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

CASE NO: CA 47/2018

REGIONAL COURT CASE NO: RC2/63/2015

In the matter between:

STEPHEN WILLY MOTSWENYANE **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: Djaje DJP *et* Scholtz AJ

Heard: November 2023

Handed down: 03 March 2024

For the Appellant: Adv G K Seleka

For the Respondent: Adv D W Ntsala

ORDER

The following order is made:

1. The appeal against sentence is dismissed.

JUDGMENT

SCHOLTZ AJ

[1] The Appellant, **MR STEPHEN WILLY MOTSWENYANE,** had been found guilty on a count of rape in terms of **SECTION 3 OF THE SEXUAL OFFENCES AND RELATED MATTERS AMENDMENT ACT 32 OF 2007** read with the **PROVISIONS OF SECTION 51 (1) and PART 1 SCHEDULE 2 OF THE CRIMINAL LAW AMENDMENT ACT**, in **THE REGIONAL DIVISION OF NORTH WEST, HELD AT KLERKSDORP** on **17 NOVEMBER 2016**. On the same day, the Appellant was sentenced to life imprisonment by the *Court a quo*.

[2] Aggrieved with his conviction and sentence, the Appellant noted an appeal to this Court.

[3] Comprehensive Heads of Argument had been filed by the legal representatives for the Appellant and Respondent, and the matter was adjudicated on the papers as both Counsels were *ad idem* that a hearing and oral argument were not necessary.

[4] Although the Appellant initially appealed against his conviction and sentence, Counsel on behalf of the Appellant in his Heads of Argument, indicated that the appeal against the conviction is not pursued. Therefore, the only aspect remaining relates to the issue of sentence, and more specifically whether the Court *a quo* erred by imposing life sentence on the Appellant. This Court should therefore determine whether substantial and compelling circumstances existed which justified the imposition of a lesser sentence, than life imprisonment, upon the Appellant.

[5] The facts of this case can briefly be summarized as follows:

(a) The complainant was standing outside of a shop, when three men emerged. One of these men was the Appellant.

(b) The Appellant dragged the complainant away by pulling her hair, to a shack at Extension 14, Jouberton. The complainant screamed but the Appellant threatened her that he will kill her, should she not stop screaming. The Appellant was weaponed with a knife.

(c) He ordered the complainant to undress herself and also undressed himself. The Appellant then had repeated unprotected sexual intercourse with the complainant without her consent.

[6] Although it is indeed so that Courts are granted a discretion to impose a lesser sentence where substantial and compelling circumstances exist, there must be convincing reasons to depart from the prescribed minimum sentences. It is trite that a Court of Appeal will not lightly interfere with the sentencing discretion of a trial Court, and will only do so in the event of a material misdirection on the part of the trial Court. In **NKABINE vs S (GAUTENG DIVISION PRETORIA, CASE NO A521/2021)** the following was mentioned:

"[6] The sentencing powers are pre-eminently within the judicial discretion of the trial court, the Court of Appeal should be careful not to erode

such discretion. The Court sitting on appeal will interfere if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate."

*"[7] In **S v PILLAY** the Court said the following regarding an appeal on sentence:*

"as the essential inquiry in an appeal against sentence, however, is not whether the sentence is right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree or serious- ness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted dictum above: one that "the dictates of justice" clearly entitle the Appeal Court "to consider the sentence afresh."

[7] The grounds upon which the Appellant rely as substantial and compelling circumstances, are the following:

(a) The Appellant was of a relatively young age (25 years).
(b) The Appellant attended school up to **Grade 8**.
(c) The Appellant is capable of being rehabilitated.

Appellant's age and Level of Education

[8] When the offence was committed, the Appellant was already **25 years** of age, and scholastically achieved **Grade 8**.

[9] In **S v MATYITYI 2011 (1) SACR 40 (SCA),** the following passage bears relevance regarding youthfulness in sentencing procedure:

"The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness. Thus, while someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view, a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor."

[10] The Appellant did not testify after his conviction (in mitigation), nor was it argued by his legal representative, that he was so immature that such should have been considered as a mitigating factor by the Court *a quo*. The Appellant was after all 25 years of age at the time of the commission of the offence. It can therefore not found that the Appellant's age and level of education constitute a substantial and compelling factor to depart from the life sentence so imposed upon him by the *Court a quo*.

Appellant as candidate for rehabilitation

[11] Regarding the issue that the Appellant could be rehabilitated, as a substantial and compelling factor to depart from life sentence, this Court finds no merit in same, as a result of the seriousness of the offence of which the Appellant had been convicted of. In **S v MM 2013 (27) SCA**, the following was stated:

"…*rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space, the very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way."*

[12] Turning to the aggravating and mitigating circumstances herein, this Court finds that the seriousness of the offence, and the interest of society far

outweighs the personal circumstances of the Appellant. It must be born in mind that the complainant was only **17 years** of age when this offence was committed. The complainant was still a minor, and the tender age of the complainant must be considered in a very serious light. In ***TSHABALALA v S 2019 ZA CC 48 it*** was mentioned:

> *"This scourge (of violence against women and children) has reached alarming proportions in our country. Joint efforts by the Courts, society and law enforcement agencies are required to curb this pandemic. This Court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African Judiciary is committed to developing and implementing sound and robust legal values of equality, human dignity and safety and security. One such way in which we can do this, is to dispose of the misguided and misinformed view that rape is a crime purely about sex."*

[13] This Court finds that there existed no substantial and compelling circumstances that warranted the Court *a quo* to deviate from life imprisonment, neither that the *Court a quo's* sentence was misplaced, nor adversely disproportionate.

[14] The Appeal against the Appellant's sentence must therefore fail.

Order

[14] Consequently, the following order is made:

(1) The Appeal against sentence is dismissed.

_____

H.J. SCHOLTZ

ACTING JUDGE
NORTH WEST DIVISION, MAHIKENG

I agree.

_____

J. T. DJAJE
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG