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

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

APPEAL CASE NO: CA85/2018

REGIONAL MAGISTRATES

CASE NO: RC2/28/2015

In the matter between:

STEVEN MOTSUMI **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Petersen J & Williams AJ

Date heard: 28 November 2023

Date handed down: 28 February 2024

ORDER

On appeal from: The Regional Court Klerksdorp, North West Regional Division, (Regional Magistrate Nzimande siting as court of first instance):

1. Condonation for the late noting of the appeal is granted.
2. The appeal against sentence is dismissed.

JUDGMENT

WILLIAMS AJ

Introduction

[1] The appellant was tried in the Regional Court, Klerksdorp on charge of rape of a five year old child in contravention of section 3 read with section 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007, further read with the provisions of section 256, 257 and 281 of the Criminal Procedure Act 51 of 1977, and the provisions of section 51 and schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended and section 92(2) and 94 of the Criminal Procedure Act 51 of 1977.

[2] The trial commenced on 23 April 2016. The appellant pleaded not guilty. On 19 May 2017 he was convicted as charged and on even date sentenced to life imprisonment. This appeal, against the sentence of life imprisonment is by virtue of his automatic right of

appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977.

Condonation

[3] The appellant seeks condonation for the late filing of his notice of appeal. The main reason for the delay is attributed to a dispute between the Department of Justice and Constitutional Development and the company responsible for the transcription of court records. The reasons advanced for the late noting of the appeal are cogent and condonation is accordingly granted.

The grounds of appeal

[4] The appellant assails the sentence of life imprisonment, contending that the trial court erred in not accepting that the appellant's age, as well as the fact that the state did not prove previous convictions, as comprising possible compelling and substantial circumstances, and that it was indicative of the prospects of rehabilitation of the appellant. The trial court is further said to have erred in imposing life imprisonment by over emphasizing the public interest and negating the personal circumstances of the appellant. The sentence is said to be out of proportion to the totality of the accepted facts and leaves no room for the appellant to be rehabilitated and reintegrated back into society as he is no longer a young man. Finally, the trial court is said to have over emphasized the retribution element of sentencing.

Factual Background

[5] The appellant's conviction and sentence stems from an allegation that the appellant on or about December 2013 and at or near Tigane Hartbeesfontein, raped the complainant who was born on […] 2008 and was 5 years old at the time.

[6] The complainant was at home with another child and her older sister when the appellant arrived at their home. He was a family friend. The appellant was looking for the complainant's older sister, who was asleep in her bedroom. The complainant knew the appellant as he was a regular visitor to their home. The complainant's sister told her that if someone came looking for her, that the complainant was to tell them she was not home. The complainant did what she was told by her older sister and told the appellant that her sister was not home. The appellant saw this as an opportunity and took the complainant to her grandmother's bedroom. The appellant instructed the other child to keep guard and to inform the appellant when somebody was coming. The appellant then raped the complainant vaginally. The child who stood at the door, witnessed the rape. After the ordeal, the complainant told her older sister that the appellant had raped her. She also told her mother on the same day. The complainant's mother went to the police to report the rape, and the complainant was later taken to a doctor.

[7] The appellant was linked to the rape of the complainant by DNA evidence despite pleading not guilty and denying that he raped the complainant. When confronted with the DNA evidence during cross-examination, the appellant admitted to raping the complainant.

The approach of appeal – sentence

[8] It is trite that a court of appeal will interfere with the sentencing of the court *a quo* only where it has misdirected itself. The approach is succinctly set out in *S v Malgas* 2001 (2) SA 1222 (SCA) as follows:

> *"[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation 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 a just and appropriate sentence. A court exercising appellate 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 trail court vitiates its exercise of that discretion an appellate 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 appellate court is at large. However, even in the absence of material misdirection, an appellate 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 trail court and the sentence which the appellate court would have imposed had been the trial court is marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasized that in the latter situation the appellate 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 difference is so substantial that it attracts epithets of the kind I have mentioned. No sch limitation exists in the former situation."

[9] In *S v Bogaards* 2013 (1) SACR 1 (CC), the Constitutional Court stated the approach as follows:

"[41] Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentence imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a 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. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."

Discussion

[10] The appellant was 51 years old at the time of the offence and 56 years old when he was sentenced. He is a first offender; has no formal education and he is a widower. He has five children who are all adults. The appellant is not a primary caregiver of any minor children. He worked as a builder. It was submitted on behalf of the appellant that his age should be a factor for rehabilitation and the fact that the appellant at the end admitted that he committed the offence. It was submitted on behalf of the State that if the State did not have the DNA evidence implicating the appellant, he would never have admitted that he raped the complainant.

