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

CASE NO : CA 49/20

REGIONAL COURT CASE NO: RC 162/18

TSHEPO MATTHEWS NKONWANE **APPELLANT**

AND

THE STATE **RESPONDENT**

CRIMINAL APPEAL – FULL BENCH

CORAM **REDDY AJ AND ROUX AJ**

DATE OF HEARING : 01 DECEMBER 2023

DATE OF JUDGMENT : 28 MARCH 2024

ORDER

(i) The appeal against the conviction and sentence on both counts is dismissed.

(ii) The ancillary orders are confirmed.

JUDGMENT

REDDY AJ

Introduction

[1] The appellant was charged with two counts of rape in contravention of section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 - ('the SORMA') and further read with sections 92(2), 94, 256, 257 and 261 of the Criminal Procedure Act 51 of 1977 ('the CPA'). The charge included a reference to the provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ("the CLAA").

[2] On count 1, the State alleged that the appellant on or about 06 January 2018 at or near Maphoitsile Village, North West Province, unlawfully and intentionally committed an act of sexual penetration with a female person NML (eleven (11) years old) by inserting his penis into her vagina without her consent. On count 2 it was alleged to have been committed on the same date with another female person ACM (nine (9) years old) by inserting his penis into her vagina without her consent.

[3] The appellant pleaded guilty to both counts on 6 February 2020. A statement in terms of section 112(2) of the CPA was admitted as evidence. The facts admitted by the appellant was accepted by the State and the appellant was duly convicted. On 18 June 2020, the appellant was sentenced to life imprisonment on each of the counts and declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000. An order was further made in terms of section 120(4) of the Childrens Act 38 of 2005, declaring the appellant unsuitable to work with children. Notably no reference was made to the Childrens Act in the charge. An order was also made that the name of the appellant be included in the National Register for Sex Offenders.

[4] The appellant is enjoined with an automatic right of appeal by virtue of the provisions of s 309(1) of the CPA since he has been sentenced to life imprisonment. The appellant approaches this Court, assailing his conviction and the sentence imposed.

Grounds of appeal – conviction

[5] The appellant assails his conviction on the basis that a Psychiatric Report (Exhibit "A") adduced as evidence in terms of section 79 of the CPA by the Regional Magistrate is defective for want of compliance with the provisions of section 79 of the CPA. The conviction is further assailed on the basis that the Regional Magistrate and prosecutor erred in unilaterally amending the formulation of the charge before sentencing. In that regard the reference to only section 51 of the CLAA was amended without affording the legal representative of the appellant an opportunity to address the Regional Magistrate on the proposed amendment.

Background

[6] The appellant appeared in the Taung Regional Court for his first court appearance on 22 October 2018. Various peremptory fair trial rights were duly explained. The appellant elected the services of a legal practitioner attorney, Miss De Klerk, from Legal Aid South Africa. The appellant had previously abandoned his application for bail in the District Court. The matter was postponed to 21 January 2019 f *inter alia* for Miss de Klerk to consult with the appellant.

[7] On 21 January 2019 the court record reads as follows:

"MS DE KLERK: As the Court pleases, Your Worship, I confirm I am representing that accused in this case. Your Worship, I confirm I had the opportunity to consult with my client.

However Your Worship, during consultation it came to light that it seems that my client will not be able to stand trial, so Your Worship, the defence is bringing an application in terms of section 78(1) of the

Criminal Procedure Act, that the accused be sent to Weskoppies Hospital for a period of 30 days:

So that we can get a report to find out if he is capable to understand what he did was wrong or not Your Worship."

[8] The Regional Magistrate did not elicit further information from Ms de Klerk or require evidence to be adduced to satisfy herself whether there was a need for the referral of the appellant for psychiatric evaluation. The submission of Ms de Klerk was clearly predicated on the provisions of section 78 of the CPA, which implies that the appellant was at the time of the commission of the offences incapable of appreciating the wrongfulness of his acts or of acting in accordance with an appreciation of the wrongfulness of his acts. The submission does not invoke section 77 of the CPA on the basis that the appellant was not capable of understanding the proceedings to make out a proper defence.

