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

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

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: CA48/2019

CASE NUMBER *A QUO:* RC2/2015

In the matter between:-

DITEKO SELEBALO Appellant

and

THE STATE Respondent

CORUM: REID J *et* LAUBSCHER AJ

FMM REID J

[1] This matter is heard in terms of section 19(a) of the **Superior Court Act** 10 of 2013, by agreement between the parties on the documents filed in the court file without the presentation of oral argument. The State and the appellant filed comprehensive heads of argument.

[2] The appeal is against the sentence of 25 years' imprisonment as imposed by Mr Nzimande, the Magistrate in the court *a quo* on 31 March 2016 in the Regional Court of North West held at Jouberton, for the conviction of rape of a minor who was 13 years old at the time of the offence.

[3] The court *a quo* refused leave to appeal on 8 February 2019. The appeal comes before this Court after the appellant successfully petitioned for leave to appeal against his sentence, which petition was granted on 25 June 2019 by Hendricks DJP (as he then was) and Petersen AJ (as he then was).

[4] The charges against the appellant reads as follows:

> *"Count No 1*
> *RAPE*
> *That the (appellant) is guilty of the crime of contravening the provisions of Section 3 read with Sections 1, 56(1), 57, 58, 59, 60 and 61 of the* ***Sexual Offences Act*** *32 of 2007 – RAPE (read with the provisions of Sections 51(1) or 51(2) and Schedule 2 of the* ***Criminal Law Amendment Act*** *105 of 1997, as amended)*

IN THAT on or about the 20th day of February 2015 and at or near Jouberton Regional Division of NORTH WEST the said (appellant) did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, KM by having sexual intercourse without the consent of the said complainant by inserting his penis in her anus and/or vagina without her consent.

- *Section 51(1) and Schedule 2 of the Criminal Law Amendment Act of 105 of 1997, as amended is applicable in that the complainant was born on the 14/04/2002.*

Count No 2
RAPE
THAT the (appellant) is guilty of the crime of contravening the provisions of Section 3 read with Sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the ***Criminal Law Amendment Act (Sexual Offences and Related Matters) Act*** *32 of 2007 read with sections 256, 257 and 281 of the* ***Criminal Procedure Act*** *51 of 1977; the provisions of Sections 51 and 5 and Schedule 2 of the* ***Criminal Law Amendment Act*** *105 of 1997, as amended as well as sections 92(2) and 94 of the* ***Criminal Procedure Act*** *51 of 1977.*

IN THAT on or about the 20th day of February 2015 and at or near Jouberton Regional Division of NORTH WEST the said (appellant) did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, KM (13 years) by inserting his penis in her anus without her consent.

- *Section 51(1) and Schedule 2 of the Criminal Law Amendment Act of 105 of 1997, as amended by*

Section 33 of Act 62 of 2000 and Section 36 of Act 12 of 2004 and further amended by Act 38 of 2007 is applicable in the complainant was born on the 14/04/2002.

- *If (appellant) is convicted of the above charge of part 1 Schedule 2, section 51(1)(a) makes provision for a minimum sentence of life imprisonment…"*

[5] In this appeal, the appellant seeks to have the sentence of 25 years' imprisonment reduced to a period of 15 years' imprisonment.

[6] The grounds of appeal are set out as follows:

"5. The Court erred by not imposing a shorter term of imprisonment:

5.1 In the absence of planning;

5.2 The age and personal circumstances of the (appellant). The (appellant) was at the time of sentencing a 24 year old male. The Court did not take this factor into consideration when the (appellant) was sentenced.

5.3 The rehabilitation element. The applicant was at the time of sentencing still very young and a first offender. A shorter term of imprisonment would have served as a proper sentence in order to rehabilitate the (appellant).

6. The court further erred in over-emphasising the following factors:

6.1 The seriousness of the offence;
6.2 The interest of society;
6.3 The prevalence of the offence;
6.4 The deterrent effect of the sentence;
6.5 The retributive element of sentencing."

[7] The evidence presented by the State before the court *a quo* was that the appellant visited the home of the complainant as he was looking for the complainant's sister. The sister of the complainant was the appellant's girlfriend at that stage.

[8] The witnesses who testified during the trial were the complainant, the complainant's mother and the medical doctor who examined the complainant. The evidence of the complainant was done in terms of section 170A of the **Criminal Procedure Act** 51 of 1977 (CPA) in that use was made of an intermediary. The evidence presented to the court *a quo* was as follows:

8.1. The complainant's mother instructed the complainant to

accompany the appellant to show him where her sister (his girlfriend) was.

8.2. On their way to a tavern, the appellant changed routes, took the complainant with him to some foreign place where he raped the complainant the whole evening and returned her home the next morning.

8.3. The complainant returned to her mother's residence the next morning, crying profusely. She informed her mother of the rape and her mother took her to a medical doctor and the South African Police Service.

[9] The appellant testified in his defence that he and the complainant decided to go to a tavern and drank alcohol. The complainant decided to home, but the appellant tried to stop her since it was very late. The appellant attempted to prevent the complainant from leaving, but she refused and left. According to him the complainant was raped on her way home, and not by him.