[11] The prescribed minimum sentence for the rape of a child under 16 years of age is life imprisonment. It is settled law that a court can only deviate from this prescribed minimum sentence if there are substantial and compelling circumstances that justifies such deviation or the imposition of the sentence would be disproportionate to the needs of the criminal, the offence and the interests of society.

[12] In *Malgas supra*, Ponnan JA stated that:

> "Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for certain crimes. Unless

there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts. The specified sentences are not to be departed from lightly and for flimsy reasons.'

[13] The fact that the appellant admitted that he committed the offence cannot be a mitigating factor. As the state submitted, he would never have admitted the offence if it was not for the DNA evidence linking him to the rape of the complainant. The appellant was in a corner and saw no other option.

[14] In my view the appellant's age is no reason to deviate from the prescribed minimum sentence of life imprisonment. It is rather an aggravating factor. One would expect a person of his age to know better and to protect young children rather than violate them. The appellant took advantage of the fact that the complainant knew him and trusted him. He exploited the complainant's vulnerability. The complainant will forever suffer the consequences of the actions of the appellant.

[15] In *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA) at 577G-I, the SCA said that:

'Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and

the advancement of human right and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting members of society. Our courts have an obligation to impose sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, of the kind which reflect the natural outrage and revulsion felt by the law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system.'

[16] More recently, in *Maila v The State* (429/2022) [2023] ZASCA 3 (23 January 2023), Mocumie JA rejected similar grounds of appeal and contentions in an appeal involving the rape of a 9 year old child by her uncle. The following was said in this regard:

"[47] Counsel for the appellant submitted that the trial court did not take into account the appellant's personal circumstances. It also, according to counsel, did not take into account that this was not one of the 'brutal cases', as the complainant was not physically injured. Counsel was taken to task during the exchange with the members of the bench on this submission, but he could not take the argument further. Correctly so, because apart from this minimising the traumatic effects of rape on any victim and more so a child, it is well documented that 'irrespective of the presence of physical injuries or lack thereof, rape always causes its victims severe harm.'

…

[52] The trial court had regard to the basic triad of sentencing and also warned itself to balance the various interests. It took into account the appellant's

personal circumstances. He was a first offender. He was gainfully employed. He had three children of his own…

[53] The trial court noted the following as aggravating circumstances: the appellant was the complainant's maternal uncle and in a position of trust – who is 'supposed to protect and love' the complainant and not abuse her… A factor ordinarily present in rapes committed within families or by those close to the families to commit these violent crimes, knowing well that the victims are left on their own at particular times of the day or on certain days.

…

[55] All these factors, in the view of the regional court, were not compelling and substantial enough to justify a lesser sentence.

…

[57] Rape of women and children is rampant in South Africa. It has reached alarming proportions despite the heavy sentences which courts impose. South Africa has one of the highest rape statistics in the world, even higher than some countries at war. The country's annual police crime statistics confirms this: in 2019/2020, there were 42 289 rapes reported as well as 7 749 sexual assaults. This translates into about 115 rapes per day.

[58] The appellant infringed the right to dignity and the right to bodily and psychological integrity of the complainant, which any democratic society (such as South Africa) which espouses these rights, including gender equality, should not countenance for the future of its children, their safety and physical and mental health. In *S v Jansen*, the court stated it thus:

'Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society. . . . The community is entitled to demand that those who perform such

perverse acts of terror be adequately punished and that the punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution.'

…

[60] The message must be clear and consistent that this onslaught will not be countenanced in any democratic society which prides itself with values of respect for the dignity and life of others, especially the most vulnerable in society: children. For these reasons, this Court is not at liberty to replace the sentence that the trial court imposed. For an uncle, who is the position of trust just as a father, to rape his own niece is unconscionable and deserves no other censure than that imposed by the trial court: life imprisonment. The sentence is not disproportionate to the serious offence that the appellant committed on a 9-year-old child, his niece. The sentence is, thus, justified in the circumstances.

(emphasis added)

[17] In my view there is nothing in the personal circumstances of the appellant or the facts of the matter which constitute substantial and compelling factors justifying a deviation from the prescribed minimum sentence of life imprisonment. I therefore cannot fault the decision of the trial court for imposing a sentence of life imprisonment.

Order

[18] In the result, the following order is made:

1. Condonation for the late noting of the appeal is granted.
2. The appeal against sentence is dismissed.

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Z WILLIAMS
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

I agree.

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A H PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Appearances:

For the Appellant:	Adv T P Moloto (Acting Pro Deo) North West Bar Advocate's Chambers Mahikeng
For the Respondent:	Adv K E Mampo
Instructed by:	The Director of Public Prosecutions, Mahikeng Mega City Complex, East Gallery 3139 Sekame Road, Mmabatho