[9] On 4 March 2019, the appellant was not in court as he was seemingly detained at Weskoppies Hospital in Tshwane, Gauteng. The matter was postponed *in absentia* of the appellant to 02 May 2019. Notably the record is silent on the accused appearing in court between the last postponement date of 21 January 2019 and 4 March 2019. The only insight on how the accused came to be admitted at Weskoppies Hospital is gathered from the Psychiatric Report dated 20 March 2019 which indicates that the accused was detained at Weskoppies Hospital pursuant to an order dated 22 February 2019 issued by the Regional Magistrate Taung in terms of section 77, 78 and 79 of the CPA. How the order of 22 February 2019 was made remains shrouded in mystery.

[10] As indicated above there is a psychiatric report dated 20 March 2019, which covers the period 22 February 2019 to date of report when the accused was admitted for 30 days observation. On 02 May 2019, the psychiatric report dated 20 March 2019 as evinced in terms of section 79 of the CPA pertaining to the appellant was made available to the defence. The psychiatric report was the read into the record. The interaction of the Regional Magistrate with the prosecution and defence is by no means a model of clarity. The record reads as follows, following the reading of the psychiatric report into the record:

"COURT: Just hold on. Ms De Klerk

MS DE KLERK: Yes, Your Worship?

COURT: Earlier on you said that you had gone through with the accused that report, do you confirm that?

MS DE KLERK: Yes, Your Worship, I do confirm that I did receive report from my learned colleague. Your Worship and I did have the consultation with my client regarding the report, Your Worship and we are not objecting to the handing in of this report.

COURT: Okay. Can I have the charge sheet, please? Can I have the charge sheet.? Mr Nkonwane, remember that you are charged with two counts of rape?

ACCUSED: Yes

COURT: And remember that both counts are calling for life imprisonment?

ACCUSED: Yes

COURT: Now, sir, as a result of the seriousness of this offence, you remember you were sent to a mental hospital for a medical check- up?

ACCUSED: Yes

COURT: Now we have a report. The prosecutor have just read the report to the record, now I wish that the interpreter read it in Setswana, the language that you speak.

ACCUSED: Yes

COURT: Please ma'am, just read it in the language Mr Nkonwane, now you understand the report?

ACCUSED: Yes

COURT: The psychiatric report then will be marked EXHIBIT A

PROSECUTOR: As the Court pleases.

MS DE KLERK: As the Court pleases, Your Worship.

COURT: Yes Mr Mbokazi, you said you wish to put the charge to the accused?

PROSECUTOR: As the court pleases, Your Worship, Your Worship may I put the charges to the accused?

COURT: Yes

PROSECUTOR: Sir,….[intervenes]

COURT : Take it one by one, ne?

PROSECUTOR: Yes, Your Worship. Sir:

PROSECUTOR PUTS CHARGE 1 TO THE ACCUSED

Count 1:

Contravention of section 3, which is read with section 1, section 55, section 56(1), section 57, section 58, section 59, section 60 and section 61 of the Criminal Law Amendment Act, Act 32 of 2007 also read with section 256, 257, 261 of the Criminal Procedure Act and the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended as well as section 92(2) and 94 of the Criminal Procedure Act 51 of 1977.

In that on or about the 6th day of January 2018 and at or near Maphoitsile Village on the regional division of North West, here in Tuang, you did unlawfully and intentionally commit an act of sexual penetration with one female person, to wit B[…] L[…], an 11 year old, by inserting your penis into her vagina and had sexual intercourse with her without her consent.

COURT: Yes?

PROSECUTOR: Count 2….[intervenes]

COURT: Yes, yes let us read count number 1 first

INTERPRETER: Your Worship, can I…?

COURT : Yes get the…

PROSECUTOR : As the Court pleases, Your Worship
COURT: Sir, do you understand the charge against you?"

[11] The correct approach the Regional Magistrate should have adopted is set out in *S v Eshane* (HC02/2022) [2022] ZANWHC 30 (29 June 2022), where Petersen J (Hendricks DJP concurring) stated as follows:

"[8] The Magistrate remarked that the Prosecutor and the accused did not dispute the report. However, the Prosecutor merely handed in the report. Nothing was said regarding the States attitude to the findings in the psychiatric report. The first time any mention was made that the Prosecutor accepts the findings was immediately prior to the Acting Regional Magistrate handing down the order which forms the subject matter of this review. The fact that the Prosecutor at a later stage stated that he accepted all the recommendations and evidence does not alter the fact that this was to be placed on record earlier in the proceedings. In respect of the defence, *Mr Shimano,* stated that the findings of the report are not disputed. Having regard to the recommendation of the psychiatrists, something more was required from *Mr Shimano* than a mere indication that the findings were not disputed.

