IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE 02/04/2024

BRAND AJ

Case number: A146/2022

Date: 02 April 2024

In the matter between:

THABO JACOB KHUMALO **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

BRAND AJ (with PHAHLANE J)

Introduction

[1] The appellant, Thabo Jacob Khumalo, was on 29 September 2021 convicted of rape of an eight-year-old child (the complainant) in the Regional Court in Pretoria. On 17 November 2021, he was sentenced to life imprisonment, in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997. He was also declared unfit to possess a firearm; declared to be unfit to work with children, in terms of section 120(1) of the Children's Act 38 of 2005; and it was ordered that his name be registered on the National Register for Sex Offenders.

[2] On 22 November 2021, the appellant noted appeal against his conviction and sentence, utilising his right to do so in terms of section 309 of the Criminal Procedure Act 51 of 1977. It is this appeal that is now before us. Below, I address first the appeal against conviction and then turn to the sentence.

Conviction

Background

[3] As is the case in many rapes, in this matter there are only two witnesses with firsthand knowledge of the rape: the complainant, who alleges the appellant raped her; and the appellant, who denies it. However, there are two further complications that apply in combination to fewer rapes. First, the complainant was an eight-year-old child when she was raped and ten years old at trial. Second, there is no physical evidence to link the appellant to the rape.[1] In sum, this case was decided by the trial court and must be decided by us, on strength of the testimony of the child complainant that the accused raped her alone, as against the appellant's version that he did not.

[4] The complainant's version is as follows:

[4.1] On 6 December 2018, she was with her sister and some friends in the street in front of the appellant's house. She decided to go to the appellant's house to buy ice lollies (which the appellant sold from his house). She saw no one other than the appellant in his house or on his yard.

[4.2] After she had bought the lollies from him, the appellant pulled her

[1] While a DNA sample was collected when the complainant was examined at a local clinic after the rape, and was sent for analysis, this sample was then lost.

toward his shack, a separate structure from the house but on the same yard. Inside the shack, he took off her clothes, including her underpants and also undressed himself, including his underwear. He told her to lie down on her back on the bed and then lay down on top of her. He inserted his penis into her vagina and had intercourse. She screamed but no one heard her.

[4.3] When he had finished, he told her not to tell anyone what had happened. She then managed to leave. When she came upon her sister outside the appellant's gate, she told her what had happened. Her sister took her to her grandmother, who they also told what had happened. Her grandmother in turn went to tell her aunt.

[4.4] Her aunt took her back to the appellant's house. She called the appellant and when he came out, she asked him what he had done to the complainant. The complainant herself said to him that he had done something painful to her. The appellant responded that he had done nothing to her.

[4.5] From the appellant's house the complainant's aunt first took her to the police station, where they reported the rape, and she was interviewed. From there she took her to the clinic, where she was asked and had to explain what had been done to her and was given an injection and some pills.

[5] The appellant's version in turn was the following:

[5.1] On 6 December 2018 the complainant came into his house to buy ice lollies. Once she had paid for the lollies, he went to the fridge, took the lollies, and gave them to her.

[5.2] After he gave the lollies to the complainant, a friend of hers arrived and they left his house together, going to a house three houses down from the complainant's, to play there on the pavement. When the complainant left, she was not crying. The complainant was in his house for no longer than three minutes.

[5.3] The appellant denied that he raped the complainant and said he does not know why she would claim that he did. He said that his mother was seated next to the open front door of the house both when the complainant arrived and when she left, and that she, had she not since passed away, would have been able to testify that the complainant was not crying when she left. He also claimed that the complainant saw his mother sitting there.

[5.4] About an hour later the complainant's grandmother and aunt, and the complainant came to his house where they first met his mother. His mother came to call him from his shack. When he came to the house, his mother said that the people there said he had raped the complainant. He denied it. The complainant's grandmother then told her to pull down her underpants and when she did so, neither he nor his mother saw anything. After this, the grandmother said they can't do anything further without the complainant's mother (who was not present) and they left. Later the same day he was arrested for the rape.

