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

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

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION - MAHIKENG

CASE NO: CA 46/21

In the matter between:

ROBERT MALATJIE **Appellant**

and

THE STATE **Respondent**

Coram: **Reddy AJ & Roux AJ**

Heard: **29 November 2023**

Handed down: **26 February 2024**

ORDER

1. In the premises, I make the following order:
2.
3. (i) The appeal against the conviction is dismissed.
4.
5. (ii) The appeal against the sentence is dismissed.
6.
7. (iii) The sentence of life imprisonment is confirmed.
8.
9. (iv) The order in terms of section 103(1) of the Firearms Control Act 60 of 2000 is confirmed.

JUDGMENT

ROUX AJ

INTRODUCTION

10. [1] This is an appeal against the conviction and sentence of the Appellant leave being granted by the trial court insofar as that was necessary.

11.

12.

13.

14. [2] In the charge sheet it is alleged that the Appellant on 30 December 2009 (within the jurisdiction of the trial court) unlawfully committed an act of sexual penetration with the complainant, (whom I will refer to as DXZ or the complainant as she is a minor), by inserting his penis inside her vagina without her consent.

15.

16. [3] Section 51(1) of Act 105 of 1997 which provides for a prescribed sentence of life imprisonment applied as the complainant was 13 years old at the time of the alleged offence.

17.

18. [4] Thereafter, the Appellant failed to prosecute the appeal within the required time limit. He applied for condonation and explained that his attorney of record had been struck off the roll and that he thereafter experienced difficulties and delays with the Legal Aid legal representative.

19.

20. [5] Notwithstanding my view on the merits, I have decided to grant condonation by virtue of the reasons advanced by the Appellant.

21.

22. [6] The Appellant pleaded not guilty to the charge.

23.

24. [7] The complainant understood the meaning of the oath, i.e. that a

person must tell the truth and relate exactly what had happened. She also considered the oath to be binding on her conscience.

25.

26. [8] The complainant testified that on the day in question, she visited her grandmother in Erasmus. She referred to the Appellant as *grandfather* although he is not her biological grandfather but that it was simply a way to refer to him.

27.

28. [9] By the 30th of December 2009 she had stayed at her grandmother for quite some time and at about 12pm on that day she was asleep in the one-bedroom house. At the time her grandmother had gone shopping. The Appellant knocked on the door and entered the room. She was lying on the bed. He had a big brown roll of cello tape with him. He went in the direction of the refrigerator that was in the room but then turned in her direction and opened the sellotape. He took both her hands and tied them to the back or as she put it *"he took both my hands to the back, your Worship, along the back of the waist and fastened me with that sellotape"*. He also as she put it *"closed my mouth by means of the very same sellotape"*. He pulled down the zip of his pants and he ordered her to lie on the bed on her back. He pulled down her trousers and panties but left her T-shirt on. He then put his penis inside her vagina. At that stage she was crying, and she stated that he *"he was having sexual intercourse with me"*. She said that she felt pain, and she was bleeding. When he finished, he threatened her that if she made a report to her grandmother, he was going to kill her.

29.

30. [10] Notwithstanding she decided the following day to report the rape incident to her grandmother. Her grandmother told her that

she must not report the rape to her mother and that she would take her that they could go and buy some clothes.

31.

32. [11] She said that her grandmother confronted the Appellant about the rape incident. The Appellant denied that he had raped her.

33.

34. [12] Although this constitutes hearsay, as the grandmother did not give evidence, I revert to this in the evidence of the Appellant where the Appellant confirmed this version. Accordingly, it is in the interests of justice to permit the hearsay evidence as admissible.

35.

36. [13] She also says that she made a report to the social worker that the Appellant had raped her and that her grandmother had told her not to tell anyone. Accordingly, the report to the social worker was about a week later. She said that thereafter a police case was opened. She said that after she had told her grandmother that she was bleeding from her vagina, the grandmother bought her sanitary towels namely: Always pads. She said she had started with her menstrual cycle before the incident but on the day of the incident she was not menstruating.

37.

38. [14] The cross-examination of the complainant centred around the allegations that she was a naughty child. The complainant's mother, P[…] Z[…], gave evidence. She confirmed the date of birth of the complainant to be 15 August 1996. She said the person that the complainant referred to as the *"grandmother is the mother to the boyfriend who gave me my child"*. She testified that when the complainant returned home *"she would not want to stay with*

me your Worship in the same place and maybe sometimes when I sent her to the shop she will go to the shop and spend some time and when I ask her X[…] what is wrong with you then she would run away from me your Worship, not telling me what is wrong with her". She then decided to take the complainant to the social workers as she was concerned that she was the one giving the complainant problems and she needed to know what the problem was with the complainant. The social worker told her to take the complainant to hospital. They spoke to her and when the social worker came back, she told her that it is true that it had happened. This evidence was provisionally admitted on the basis that the social worker would give evidence.