[9] The sentiments expressed in *S v Matu* 2012 (1) SACR 68 (ECB) by Hartle J are apposite in this regard, where in an analogous review matter, he said:
"14. She (the Magistrate - my insertion) appears to have assumed, with reference to annexure B, that the prosecutor accepted the finding of the panel. but this ought to have been clearly established and an indication made on the record to this effect. ***As for the accused, the record is innocent of any invitation extended to him to indicate if he wished to dispute the finding: or of any explanation made to him concerning his right to lead evidence on the basis provided for in subsection 3 or indeed as to the consequences which might ensue arising from the drastic provisions of***

Chapter 13. In my view the phrase "is not disputed by...the accused" referred to in the subsection cannot be equated with an accused person being unable to dispute it by virtue of mental illness or defect. The accused has a clear election to challenge a section 79 finding and to present evidence towards this end.

(my emphasis)"

[12] Following the postponement of the matter on 17 September 2019 to 29 October 2019 for representations to be made by the defence to the Senior Public Prosecutor and awaiting the decision of the Senior Public Prosecutor and the absence of the appellant at court, the matter was ultimately postponed for plea to 06 February 2020.

[13] On 06 February 2020, the scene which played out in court on 02 May 2019 played itself out once again. Preceding, the State putting the charges to the appellant, the prosecutor, Mr Mbokazi aerated that he intended to introduce the psychiatric report. The report was once again read into the record and again admitted as Exhibit "A" as on 02 May 2019. On this occasion, however, the Regional Magistrate did engage Ms De Klerk on the psychiatric report. The record reads as follows in this regard:

" ….

Prosecutor: As the Court pleases. Your Worship. Your Worship, before proceed to put the charges to the accused, may I put it on record I am intending to hand in the report, your Worship that the accused was sent for mental observation and the report is available to be handed in as evidence Your worship. And…

Court : Yes?

PROSECUTOR: …it is uncontested by the defence

COURT: Ms de Klerk. Are you aware of the report?

Witness (which should read Ms De Klerk): Yes Your Worship I am aware of the report, Your Worship, I did have the opportunity to go through with my client with the report, Your Worship and we are not objecting that it be handed in.

COURT: Thank you. Proceed, read the report.

…

COURT: Just hold on, Ms De Klerk

MS DE KLERK: Yes Your Worship?

COURT: Earlier on you said you have gone through with the accused that report, do you confirm that?

MS DE KLERK: Yes, Your Worship, I confirm that did receive report from my learned colleague, Your Worship and I did have the consultation with my client regarding this report. Your Worship, and we are not objecting to the handing in of this report….

[14] It appears from the record that of 06 February 2020, that Miss de Klerk confirmed being aware of the psychiatric report and further that same had been canvassed with the appellant. Mr Mbokazi on 06 February 2020 read the psychiatric report into the record. Miss de Klerk later reiterated that she had indeed received the relevant report and had an opportunity to consult the appellant on same. Thus, there was no objection to the admission of the psychiatric report. From this, it is accepted that the findings in the report were not in dispute

[15] To his credit, Regional Magistrate Matolong ensured that the psychiatric report was read to the appellant in a language that

allowed the appellant to best understand the contents thereof. On being satisfied that the appellant was *au fait* with the report, as indicated it was again admitted as Exhibit “A”.

Submissions on behalf of the appellant

[16] *Advocate Mokwena* for the appellant contended that the psychiatric report had three primary defects. Firstly, the composition of the psychiatric panel was irregular in that the panel consisted of two psychiatrists, one being for the state, whilst the other appointed by the court for the accused in the absence of an application by the prosecutor to dispense with section 79 (1)(b)(ii) of the CPA for a third panellist. Secondly, the appellant was observed for less than thirty (30) days. Thirdly, the psychiatric report did not disclose a satisfactory description of the nature of the enquiry as envisaged by section 79(4)(a) of the CPA.