[6] Several other witnesses testified for the State: Sister Ncube, the nurse who examined the complainant at the Daveyton Clinic on the day of the rape; the complainant's aunt, Ms Mkhwanazi (a teacher at a local school); the complainant's older sister; and one of the complainant's friends. In broad terms their evidence corroborated the version of the complainant. I return to this in the discussion below.

Discussion

[4] The approach to evaluating the findings of fact of a trial court on appeal is well settled: 'In short, 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.'[2]

[5] This general approach applies particularly acutely concerning findings of fact based on oral evidence, such as are in issue in this appeal.[3] These findings hinge on conclusions of the trial court concerning the reliability and credibility of witnesses. These conclusions are quite obviously better reached when one actually sees and hears the witnesses and can assess their demeanour and appearance firsthand, than when one relies on a record of the testimony, as on appeal.[4]

[6] In this matter the judgment of the trial court is based entirely on oral evidence, with no physical evidence of the rape. Accordingly, we approach the discussion below well aware of the generally cautious approach we must apply as appellate court.

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[2] *S v Hadebe and others* 1997 (2) SACR 641 (SCA) at 645e-f (per Marais JA).
[3] *Gqika v S* (CA&R 112/2021) [2022] ZAECGHC 15 (1 March 2022).
[4] *A M and Another v MEC for Health, Western Cape* (1258/2018) [2020] ZASCA 89; 2021 (3) SA 337 (SCA) (31 July 2020).

[7] As stated in the introduction to this judgment, our consideration of the evidence in this appeal is further complicated (as it was also for the trial court) by the fact that the appellant's conviction was based on the testimony of a single witness who is also a child. Both the fact that the complainant was a single witness and a child witness attract application of the cautionary rule.

[8] The cautionary rule means simply that courts should approach the testimony of those categories of witnesses to which it applies carefully and should seek to apply some kind of safeguard, tailored to the particular reasons that make their testimony suspect, to avoid as far as possible an incorrect finding based on their testimony.[5]

[9] Caution should, however, not supplant common sense.[6] Ultimately, courts should assess the testimony of the witness for its reliability and credibility in light of the specific context of the case, while remaining aware of the particular reasons why the suspect category of witness should be treated with care and trying to mitigate those.[7]

[10] Concerning single witnesses, the point of departure is that provided by section 208 of the CPA: That an accused may be convicted of any offence on the single evidence of any competent witness. It has further been held that the testimony of a single witness must be 'clear and satisfactory in every material respect'; and that where the single witness 'has an interest or bias adverse to the accused', it must be approached with particular caution.[8]

[11] Nonetheless, it is clear that '[t]here is no rule of thumb, test or formula to apply when it comes to a consideration of the credibility of the single witness'[9] and that '[t]he trial Judge will weigh [their] evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, [they are] satisfied that the truth has been told'.[10]

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[5] Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed 2012) at p 546.
[6] Schwikkard and Van der Merwe (above) at p 546; *S v Snyman* 1968 (2) SA 582 (A) 585.
[7] *Mohale v S* (A634/2017) [2019] ZACC 376 (27 June 2019) at para [36].
[8] *R v Mokoena* 1956 (3) SA 81 (A) at 85H; *Sekoala v The State* (579/2022) [2024] ZASCA 18 (21 February 2024).
[9] *S v Webber* 1971 (3) SA 754 (A) at 758.
[10] *S v Sauls & others* 1981 (3) SA 172 (A) at 180E–F; *Sekoala v The State* (579/2022) [2024] ZASCA 18 (21 February 2024).

[12] For child witnesses, the position is similar. Although misgivings with application of the cautionary rule to child witnesses have been expressed,[11] the approach is still simply that the evidence of particularly young children, should be approached with caution.[12] But this caution should be exercised simply as part of the ordinary approach to assessing evidence in a criminal trial, which is:[13]

> 'to weigh up all the elements which point towards the guilt of the accused against 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 about the accused's guilt.'