39.

40. [15] Nokpiwa Khanyile testified. She is a nursing sister at the Natalspruit Hospital and the social worker referred to. She testified that on 8 June 2010 at about 20:00 she was on duty and the complainant, and her mother arrived at the hospital. She said *"what actually made to visit the hospital your Worship was that X[…] was raped"*. She said about that *"it is X[…] who made such a report that she was raped by the grandfather who lives with her grandmother"*. At that time when she made the report, the complainant's mother was outside. She also told her that the complainant was afraid to report the matter to her because the grandfather had threatened her, and she explained that that was the reason why she did not make a report to her mother. She did, however, say that she reported the incident to her grandmother. She then called the doctor to examine the complainant.

41.

42. [16] The legal representative of the Appellant admitted the medical

certificate, J88. This medical examination took place on 8 June 2020 which is long after the incident. According to the certificate, the complainant's hymen was not intact. According to the report there was evidence of penetration.

43.

44. [17] The Appellant gave evidence. It seems that he attributed the report that the complainant had made against him to the fact that she was a naughty child and that she had a boyfriend and that the grandmother found the boyfriend with her at night. He denied that ever had sexual intercourse with the complainant. In cross-examination he admitted that his wife (the complainant's grandmother) confronted him with the allegation that he had sexual intercourse with the complainant, but he denied it. He said that the complainant told her grandmother that she had been raped after he had reprimanded her when she was naughty. He was confronted with the fact that had he told the court before that he only found out about the rape allegation in July of that year whilst according to his own evidence, he knew about it before that time as his wife had told him that. He said that during that time the complainant was sick, and her grandmother had asked her what was wrong. She testified *"she asked her what did grandfather do to you. She said that on the day when I was cleaning the yard, your Worship, setting the dirt alight, that on that day grandfather raped her your Worship."* He said that was a leading question coming from his wife and not that the complainant made such a report. He said he told her that they could go to the police station as he lived next to the police station. That is when the complainant said that she was lying about the allegations. He was confronted by the prosecutor that it was a new version. He repeated that she

came up with the rape allegation after he had reprimanded her. He denied that he sexually molested the complainant on the day and he said *"the child was not raped by anyone, no not me. Not me."*

45.

46. [18] The Regional Magistrate gave a detailed judgment with reference to various applicable decided cases and in the judgment correctly summarised the evidence. The trial court also dealt with the onus which rested on the State to prove the guilt of the Appellant beyond a reasonable doubt. The Regional Magistrate also considered that the evidence of the complainant must be approached with caution because she was a single and a child witness. The Regional Magistrate also referred to the case of *S v Tshabalala* 2003 (1) SACR at page 134 of the Supreme Court of Appeal where the following was said:

47. *"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, in having done so to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt as to the accused's guilt."*

48.

49. [19]Further the Regional Court Magistrate, in my view, correctly juxtaposed the principles laid down in those cases to the facts of the matter considered. I would have preferred if more attention was given during the evidence dealing with the reports made to the grandmother and the nurse as to whether anything was reported about the use of sello tape as the reference to the use of sello tape appears to be peculiar. but even so I am of the view that the State proved its case beyond a reasonable doubt. and the appellant was

represented at the trial.

~~50.~~

[20] It is settled law that a court of appeal will not likely interfere with credibility and factual findings of the trial court. In the absence of an irregularity or misdirection, the court of appeal is bound by such findings, unless it is convinced that the findings are clearly incorrect or unless an examination of the record reveals that those findings are patently wrong. (*S v Francis* 1991 (1) SACR 198 (A) at 204c-e, *S v Mkohle* 1990 (1) SACR (A) at 100e).

[21] In S v Hadebe 1997(2) SACR 641 (SCA) at 645 e-f Marais JA stated as follows:

"Before considering these submissions it would be as well to recall yet again that there are well—established principles governing the hearing of the appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellant Coutts to factual findings of the trial court are well known that restatement is unnecessary."

51. [22] After a well-reasoned judgment, the Regional Magistrate found that the State had proved its case beyond a reasonable doubt and convicted the appellant on one count of rape. An application of trite legal principles leads to the ineluctable conclusion that there was no misdirection in the findings of the court a quo. Accordingly, the appeal against the conviction falls to be dismissed.