[17] Regarding the amendment of the charge sheet invoking the applicability of section 51(1) of the CLAA, it was submitted that the unilateral amendment by the Regional Magistrate of the charge without an adjournment and without informing the appellant of the intention to make the amendment was irregular and ought to have been dealt with in terms of section 86 (1), 86(2) or 86(3) of the CPA. See: *S v Thakeli & Another* 2018 (1) SACR 621 (SCA). This the contention goes, resulted in the Regional Magistrate imposing a sentence in terms of section 51(1) on a unilateral irregular amendment. The contention further went that a court, whether it acts on its own motion or the application of the prosecutor, should not make any amendment without informing the accused of its

intention to do so and allowing him to show that the amendment would prejudice him in his defence. Reliance was placed on *S v Gelderbloem & Another* 1962 (3) SA 631(C) at 633 A in this regard.

Submissions by respondent

[18] The submissions on conviction by *Advocate Makhuvha* for the respondent is at best terse. The fulcrum of the appellant's grounds of appeal were not denuded by any substantial reference to the facts or the law.

The law

[19] Chapter 13 of the CPA deals with the capacity of an accused to understand proceedings under the rubric of mental illness and criminal responsibility under sections 77, 78 and 79 of the CPA. These provisions provide the procedure relating to the management of court processes and custody of remand detainees where mental defects affect the accused and impacts the further conduct of the criminal proceedings. When it appears to a court that due to a mental illness an accused person is incapable of understanding the proceedings (section 77); or incapable of appreciating the wrongfulness of his or her actions (section 78); the court is obliged to refer that person for observation. A panel of experts must be established to enquire and report on the accused fitness to stand trial and/ or mental capacity. (section 79).

[20] As indicated above only section 78 of the CPA was at issue in this matter. Section 78 of the CPA provides that:

"If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such reasons not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79."

[21] Section 79 of the CPA provides as follows regarding the composition of the panel for purposes of enquiry and report under, *inter alia*, sections 77 and 78:

"2(a) The court may for the purposes of the relevant enquiry commit the accused to a psychiatric hospital or to any at other place designated by the court, for such periods, not exceeding thirty days at a time (own emphasis), as the court may from time to time determine, and where an accused is in custody when he is so committed, he shall, while he is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he was at the time of such committal.

(b) When the period of committal is for the first time extended under paragraph (a), such extension may be granted in the absence of the accused unless the accused or his legal representative requests otherwise.

(c) The court may make the following orders after the enquiry referred to in subsection (1) has been conducted-

(i) postpone the case for such periods referred to in paragraph (a), as the court may from time to time determine;

(ii) refer the accused at the request of the prosecutor to the court referred to in section 77(6) which has jurisdiction to try the case;

(iii) make any other order it deems fit regarding the custody of the accused; or

(iv) any other order."

[22] I propose to deal with each of the three grounds that form the basis of the appeal against conviction relevant to sections 77, 78 and 79 under three distinct headings: *"The irregular composition of the psychiatric panel"*; "*The observation of the appellant for less than thirty (30) days"; and "The psychiatric report not disclosing a satisfactory description of the nature of the enquiry as envisaged by section 79(4)(a) of the CPA."*

<u>The irregular composition of the psychiatric panel</u>

[23] The current legal position in respect of the composition of the psychiatric panel is regulated by section 79(1)(b) of the CPA as amended by the Criminal Procedure Amendment Act 4 of 2017('the CPAA'). The preamble of the CPAA states that the Act aims to "clarify the composition of the panels provided for in section 79 to conduct enquiries into the mental condition of accused persons." The Act was assented to on 27 June 2017 and published in Government Gazette GG 40946 of 29 June 2017. Section 79(1)(b) of the CPA (as amended) provides that a section 79-assessment panel must consist of:

> "(i) the head of the designated health establishment, or another psychiatrist delegated by the head concerned,
>
> (ii) a psychiatrist appointed by the court,
>
> (iii) a psychiatrist appointed by the court, on application and on good cause shown by the accused for such appointment; and
>
> (iv) a clinical psychologist where the court so directs."

[24] A contextual reading of section 79(1)(b) of the CPA unequivocally provides that the two compulsory members of the panel are the head of the health establishment or a psychiatrist delegated by him (the state psychiatrist) and a psychiatrist appointed by the court. The amendment of section 79(1)(b) was brought about because of misinterpretation of section 79, as is the case with the ground of appeal relied on in this appeal.