[13] In this matter, did the trial court approach the testimony of the complainant with the necessary level of caution given that she is both a young child and a single witness, while deciding whether 'the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the [appellant's] guilt'?[14]

[14] Unlike in the recent matter of *Sekoala v S*[15] where the Supreme Court of Appeal overturned a conviction based on the single testimony of a rape complainant in part because the trial court failed at all to take account of the cautionary rule concerning single witnesses in its assessment of her evidence, in this matter the trial court was acutely aware in its assessment of the complainant's testimony that it should be approached with caution both because she is a child and single witness.[16]

[15] The trial court commences its assessment of the complainant's testimony with the following statement:[17]

> '[T]he victim in this matter is a single witness with regards to the incident that happened in the accused's house. She is also a child witness and for both these reasons the cautionary rules applicable to the evidence of a single witness as well as that of a child witness should be applied to her evidence. The Court should therefore find guarantees for [the] reliability of her version.'

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[11] See eg South African Law Commission Discussion Paper 102, Project 107, *Sexual Offences: Process and Procedure* (2002) para 31.
[12] *S v V* 2000 1 SACR 453 (SCA) at para [2].
[13] *S v Chabalala* 2003 SACR 134 SCA 140A-B. See also, concerning a single child witness, *S v Haupt* 2018 (1) SACR 12 (GP) at para [25].
[14] *S v Chabalala* (above) at para [25].
[15] (579/2022) [2024] ZASCA 18 (21 February 2024).
[16] See also *Raleting v S* (A69/2021) [2021] ZAFSHC 198 (14 September 2021) at para [10] where Opperman J emphasises that in cases relying on the singe testimony of a child witness, '[a] court must articulate the warning of care and the need for caution and with reference to the circumstances of the case'.
[17] Judgment (Conviction), Record at p 131.

[16] It not only makes this statement in the abstract but then proceeds to apply several such 'guarantees for [the] reliability' of the complainant's version. The first such guarantee is in the corroboration of the complainant's evidence by the versions presented by all the other witnesses, including in several respects even the accused. Specifically, the trial court lists the following corroboration:

[16.1] The testimony of the complainant's sister (also a child witness) corroborates all aspects of the complainant's testimony concerning her movements on the day of the rape, leading up to the rape and concerning what happened afterwards.[18]

[16.2] The testimony of the complainant's friend (also a child witness) that also corroborates the complainant's testimony concerning her movements before and after the rape.[19] Here the trial court notes one discrepancy: the friend testified that she saw the accused's mother through the open front door of the main house on the accused's yard, while the complainant testified that there was no one else on the accused's yard when the rape happened. The trial court discounts this discrepancy as immaterial, to my mind cogently: The magistrate points out that it is clear that the complainant simply didn't see the accused's mother through the open front door (at the time the complainant entered the house, the mother could have been anywhere else in the house or on the yard), so that she testified that there was no one else on the yard.[20]

[16.3] The testimony of the complainant's aunt, which corroborates every aspect of the complainant's testimony about what transpired from the moment the aunt was informed of the rape.[21]

[16.4] The testimony of Sister Ncube, the nurse who examined the complainant when she was brought to the clinic, which unequivocally corroborates that she was indeed raped.[22]

[16.5] The accused's testimony, which but for his denial of the rape and his assertion that his mother was in the main house while the complainant was on his yard, also corroborates every aspect of her testimony concerning her movements

[18] Judgment (Conviction), Record at p 132.
[19] Judgment (Conviction), Record at p 132.
[20] Judgment (Conviction), Record at p 133-134.
[21] Judgment (Conviction), Record at p 133.
[22] Judgment (Conviction), Record at p 132.

around the time that the rape occurred.[23]

[16] The trial court notes that the three child witnesses also cross-corroborate one another, which indicates that the magistrate also considered and applied the cautionary rule concerning child witnesses to the sister and the friend's testimony.

