the cross examination of the medical doctor. Upon questions by the court *a quo* and also in cross examination the medical examiner confirmed that the injuries to BN’s anus and perineum were caused “...*from the outside...*” as a result of blunt object penetration. She confirmed that “*the injuries caused from the outside to inside...*”.

[29] It was evident from the testimony of the medical doctor that BN had sustained injuries to her anus and perineum as a result of the rape.

[30] After the testimony of the victim, her mother and the medical doctor, the Respondent closed its case.

[31] The Appellant testified in his own defence. The following is evident from the testimony of the Appellant:

- (a) The Appellant did not deny that he was present at the premises where the victim, her sibling and her mother was present on the day of the incident.
- (b) On the day in question the Appellant did consume some alcohol, but his state of sobriety was that of a “*good condition*”.
- (c) He arrived with the BN’s mother at the house where he went into a room to rest.
- (d) The Appellant testified that there was no one in the room with him. He heard conversations outside of the room and then he fell asleep.
- (e) He was woken up by the police who arrested him.
- (f) The Appellant denies raping BN or threatening her.
- (g) The Appellant testified that there was neither a boy nor a girl presents in the room that he was sleeping. He testified that when BN’s mother left the room, he was alone in the room.

[32] It is evident from the judgment of the court *a quo* that the said court considered the totality of the evidence before it. The court *a quo* looked at the “*mosaic of evidence as whole*” as adduced by all the witnesses, including the Appellant.

[33] The court *a quo* was of the view that “...*At the close of the evidence quite clearly there is little in dispute. What is in dispute is really the identity of the perpetrator who caused the injuries sustained by the victim herself...*” and “...*there is no dispute that Mr Modise was on the premises, on the same premises, as the alleged victim in this case and her mother as well as other people on the evening in question.*”

[34] The court *a quo* also stated that: “*There is no dispute that the alleged victim sustained the injuries which were depicted by the medical professional on form J88 and on which the doctor testified.*”

[35] The court *a quo* also addresses the issue raised by the Appellant’s attorney to the effect that there were certain discrepancies between the evidence of the victim and her mother. This issue was also raised with prominence by the Applicant’s counsel before this Court of appeal.

[36] The court *a quo* importantly stated in this regard the following: “***Well in this case very clearly that argument does not have hold water because the victim’s evidence is corroborated in material aspects by other witness’s testimony her mother and the medical examination which indicates that she was in fact injured in the way that she described she***

was injured. On that point of view I am satisfied that her testimony is in material respects credible and reliable and supported by other evidence including surrounding circumstances.”

[37] The Appellant’s counsel on appeal also raised the issue of the cautionary rule which must be applied in respect of single child witness. It was argued that: “... *these factors warranted that, where further corroboration was available, in the form of further witnesses, such ought to have been tendered, otherwise an explanation for this failure was surely indicated.*”

[38] The court *a quo* was alive to the cautionary approach which a trial court must adopt in respect of the evidence adduced by a young child. Thus, the court *a quo* was at pains to seek corroboration of the victim’s testimony. The court *a quo* found this corroboration in the version of the victim’s mother and the medical doctor.

[39] The court *a quo* found that the testimony of the victim’s mother “...*is in material respect supportive and corroborative about what the complainant had to say.*”

[40] Regarding the Appellant’s version of events, it was argued on behalf of the Appellant that: “... *the appellant’s version remains reasonably probably true, and that the State has failed to prove its case above a reasonable doubt. This could be no clearer than when considering the fact that the victim could not identify the appellant, when called into court*”.

[41] Having dealt with the evidence of the witness who testified on behalf of the Respondent, the court *a quo* turned to the Appellant's version and stated the following in regard thereof: *"The accused version is that he did nothing to the victim in this case. His version is that he did not even meet children and he was alone. That version cannot be reasonably possibly true. **Having considered all the evidence before the court and having regard to the doctor her testimony about the penetration aspect, I am satisfied on her evidence that there was penetration into or onto, or beyond the anal orifice. The definition requires into not necessarily beyond. On this evidence there was at least penetration into the anal orifice of the victim which caused the perineum and Anal tears and cracks. I am that satisfied that the state has proved its case beyond a reasonable doubt. Mr Modise you are found guilty as charge.**"* (own emphasis)

[42] In respect of sentence:

- (a) The Appellant is not a first offender. The Appellant was previously, in 1993, found guilty of and sentenced for robbery. Although not proven by the Respondent the Appellant did disclose to the court *a quo* prior to sentence that at the time of the rape the Appellant was on parole for another previous conviction of robbery with aggravating circumstances, for which he was sentenced to 15 years imprisonment. The Appellant was convicted and sentenced on this count of robbery with aggravating circumstances in 1998 and he was release on parole in 2009. The Appellant's parole was still in effect when he

committed the rape. He was reincarcerated on the robbery conviction when he was arrested on the count of this rape incident.