SENTENCE

[23] There is a multiplicity of jurisprudential authority re-iterating the trite position that, the imposition of sentence is pre-eminently within the discretion of the trial court. An Appeal Court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognized grounds justifying an interference on appeal, has been shown to exist. (See *S v Mtungwa en 'n Ander* 1990 (2) SACR 1 (A))

The grounds on which a court of appeal may interfere with sentence on appeal are that the sentence is:

(i) disturbingly inappropriate;

(ii) so badly out of proportion to the magnitude of the offence;

(iii) sufficiently disparate;

(iv) vitiated by misdirection showing that the trial court exercised its discretion unreasonably;

(v) is otherwise such that no reasonable court would have imposed it.

(See S v Giannoulis 1975 (4) SA 867 (A) at 873G-H; S v Kibido 1998 (2) SACR 213 (SCA) at 216g-j; S v Salzwedel & others 1999 (2) SACR 586 (SCA) para [10].)

[24] In respect of the courts sentencing discretion where a mandatory sentence finds application, the guidance provided in *S v Malgas* 2001 (2) SA 1222 where the following was stated, is instructive:

"[12] The mental process in which courts engage when considering the questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by the legislature or binding judicial precedent, a trial court

will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be just and appropriate sentence. A court excising appellant jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellant court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellant court is large. However, even in the absence of material misdirection, an appellant court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellant court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate. " It must be emphasised that in the latter situation the appellant court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.

[25] In S v Matytyi **2011 (1) SACR 40** (SCA) at paragraph 23, Ponnan JA stated as follows in respect of serious crimes, such as the present:

"[23] Despite certain limited successes there has been no real let-up jn the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is "no longer business as usual". And yet one notices all to frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for flimsiest of reasons-reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement

those sentences. Our courts derive their power from the Constitution and the like other arms of state owe fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol boundaries of their own power by showing due deference to the legitimate domains of the power of the other arms of the state**. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague. ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness- Predictable outcomes. not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order. '**

(my emphasis)

52.

53.

54. [26] The court a quo considered all the relevant factors including the personal circumstances of the appellant and the fact that he was a first offender. In accentuating the seriousness of the offence, the Regional Magistrate referred *inter alia*, *State v Chapman* 1997 (3) SA 341 (SCA), where the Supreme Court of Appeal had occasion to state as follows:

55. *"The court have a duty to send a clear message to the accused, to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of a woman and we shall show no mercy to those who seek to invade those rights.*

56. *It becomes more serious when a victim is a child. There may be no physical injuries or serious physical injuries. However psychological injuries are not easily discernible nor easy to qualify. Especially in a young victim."*

57.

58.

59.

60. [27] The court a quo correctly referred to the approach in

assessing the existence of substantial and compelling circumstances in the sentencing process. Reference was made to the seminal authorities of *S v Malgas* 2001 (1) SACR at 469 (SCA), and to the Constitutional Court decision in *S v Dodo 2001* (2) SACR at page 594.

61.

62. [28] Upon a careful consideration of all the circumstances, the trial court came to the conclusion that there were no substantial and compelling circumstances justifying a lesser sentence than life imprisonment.

63.

64. [29] I am unable to find that the court *a quo* exercised its sentencing discretion incorrectly as set out in the recognised grounds in our law. I am satisfied that court *a quo* properly considered the matter and applied the correct legal and factual principles when considering the sentence and when imposing the sentence of life imprisonment.

65.

66. [30] In *S v PB* 2013 (2) SACR 533 (SCA) ([2012] ZASCA 154), the Supreme Court of Appeal, after stressing that a prescribed minimum sentence cannot be departed from lightly or for flimsy reasons, refused to interfere with a prescribed sentence of life imprisonment imposed on a father who had raped his 12-year-old daughter. The court found that:

67. " *While this can only serve as a guideline, it emphasises the necessity to impose heavy sentences in cases such as the present, to prevent young girls from being abused. Before us counsel for the appellant was constrained to concede that child rape is becoming prevalent in Limpopo. Indeed, child rape is a national scourge that shames us as a nation".*

68.

69. [31] Resultantly, I am therefore of the view that the appeal against the sentence should also be dismissed.

70.

71. **Order:**

72.

73. [32] In the premises, I make the following order:

74.

75. (iv) The appeal against the conviction is dismissed.

76.

77. (v) The appeal against the sentence is dismissed.

78.

79. (vi) The sentence of life imprisonment is confirmed.

80.

81. (iv) The order in terms of section 103(1) of the Firearms Control Act 60 of 2000 is confirmed.

82.

83.

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B ROUX

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

84.

85. **I agree**

86.

_____

A REDDY

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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Date of hearing:	29 November 2023
Date of judgment:	26 February 2024