[17] The trial court also considers the quality of the testimony of the complainant, and the other four witnesses for the state and concludes that 'on a conspectus of all the evidence that was presented to court … these witnesses gave their evidence in a logical, chronological manner' and that there were 'no improbabilities in any of the witnesses' evidence and no material contradiction'.[24]

[18] From the record it is clear that the magistrate was careful during the testimony of all three the child witnesses (the complainant, her sister and her friend) to apply particular safeguards to ensure the integrity of their testimony, properly ensuring that they understood the difference between truth and lie[25] and intervening where necessary (and appropriately so) in those cases where misunderstandings seemed to arise.[26]

[19] In sum, I am satisfied that the trial court approached the testimony of the complainant as single child witness, and the testimony of the two other child witnesses with the requisite level of caution and employed appropriate safeguards, including corroboration, to conclude that the complainant's testimony could be accepted.

[20] The trial court then proceeded to consider together the testimony of all the witnesses, including the accused. On this basis, it concludes:

[20.1] that the complainant was indeed raped on the day in question, after she went to the accused's yard to buy lollies; and

[20.2] 'there was no opportunity for anyone else to do something to the [complainant] on that day from the time that she visited the accused'.[27]

[21] As against this, the trial court found that the accused's denial that he raped the complainant, while admitting all other material aspect of the state's version,

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[23] Judgment (Conviction), Record at p 132.
[24] Judgment (Conviction), Record at p 133.
[25] See eg Record at p 7-8.
[26] See eg Record at p 15.
[27] Judgment (Conviction), Record at p 132.

meant that his was simply a ‘bare denial’. If compared to the version of the state, which the trial court found to be ‘such that [it could] rely on it in order to come to a finding’, this ‘bare denial’ could not reasonably possibly be true and was ‘rejected as being false’.[28] On this basis, the accused was then convicted.

[22] I can find neither a material misdirection in the trial court’s assessment of the evidence nor any aspect where it is ‘clearly wrong’ in its findings of fact. The trial court applied the correct test to arrive at its eventual conclusion concerning the guilt of the accused (that, on a conspectus of all the evidence, there is no reasonable doubt as to his guilt) and also appropriately assessed the evidence of the complainant and the other witnesses (by approaching the testimony of the complainant as single child witness and of the two other child witnesses with appropriate caution and demonstrably applying safeguards, including corroboration in exercise of that caution).

[23] The trial court’s assessment of the evidence included consideration of the quality of the evidence provided by all the witnesses and a proper interrogation of possible improbabilities in and contradictions between that evidence. I cannot find any reason to doubt the trial court’s conclusion that the state’s version permits of no reasonable doubt while the accused’s, cannot be reasonably possibly true; let alone any indication that it is ‘clearly wrong’.

[24] Accordingly, I find that the trial court was correct in its rejection of the accused’s version and acceptance of the state’s and in its conclusion that the accused had raped the complainant. The appeal against conviction must be dismissed.

The sentence

Background

[25] For his rape of the complainant, the appellant was sentenced to life imprisonment, in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (‘the Act’); declared unfit to possess a firearm; declared to be unfit to work with children, in terms of section 120(1) of the Children’s Act 38 of 2005; and it was ordered that his name be registered on the National Register for Sex Offenders.

[28] Judgment (Conviction), Record at p 134.

[26] His appeal against sentence seems to be directed only at the sentence of life imprisonment.

[27] He was sentenced to life imprisonment because section 51(1) of the Act, read with its Schedule 2 determines that anyone convicted of the rape of a child under the age of 16 years must be sentenced to life imprisonment, unless there are substantial and compelling circumstances justifying otherwise.

The law

[28] Courts considering appeals against sentence must do so in terms of the following general approach: '[T]he imposition of sentence is the prerogative of the trial court for good reason and … it is not for appellate courts to interfere with that exercise of discretion unless it is convincingly shown that it has not been properly exercised'.[29] Interference in the trial court's exercise of its sentencing discretion is warranted only where that court is found to have materially misdirected itself, or, failing that, where the trial court's sentence diverges from the sentence which the appellate court would have imposed had it been the trial court to such a degree that it may be described as 'shocking', 'startling' or 'disturbingly inappropriate'.[30]

[29] As mentioned above, in imposing sentence in this matter, because the appellant stood convicted of the rape of a child under 16 years of age, the trial court was constrained in its sentencing discretion by section 51(1) read with Schedule 2 of the Act to impose life imprisonment, unless there were substantial and compelling circumstances justifying otherwise. This means that our task as appellate court is to consider whether the trial court either materially misdirected itself in its conclusion that there were no substantial and compelling circumstances warranting departure from the prescribed sentence of life imprisonment, or that it was so wrong in that conclusion that imposition of the minimum prescribed sentence of life imprisonment was shocking, startling or disturbingly inappropriate.