- (b) The personal circumstances of the Appellant is that he was 46 years old during 2017. Prior to the Appellant's reincarceration he was the sole breadwinner supporting his three children of 20, 12 and 7 years old and his brother. He was employed as taxi operator and earned approximately R 4000.00 per month. The Appellant was educated to the level of matric. Certain other and additional personal circumstances of the Appellant were also placed before the court *a quo*.
- (c) The court *a quo* also discounted the seriousness of the crime and the impact which it had on the tender aged victim (“...*about seven years, seven years five months and 24 days of age...*”) and the interest of society at large.
- (d) The court *a quo* dealt with the prescribed minimum sentence by referring to the trite authorities setting out the manner in which the court should conduct the enquiry as to the presence of “...*substantial and compelling circumstances...*”, as dealt with in more detail below.

[43] The court *a quo* accordingly found that there were no “...*substantial and compelling circumstances present...*” to warrant the departure from the

prescribed minimum sentence as per the provisions of section 51(1) of the Criminal Law Amendment Act, for the offence of which the Appellant was found guilty, i.e., rape as contemplated in section 3 of the SORM Criminal Law Amendment Act of a victim who is “...a person under the age of 16 years...” and where “..grievous bodily harm...” was inflicted upon the victim as contemplated in the provisions of Schedule 2, Part 1 (Rape) to the Criminal Law Amendment Act.

[44] The court *a quo* then proceeded to sentence the Appellant as set out in paragraph [7] above.

THE PRESCRIBED MINIMUM SENTENCE

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

[46] Section 51(3)(a) of the Criminal Law Amendment Act contains a redeeming provision and states the following: “*If any court referred to in subsection (1) or (2) **is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence** than the sentence prescribed in those subsections, it shall enter those circumstances on the*

record of the proceedings and [may] must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.” (own emphasis)

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

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

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

(a) *when committed—*

- (i) *in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;*
- (ii) *by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;*
- (iii) *by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or*
- (iv) *by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;*

(b) *where the victim—*

- (i) *is a person under the age of 16 years;*
- (iA) *is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);*
- (ii) *is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable;*
or
- (iii) *is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or*

(c) *involving the infliction of grievous bodily harm.”*

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

[49] The court a quo having due regard to the conspectus of evidence before it rejected the Appellant’s version of events and found that the Respondent has proven its case beyond reasonable doubt. In doing so the court *a quo*, in view of this Court, correctly found that the discrepancies between the evidence of the victim and her mother were not significant enough to stem the tide of corroborative evidence which emerge from the evidence of the victim, her mother and the medical doctor.

[50] In this regard the heads of argument delivered on behalf of the Respondent in this appeal aptly refers to the matters of S v Mkohle.³² In this matter the SCA stated the following:

“Contradictions per se do not lead to the rejection of a witness’s evidence. As NICHOLAS J, as he then was, observed in S vs Oosthuizen 1982(3) S A 571(T) at 576 B - C, they may simply be indicative of an error. And (at 576 G - H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness’s evidence. WILLIAMSON J obviously did this. In my view, no fault can be found with his conclusion that

³² S v Mkohle (639/88) [1989] ZASCA 98 (7 September 1989) at page 13.

what inconsistencies and differences there were, were "of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction." One could add that, if anything, the contradictions point away from the conspiracy relied on."

[51] The finding made by the court *a quo* that BN was sexually penetrated as defined in section 1 read with section 3 of the SORM Criminal Law Amendment Act was correct and supported again by the conspectus of evidence adduced by the Respondent.

[52] In argument before this Court, counsel on behalf of the Applicant stated that: *"...where further corroboration was available, in the form of further witnesses, such ought to have been tendered, otherwise an explanation for this failure was surely indicated."*

[53] The fact that the Respondent did not adduce any DNA evidence (for whatsoever reason(s)) does not detract from the fact that the court *a quo* found the Appellant guilty beyond reasonable doubt of the offence of the rape of BN *in casu* on the strength of the evidence which was adduced before it and which was found by the court *a quo* to have comprise sufficient evidence to prove the guilt of the Appellant beyond reasonable doubt.

[54] As to the conviction of the Appellant, the court *a quo* in the view of this Court correctly found that the full conspectus of evidence placed before it established the guilt of the Appellant. The conclusion reached by the court *a quo* rationally and in some detail accounted for all the evidence before it. It

discounted and addressed the discrepancies in the evidence of the victim and her mother. There is no reason for this Court of appeal to interfere with the finding of the court *a quo* in respect of the conviction of the Appellant on the count of rape as per the charge levied against him.

[55] In respect of sentence, on the evidence as adduced before the court *a quo*, the court *a quo* applied the provisions of section 51(1) of the Criminal Law Amendment Act and sentenced the Appellant to life imprisonment, having found no “*substantial and compelling circumstances*” as contemplated in section 51(2) of the Criminal Law Amendment Act, to trigger the redeeming effect of the last mentioned section.

[56] It is clearly evident from the contents of the record that the court *a quo* extensively considered the question as to whether or not “*substantial and compelling circumstances*” as contemplated in section 51(2) of the Criminal Law Amendment Act were present in this matter. The court *a quo* was alive to the fact that there must be a separate and distinct enquiry as the absence of any substantial and compelling circumstances before the court can proceed to impose the prescribed minimum sentence, *in casu*, life imprisonment.

[57] Turning to the manner in which the court *a quo* dealt with the prescribed minimum sentences imposed by the court *a quo*, reference must be made to the matter of S v Malgas,³³ wherein the following was stated by Marais JA in the SCA:

³³ 2001 (1) SACR 469 (SCA).

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

In what respects was it no longer business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public’s need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in *Flannery v Halifax Estate Agencies Ltd* by the Court of Appeal, 'a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based- than if it is not'. Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. **The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders...**"³⁴ (own emphasis)

[58] In the matter of *S v GN*,³⁵ Du Plessis J stated in respect of the Malgas judgment:

³⁴ At paragraph [7] to [9].

³⁵ 2010 (1) SACR 93 (TPD).

“...As I understand the Malgas judgment, the prescribed minimum sentence may be departed from if, having regard to all the factors that play a role in determining a just sentence, the court concludes that the imposition of the prescribed minimum would in the particular case constitute an injustice or would be “disproportionate to the crime, the criminal and the legitimate needs of society”...”³⁶

[59] The Supreme Court of Appeal has recently confirmed that certain mitigating personal circumstances of an accused and even the fact that an accused person is a first offender (which is not applicable *in casu*) do not constitute “substantial and compelling circumstances” as contemplated in section 51(2) of the Criminal Law Amendment Act. The SCA in the matter of Mthanti v The State³⁷ stated the following in this regard:

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

³⁶ At paragraph [6].

³⁷ (Case no 859/2022) [2024] ZASCA 15 (8 February 2024) at paras [19] to [21].

[20] The only submission made on appeal was that the appellant's mother died when he was 7 years old. The suggestion was that the appellant was troubled by the fact that his mother died without revealing the identity of his father. But all of this was considered by the high court. The court also considered in the appellant's favour, his personal circumstances - that he was gainfully employed at the time of his arrest for the offences in question and supporting his two minor children. It considered that although he lost his only biological parent early in his life, his uncle and aunt gave him 10 a 'good and warm upbringing' until he abandoned his post matric studies without telling them'. The court considered that the appellant was a first offender.

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

[60] The above referred to case (as confirmed in the Malgas matter) confirms that certain mitigating factors from the Appellant's personal circumstances are in isolation not sufficient to justify a departure from the imposition of a minimum sentence. There must be substantial and compelling reasons to do so. As stated above, the court *a quo in casu* and in the view of this Court correctly so, did not find substantial and compelling circumstances to deviate from the minimum prescribed sentences.

[61] The usual triad of the crime, the offender, and the interests of society, as enunciated in S v Zinn³⁸ were expressly considered by the court *a quo* and this Court.

[62] With regard to the offence of rape, which are disturbingly prevalent in our country, this Court deems it appropriate to make reference to the following:

(a) The court in the matter of Vilakazi³⁹ held as follows:

"...The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in

³⁸ 1969 (2) SA 537 (A) at 540G to H.

³⁹ 2009 (1) SACR 552 (SCA) at para [21].

the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important. From those who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound.”

- (b) Most recently, in the matter of Director of Public Prosecutions, Kwazulu-Natal Pietermaritzburg v Ndlovu⁴⁰ the Supreme Court of Appeal Stated:

“Rape is an utterly despicable, selfish, deplorable, heinous and horrendous crime. It gains nothing for the perpetrator, save perhaps fleeting gratification, but inflicts lasting emotional trauma and, often, physical scars on the victim. More than two decades ago, Mohamed CJ, writing for a unanimous court,⁴¹ aptly remarked that: ‘Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a

⁴⁰ (888/2021) [2024] ZASCA 23 (14 March 2024) at para [73] and [74].

⁴¹ With reference to S v Chapman 1997 (3) SA 341 (SCA) at paras [3] to [4].

legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

In similar vein Nugent JA, writing for a unanimous court⁴², in equal measure described rape in these terms: 'Rape is a repulsive crime, it was rightly described by counsel in this case as an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity.'"

(c) In Tshabalala v S (Commissioner for Gender Equality and Centre for Applied Legal Studie sas Amici Curiae); Ntuli v S⁴³ the Constitutional Court stated “...rape is not rare, unusual and deviant. It is structural and systemic...”

(d) In Masiya v Director of Public Prosecution Pretoria and Another (Centre for Applied Legal Studies and another as Amici Curiae)⁴⁴ the Constitutional Court said the following of rape:

“Today rape is recognised as being less about sex and more about the expression of power through degradation and

⁴² With reference to S v Vilakazi supra at para [1].

⁴³ 2020 (2) SACR 38 (CC) at para [67].

⁴⁴ 2007 (5) SA 30 (CC) at para [51].

concurrent violation of the victim's dignity, bodily integrity and privacy. Regrettably, 26 years, since the decision of this Court in Chapman, the scourge of rape has shown no signs of abating. On the contrary, it appears to be on an upward trajectory.”

- (e) In recent times, this “...upwards trajectory...” referred to by the Constitutional Court in 2007 seems to be continuing unabated, notwithstanding numerous efforts from government and society at large to address violence committed against women and children.
- (f) It is not only this Court that is saying this. In the matter of Director of Public Prosecutions, Grahamstown v T M⁴⁵

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

⁴⁵ (131/2019) [2020] ZASCA 5 (12 March 2020) at para [15].

only appropriate sentence is that which has been ordained by statute." (footnotes omitted and own emphasis)

[63] In this instance the Appellant's actions are especially heinous. The rape of a girl of seven years old evoke the strongest possible feelings of shock, outrage and condemnation. In fact, having regard to the facts in this matter and the manner in which the rape of BN was perpetrated by the Appellant it is difficult to imagine which scenario of facts would have constituted substantial and compelling circumstances to have justified the imposition of a lesser sentence than the prescribed maximum sentence. The court *a quo* found none. There exists no reason for this Court to interfere with this finding.

[64] This is also apparent from a consideration of recent case law that deals with similar facts surrounding vicious incidents of rape.⁴⁶

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

⁴⁶ See, for example S v FM 2016 JDR 1564 (GP), S v Mgandela 2016 JDR 1748 (ECM), S v Redebe 2019 JDR 1257 (GP) and S v Daile 2021 JDR 1879 (GP) and Director of Public Prosecutions, Grahamstown v Mantashe supra at para [11] and [12].

[66] In the matter of Ndou v S⁴⁷ Shongwe JA stated that:

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

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

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

⁴⁷ [2012] JOL 29522 (SCA) at para [14].

[69] In S v Dodo⁴⁸ Ackermann J dealt with the “concept of proportionality” and stated the following:

“...The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. This was recognized in S v Makwanyane. Section 12(1)(a) [of the Constitution] guarantees, amongst others, the right “not to be deprived of freedom... without just cause.” The “cause” justifying penal incarceration and thus the deprivation of the offender’s freedom, is the offence committed. “Offence”, as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender’s freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence.

...To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of

⁴⁸ 2001 (5) BCLR 423 (CC) at paras [37] and [38].

*a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in paragraph 37 above) the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity."*⁴⁹

[70] The principle of proportionality was also addressed in Vilakazi v S,⁵⁰ where Nugent JA observed that a prescribed sentence cannot be assumed, *a priori*, to be proportionate in a particular case. This was an issue to be determined upon consideration of all the circumstances in the matter. In casu, the court *a quo* did so, and there is no reason for this Court to interfere with the sentence imposed by the court *a quo*.

[71] In this matter this Court is satisfied that the imposition of the prescribed minimum sentence would most definitely not constitute an injustice, neither would it be disproportionate to the crime, the criminal and the legitimate needs of society.

⁴⁹ At paragraphs [37] and [38].

⁵⁰ [2008] 4 All SA 396 (SCA).

CONCLUSION AND JUDGMENT

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

[73] Accordingly, the Appellant's appeal against both conviction and sentence is dismissed.

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

I agree and it is so ordered.

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

DATE OF HEARING: 1 December 2023

DATE OF JUDGMENT: ____ APRIL 2024

**For the Appellant: Adv Hugo
 Instructed by Legal Aid South Africa**

**For the Respondent: Adv Mosegedi
 Office of the Public Prosecutor**