[25] Legal certainty regarding the number of psychiatrists that must be appointed to a section 79-assessment panel has been brought to bear. To constitute a legally recognized quorum for a section 79-assessment panel must consist of at least two psychiatrists. In particular, the amendment sets out the composition of a section 79-assessment panel to assess persons accused of violent offences, to make it clear that a section 79-assessment panel need only consist of a minimum of two psychiatrists. The proviso to this is that it is permissible for a court to appoint a psychiatrist for the accused, which would only occur if the accused has brought an application to this effect, in which he is required to show good cause for such an appointment. In terms of section 79(1)(b)(iii) of the CPA, the appointment of a psychiatrist for the accused is therefore no longer peremptory but permissive. The appointment of a clinical psychologist to an assessment panel remains optional.

[26] There is therefore no merit in the ground of appeal based on the composition of the section 79 assessment panel.

The observation of the appellant for less than thirty (30) days

[27] The circumstances under which the accused was transferred and detained at Weskoppies Hospital under order of the Regional Magistrate is unclear. However, it is clear from the psychiatric report based on the date it was signed by the two psychiatrists that the appellant was detained at Weskoppies Hospital for the requisite thirty days observation as required by section 78(2)(a) of the CPA. The second ground of appeal can therefore safely be dismissed as being without merit.

The psychiatric report not disclosing a satisfactory description of the nature of the enquiry as envisaged by section 79(4)(a) of the CPA

[28] The "defect" contended by the appellant relevant to section 79(4)(a) of the CPA is best addressed with reference to *Ntshongwana v S* (1304/2021) [2023] ZASCA 156; [2024] 1 All SA 345 (SCA) (21 November 2023), where the following was stated:

"[4] The type of defence sought to be raised is commonly referred to as a defence of pathological incapacity. Section 78(1) of the Criminal Procedure Act 51 of 1977 (the CPA) in that regard provides:

'A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable –

(a) of appreciating the wrongfulness of his or her act or omission; or

(b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission.'

[5] Section 78(1A) states that: 'Every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms

of s 78(1), until the contrary is proved on a balance of probabilities'. Section 78(1B) provides that the burden of proof with reference to the criminal responsibility of the accused shall be on the party that raises it. The onus in the present matter thus rested on the appellant. To discharge the onus, he had to prove that he suffered from a mental illness or mental defect during the commission of the offences and that the mental illness or mental defect resulted in a lack of criminal capacity.

…

The appellant's medical history

[22] When the appellant first appeared in court on the charges, he was referred by the magistrate, in terms of s 77(1) and 78(2) of the CPA, to undergo psychiatric observation. The purpose was to enquire into and report on whether, by reason of mental illness or mental defect, the appellant was capable of understanding the court proceedings so as to make a proper defence, and whether the mental illness or mental defect, if any, rendered him incapable of appreciating the wrongfulness of his acts or of acting in accordance with an appreciation of the wrongfulness of his acts (ie not criminally responsible).

[23] Three psychiatrists presented reports in terms of s 79(1)*(b)* of the CPA: Dr Dunn, Dr Moodley and Dr Brayshaw (the panel psychiatrists). A formal enquiry was held to determine whether the appellant was fit to stand trial as provided for in s 77(3) of the CPA. The KwaZulu-Natal Division of the High Court, Durban, per Pillay J, found the appellant capable of understanding the proceedings to make a proper defence. The proceedings then continued in the 'ordinary way' as prescribed in s 77(5) of the CPA."

[29] The appellant places special emphasis on section 79(4)(a) of the CPA, which prescribes that the report by the assessment panel as constituted for the purposes of assessing the accused shall include a description of the nature of the enquiry. On a careful reading of

the section 79 report, it coheres with the prerequisites of section 79(4)(a) of the CPA. Consequently, this ground too has no merit.

The approach to sentence on appeal

[30] In *S v De Jager* 1965 (2) SA 616 (A) at 629, Holmes JA stated as follows regarding the discretion of a court of appeal to interfere with the sentence imposed by a lower court:

"It would appear to be sufficiently recognized that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which hosts the discretion, and a *Court of appeal cannot interfere unless the discretion was not judicially exercised. that is to sav unless the sentence is vitiated by an irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard on an accepted test is whether the sentence induces a sense of shock that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognized that appellant jurisdiction to interfere with punishment is not discretionary but on the contrary: is very limited."*

(emphasis added)

[31] In *S v Malgas* 2001 (2) SA 1222 Marais JA said the following:

"[12] ...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."