[30] In considering sentence in cases resorting under section 51(1) of the Act, a trial court must use as point of departure imposition of a life sentence: it is settled that in such cases, life imprisonment is the sentence that must *ordinarily* be

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[29] *S v Malgas* 117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) at para [13].
[30] *S v Malgas* (above) at para [12].

imposed.[31]

[31] From that point of departure, courts must then consider whether there are any reasons that rise to the level of substantial and compelling circumstances that justify imposition of a lesser sentence. The fact that section 51(1) of the Act refers to 'substantial' and 'compelling' circumstances does not mean that the ordinary factors that can play a role in a trial court's determination of sentence are excluded from this evaluation. When determining sentence in section 51(1) cases, a trial court must, while assuming that the prescribed minimum sentence applies, simply consider, in the ordinary course of deciding whether the punishment is proportionate to the crime, whether there are circumstances which viewed cumulatively and in the context of the specific case indicate that imposition of the prescribed minimum sentence would amount to an injustice. If so, then the minimum prescribed sentence should be departed from. The reasons for deciding so, although they need not be extraordinary, may not be light or 'flimsy'.[32]

Discussion

[34] The trial court properly considered any possible mitigating factors against the impact that the rape plausibly had on the complainant and the interests of society to decide whether the sentence of life imprisonment is proportionate, in these circumstances, to the crime of rape of the complainant as an eight-year-old child. In the process it also considered and discarded those circumstances that the appellant specifically raised as substantial and compelling. It concluded that the minimum prescribed sentence of life imprisonment was indeed proportionate to the crime committed by the appellant, and accordingly appropriate.

[35] With this conclusion I must agree, for two reasons. First, the trial court's understanding and application of section 51(1) of the Act read with Schedule 2 in the exercise of its sentencing discretion was correct. It used life imprisonment as point of departure and then considered whether this sentence was proportionate to the crime in light of the circumstances of the case, including those circumstances specifically offered by the appellant as substantial and compelling.[33] There is no misdirection,

[31] *S v Malgas* (above) at para [8].
[32] *S v Malgas* (above) at para [25].
[33] Judgment (Sentence), Record at p 141-142 and 145-146.

material or otherwise concerning that.

[36] Second, the trial court exercised its sentencing discretion properly on the facts. For possible mitigation the trial court considered the following:[34]

[36.1] The family history of the appellant (stable and happy, despite the death of his father when he was 14 years old).

[36.2] That at the time of the rape the appellant was his family's sole breadwinner.

[36.3] Reports from his family that he was a responsible and reserved person with respect for children and elders, who often assisted young men in the community by teaching them electro-mechanical skills.

[36.4] That the appellant maintained his innocence (here the trial court noted that while the appellant was entitled to do so despite conviction, it did diminish his propensity for rehabilitation, as a prerequisite for rehabilitation is acknowledgement of the wrong committed).

[36.5] The fact that the appellant was a first offender.

[37] Against that, the trial court continued, must be considered the following:[35]

[37.1] The inherent seriousness of the crime – not only rape, which is already a scourge in our society but rape of an eight-year-old child.

[37.2] The prevalence of this crime in our society and the concomitant need to protect against it and deter it.

[37.3] The impact of the crime on society – in a community such as the appellant's and complainant's where circumstances dictate that members must be able to trust fellow members to look after and not harm their children, the appellant's breach of that trust is particularly impactful.

[37.4] The impact of the rape on the complainant – even in the absence of a victim impact statement or report, the trial court, correctly to my mind assumes that both the physio- and psychological impact on the child must be lasting and debilitating.

[38] The trial court then concludes that a consideration of all these factors together

[34] Judgment (Sentence), Record at p 142-143.
[35] Judgment (Sentence), Record at p 143-145.

indicates nothing other than imposition of a very serious sanction, such as, indeed the life sentence it was required to impose.[36] With this conclusion I agree.

[39] I also agree with the trial court's rejection of those circumstances raised on behalf of the appellant at trial as substantial and compelling and so justifying a lesser sentence than life imprisonment: the fact that the appellant had been incarcerated for a substantial period of time prior to trial and that his mother had passed away while he was in custody.[37] Both these factors seem at best only tangentially relevant to the question whether to depart from the minimum prescribed sentence.

[40] Counsel appearing for the appellant at the hearing of this appeal raised in his heads of argument and before court the following circumstances as substantial and compelling such as, viewed cumulatively, to justify departure from the prescribed minimum sentence:

[40.1] The appellant is a first offender.

[40.2] The appellant spent three years in custody awaiting trial.

[40.3] The complainant suffered no injuries other than to her genitalia.

[40.4] The appellant's age.

[40.5] The possibility for the appellant to be rehabilitated.

[41] I am not persuaded that, whether viewed cumulatively or in isolation, these factors justify departure from the prescribed minimum sentence. Although it is so that a convicted person being a first offender is often regarded as a mitigating factor indicating a reduction in sentence, it is important to consider the reason for that: that it indicates smaller potential for repeat offending and a better chance at rehabilitation. This must be considered in the context of this case – with the appellant currently being over 50 years old the importance of considering the possibility of repeat offending and the propensity for rehabilitation recede into the background somewhat where even with a reduced sentence the appellant will be elderly when he is released back into society. Against this must also be considered the fact that the appellant continues to maintain his innocence, which, as the trial court held, he is entitled to do, but diminishes his prospects of rehabilitation.

[42] It is unclear what the relevance is of the fact the appellant spent three years in

[36] Judgment (Sentence), Record at p 145.
[37] Judgment (Sentence), Record at p 146.

custody awaiting trial. These three years could perhaps be considered in deciding when the appellant would become eligible for parole and in deciding whether to grant him parole, but they don't seem relevant at the sentencing stage.

[43] It is surprising that the appellant would raise the absence of physical injury other than injury to the genitalia in the context of substantial and compelling circumstances justifying departure from the prescribed minimum sentence. Section 51(3)(a)(A) of the Act clearly precludes reliance on precisely such absence of injury as substantial and compelling circumstances.

[44] While the appellant's age is certainly potentially a mitigating factor that would ordinarily indicate reduction of sentence (it is so that the appellant, with a sentence of life imprisonment may spend the rest of his life in jail), on its own it is not enough to justify departure from the prescribed minimum sentence, particularly if one has regard to the seriousness of his offence.

[45] The potential for rehabilitation is again, as with several of the other factors, a factor that is often considered in mitigation of sentence. But the trial court already, as set out above, considered its relevance and weight in the context of this case and found it wanting. The magistrate pointed out that the appellant maintaining his innocence presents a serious obstacle in the way of his potential rehabilitation. To this I must add that the appellant's age and the fact that at best when again he is released into society, he will be elderly means that the importance of the potential for rehabilitation recedes.

[46] For all these reasons I conclude that I can find neither material misdirection in the trial court's imposition of the minimum prescribed sentence, nor that the sentence of life imprisonment imposed diverges so from the sentence I would have imposed that it is shocking, startling or disturbingly inappropriate. Indeed, were I in the shoes of the trial court I would have imposed the same.

[47] Accordingly, the appeal against sentence must also be dismissed.

Conclusion

[48] In the circumstances, the following order is made:

1. The appeal both against conviction and sentence, is dismissed.

JFD Brand
Acting Judge of the High Court
Gauteng Division, Pretoria

I agree

PD Phahlane
Judge of the High Court
Gauteng Division, Pretoria

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INSTRUCTED BY:	Director of Public Prosecutions
DATE OF THE HEARING:	1 February 2024
DATE OF JUDGMENT:	2 April 2024