(emphasis added)

[32] The approach adopted to an appeal against sentence in the authorities as aforesaid has been endorsed by the Constitutional Court in *S v Bogaards* 2013 (1) SACR 1 (CC), where the following is stated:

"[14] Ordinarily, sentence 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."

(emphasis added)

[33] The appellant complains that the Regional Magistrate and the prosecutor erred in unilaterally amending the construction of the charge before sentencing regarding the reference to section 51 of the CLAA without allowing the appellant to address the question of prejudice. The enquiry in this regard has been simplified and is settled in our law. I am not persuaded by this submission. It does not warrant an in-depth exposition of the law and a regurgitation of

established legal principles. The SCA has decisively pronounced on provisions of s 51 of the CLAA. It has been decided that the question whether the accused's constitutional right to a fair trial has been breached at the sentencing phase, can only be answered after 'a vigilant examination of the relevant circumstances'. See *S v Legoa* 2003 (1) SACR 13 (SCA) and *S v Ndlovu* 2003 (1) SACR 331 (SCA) paragraph [12].

[34] I shift focus to the issue that is germane to the appeal against sentence, namely: whether on the facts that there existed substantial and compelling circumstances which warranted a departure from the minimum sentence. The seminal authority on this is *Malgas*. *Malgas* is 'not only a good starting point but the principles stated therein are enduring and uncomplicated' (See :*DPP KZN v Ngcobo* 2009 (2) SACR 361 (SCA) paragraph [12])

[35] The appellant did not testify. A pre-sentence report as prepared by Probation Officer Tebogo Mosang was introduced as evidence. The appellant's family background and battle with substance abuse is set out in some detail. These factors need not be regurgitated. The appellant was twenty -five (25) years old when the offences were committed. The appellant was arrested on 6 January 2018 and was a detained to 18 June 2020, the date of sentencing. He was in custody for over twenty-nine (29) months. At the time of sentencing, he was twenty-seven (27) years old. He is unmarried with no children. Prior to his arrest, the appellant was employed at Makgagong Panel Beaters for a year as a general worker, where he accrued an income of R2500-00 per month. The

appellant resided with his mother and sister. He was the primary breadwinner as his mother was unemployed. His sister received a grant for her children. In 2010, the appellant attained his highest level of education which was Grade 10. He has two previous convictions. On 10 October 2011 the appellant paid an admission of guilt fine of R50-00 for the contravening section 4(b) of Act 40 of 1992, possession of an undesirable dependence producing substance. On 25 October 2016, the appellant was convicted of assault with intent to do grievous bodily harm and sentenced to R1000-00 or three (3) months imprisonment which was conditionally wholly suspended. The appellant placed store on three factors, firstly that the accused had pleaded guilty, secondly the period that the accused spent in custody, and thirdly, that the rehabilitative aspect of punishment was not properly considered.

The plea of guilty

[36] The accused seems to inadvertently be overlooked what had transpired on 21 January 2019, the record provides:

"PROSECUTOR:…..

The matter was postponed for both the state and the defence to consult. Your Worship and the state has not consulted yet. Your Worship this is the matter I confused with the earlier matter which I dealt with. Your Worship, Ms De Klerk however will address the Court, Your Worship.

MS DE KLERK: As the Court pleases, Your Worship, I confirm I am representing that accused in this case Your Worship, I do confirm that I had the opportunity to consult with my client. However during consultation it came to light that it seems that my client will not be able to stand trial, so Your Worship, the defence is bringing an application in terms of section 78(1) of the Criminal Procedure Act, that for the accused to be sent to Weskoppies

Hospital for a period of 30 days. So that we can get are port to find out if he is capable to understand that he was wrong or not, Your Worship.

COURT: Ms De Klerk, so you have gone through with the witness, with the accused.

MS DE KLERK: Yes, Your Worship, I went to prison on 31st October last year and I tried to consult with him but regarding that specific date, Your Worship, **he is just saying that he does not know**. So Your Worship, I think he will not be able to stand his trial…… "

[37] The appellant was arrested on 8 January 2018, almost a year later, the appellant did not want to take the court into his confidence and come clean regarding the offences that he had committed. Instead after the appellant had been examined and a report been compiled in terms of the provisions of section 79 of the CPA, the appellant elected to make representations. Tellingly, the appellant reported to the probation officer that he could **remember each and every detail of the incident as if happened yesterday**. This is indirect contrast with his averment to his legal representative that he does not know. The record is demonstrative of the legal manoeuvring that the appellant embarked upon. Moreover, in so far as his plea of guilty is concerned it is not demonstrative of pure contrition but regret for having been brought to justice.

[38] The appellant was arrested after he had fallen asleep at the scene where he had violated both the victims. It is trite that the acceptance of the admissions made by the appellant form the factual matrix on which the sentence of the appellant would find. This factual admission may be elaborated on but not be open to

countervailing evidence. In the admissions made, the appellant contended that he had met both victims whilst they were on their way home. To the probation officer, the appellant reported that he whilst attending an ancestral ceremony, the two victims were also present.

[39] In the matter of *S v Matyityi* 2011(1) SACR 40 (SCA) at 47 A – D the Supreme Court held:

> "There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia, what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case."

Time spent in custody

[40] The appellant was detained awaiting trial for over twenty-nine (29) months. Pretrial incarceration is not the overarching factor in the exercise of a court's sentencing discretion. It must be accentuated that all factors must be cumulatively considered. There is no scientific formula that finds application in the calculation of the

weight that must be given to time spent as a pretrial detainee. In *Ngcobo v S* 2018 (1) SACR 479 (SCA) at paragraph [14] the Supreme Court reminded us that a pretrial incarceration period of imprisonment is not, on its own, a substantial and compelling circumstance; it is merely a factor in determining whether the sentence imposed is disproportionate or unjust. The test is not whether on its own that period of detention constituted a "substantial and compelling circumstance", but whether the effective sentence proposed was proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to the conviction and sentencing as a just one.

[41] In *S v Livanje* 2020 (2) SACR 451 (SCA) considered the role played by the period that a person spends in detention while awaiting finalisation of the case. It was reiterated what it had held in *S v Radebe*[13 2013 (2) SACR 165 (SCA) at paragraph [14.] namely that:

'the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime committed: whether the sentence in all the circumstances, including the period spent in detention, prior to conviction and sentencing, is a just one.

The appellant as candidate for rehabilitation

[42] The appellant complains that the Regional Magistrate in imposing two life sentences placed undue emphasis on the deterrence, prevention, and retribution elements of punishment at the expense

of the rehabilitation aspect. Furthermore, the presentencing report reinforced the contrition that the appellant exhibited and that whilst imprisonment was a suitable sentencing option, "*imprisonment will assist accused person to receive counselling and put programs which will assist him in getting rehabilitated."*

[43] The judgment of the Regional Court Magistrate illustrates that the Regional Magistrate was acutely aware of the rehabilitation aspect of punishment. To this end his judgment provides as follows:

"… This Court will not overlook the four main purpose of sentencing, that is retribution, rehabilitation prevention and deterrence. In the case of State vs Tonga 1993 Vol.1 SACR page 13, 136 Appellant Division at page 145 to 146 Du Toit AJA, AJ said as follows:

"A sentence is only effected when it strikes a fine balance between the interests of society and the offender. It brings about retribution but of a balanced nature. It deters moderately, individually as well as collectively and generally. It makes provision for the person and the, and unique characteristics of the offender seeking to rehabilitate or at least improve himself. And the offender will be provided with opportunity for rehabilitation where possible. However the distinct circumstances of each case will dictate which purpose of sentence should be given prominence. It requires of the Court to weigh and balance those elements and strive to accomplish and arrive at a well judged counterbalance between this, between these elements. In order to ensure that one element is not unduly overemphasised at the expense of and to the exclusion of others. It is a question of constantly balancing the scale of justice to arrive at an appropriate sentence."

In the case of State vs Swarts 2004, Vol 2 SACR page 370 SCA it state as follows:

"Each of the elements of punishment is not required to be accorded equal weight. But instead proper weight must be accorded to each according to the

circumstances. Serious crimes will, will usually requires that retribution and deterrence should come to the fore."

[44] Central to the exercise of a sentencing discretion, is proportionality. The sentencing court is entitled to depart from imposing the prescribed minimum sentence if it is of the view that having regards to the nature of the offense, the personal circumstances of the accused and the interest of society. This is often referred to as the proportionality test. When sentencing an accused person, the court must evaluate all the evidence including the mitigating and aggravating factors to decide whether substantial and compelling circumstances exist. A court must be conscious of the fact that the legislature has ordained a particular sentence for such an offence and there must be convincing reasons to depart therefrom which reasons must be recorded.

[45] The interests of society must be afforded due consideration. Sentences are not to serve public interest but to protect same. The appellant infringed the right to dignity and the right to bodily integrity of both victims. The rape of children and women is rampant in our constitutional epoch wherein the rights of women and children ought to be afforded reverence and protection.

[46] In *S v Jansen* 1999 (2) SACR 368 (C) at 378G-379B the court stated that :

'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.'

[47] More recently in *Maila v S* (429/2022) [2023] ZASCA 3 (23 January 2023, Mocumie JA (Carelse and Mothle JJA and Mjali and Salie AJJA concurring), dealt with the onslaught of rape cases by stating as follows:

Taking into account *Jansen, Malgas, Matyityi, Vilakazi* and a plethora of judgments which follow thereafter as well as regional and international protocols which bind South Africa to respond effectively to gender-based violence, courts should not shy away from imposing the ultimate sentence in appropriate circumstances, such as in this case. With the onslaught of rape on children, destroying their lives forever, it cannot be 'business as usual'. Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. Reasons such as lack of physical injury, the inability of the perpetrator to control his sexual urges, the complainant (a child) was spared some of the horrors associated with oral rape, which amount to the acceptance of the real rape myth, the accused was drunk and fell asleep after the rape, the complainant accepted gifts (in this case, sweets) are an affront to what the victims of gender-based violence, in particular rape, endure short and long term. And perpetuate the abuse of women and children by courts. When the Legislature has dealt some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-

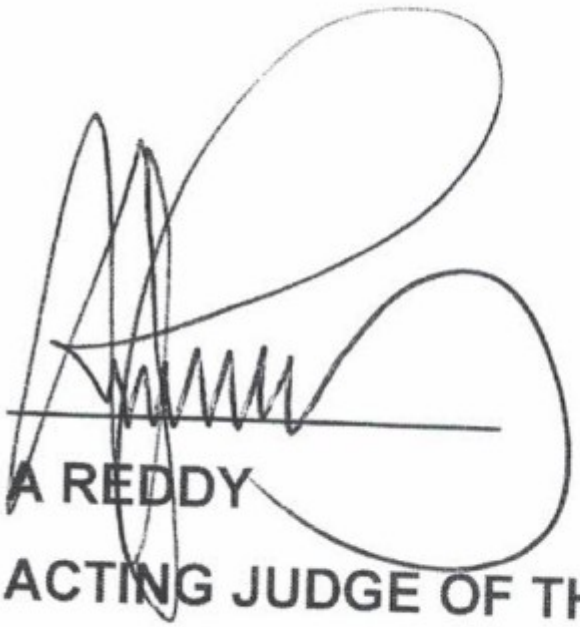
based violence against women and children and promote what Thomas Stoddard calls ‘culture shifting change’. (footnotes omitted)

[48] The appellant raped not one but two children, aged eleven (11) and nine (9) years of age at the time of these abhorrent and reprehensible deeds were perpetrated. The impact of these offences on the victims and the effect it has had on each of their respective families is well set out in the pre-sentence report. What stands out is that these are heinous crimes. In cases of serious crimes, the personal circumstances of the offender, by themselves, will necessarily recede into the background. This is one of those such matters. In the final analysis to my mind, the appeal stands to be dismissed. In the premises I propose the following order:

Order

(i) The appeal against the conviction and sentence on both counts is dismissed.

(ii) The ancillary orders are confirmed.



A REDDY

ACTING JUDGE OF THE HIGH COURT,

NORTHWEST DIVISION, MAHIKENG

I agree

B ROUX

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

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Date Of Hearing	01 December 2023
Date Of Judgment	28 March 2024