[10] The court *a quo* found the appellant guilty for rape of a minor. the court *a quo* treated the two separate charges of rape as one single chargel.

[11] In relation to determination of the appropriate sentence, the following evidence was presented to the court *a quo*:

11.1. That the appellant has a previous conviction of possession of suspected stolen property wherein he was sentenced to 12 months' direct imprisonment.

11.2. The appellant was born on 3 February 1992 and was 24 years of age at the time of the commission of the offence.

11.3. He had no children and was staying with his parents and siblings and his girlfriend, who is the complainant's sister.

11.4. He did not have fixed employment and his highest academic qualification is Grade 10.

[12] The record reflects that the legal representative of the appellant did not address the court *a quo* in relation to substantial and compelling circumstances to justify a lesser sentence of life imprisonment or of 25 years' imprisonment.

[13] In aggravation it was argued by the State that the injuries of the complainant indicated horrific rape by the appellant, both vaginally and anally, which is supported by the J88 medical report.

[14] The court *a quo,* in determination of an appropriate sentence, held the following:

> *"You have indeed been convicted of a serious offence, that is rape of a child for which a life imprisonment is prescribed by the Legislator unless the Court finds that there are substantial and compelling circumstances to deviate from the prescribed sentence.*
>
> *On the day in question you behaved like an animal, a wild animal. You came to the residence of the complainant looking for your girlfriend M[…], when you are told that she is not there the complainant was entrusted to you to go and show you, to accompany you to show you where your girlfriend was.*
>
> *However on the way the evil inside you got the better of you, you decided that you are not going to*

proceed to M[…], instead you are going to rape this young girl.

You showed that really you are truly an animal.

Now the question is as your attorney asked whether there are substantial and compelling circumstances for the court to deviate from the prescribed Minimum Sentence of Life, the State has asked for life imprisonment. The court has therefore to consider your personal circumstances, the interest of the society as well as the seriousness of the offence to determine whether there are substantial and compelling circumstances.

Yes indeed you can be regarded as a first offender because the previous conviction you have is not relevant to the charge you have been convicted with as well as the fact that you are relatively young.

I am prepared to record those two factors that you are relatively young and there can be a prospect of you being rehabilitated.

Nonetheless the court is of the view that a lengthy term of imprisonment is warranted which will send out a clear message to the people out there, the men out, and boys that raping a child, raping a woman will not be tolerated by the society.

You are therefore sentenced as follows: In terms of Section 51(1) of Act 105 / 1997 the (appellant) is sentenced to 25 years' imprisonment."

[15] The court *a quo* considered, and recorded as substantial and compelling circumstances the fact that the appellant was relatively young (24 years) at the commission of the offence, and that there is prospects of rehabilitation of the appellant.

On the basis of these two aspects the court *a quo* deemed it sufficient to deviate from the minimum legislative sentence of life long imprisonment.

[16] The question for this Court of appeal to determine, is whether the court *a quo* erred to such an extent that the sentence that was imposed, is shockingly inappropriate.

Sentence

[17] As a point of departure, the provisions of section 51(1) of the Criminal Law Amendment Act are applicable in this matter and prescribe the following minimum sentence in a peremptory manner:

> *"Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person—*
> *(a) if it has convicted [a person] of an offence referred to in Part 1 of Schedule 2 … to imprisonment for life."*

[18] Section 51(3)(a) of the Criminal Law Amendment Act contains a redeeming provision and determines the following:

> *"If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence*

than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and [may] must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years."

[19] Section 51(3)(aA) of the Criminal Law Amendment Act aids the interpretation of the phrase *"substantial and compelling circumstances"* by stating which facts shall not constitute *"substantial and compelling circumstances"*. This provision reads as following:

> *"When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:*
>
> *(i) The complainant's previous sexual history;*
> *(ii) an apparent lack of physical injury to the complainant;*
> *(iii) an accused person's cultural or religious beliefs about rape; or*
> *(iv) any relationship between the accused."*

[20] In **S v Malgas** 2001 (1) SACR 469 (SCA) the Supreme Court of Appeal summarised the legal position that should be applied in relation to offences which has been legislatively

mandated to a minimum sentence of a specific period. It was held that:

> *"The specified minimum sentences are not to be departed from lightly and for flimsy reasons. The court should not consider speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded."*

and further:

> *"First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes."*

[21] When it comes to sentencing, it is of paramount importance to state the position enshrined regarding the manner in which courts of appeal should approach appeals from the lower courts. In **S v Pektar** 1988 (2) All SA 550 at 551 it was held

that:

> *"This Court's powers to interfere with a sentence on appeal are circumscribed. It may only do so if the sentence is vitiated by (1) irregularity, (2) misdirection, or (3) is one to which no reasonable court could have come, in other words, one where there is a striking disparity between the sentence imposed and that which this Court considers appropriate."*

[22] The aforesaid position was confirmed in the matter of **Tsiba v S** (CA 44/2022 [2023] ZANHC 27 (15 March 2023) as follows:

> *"It is trite that a court of appeal will not lightly interfere with the sentencing discretion of a trial court. In the context of the mandated sentence of life imprisonment which was imposed in respect of the rape charge (count 2), this court will only be entitled to interfere if there is a material misdirection on the part of the trial court, if the sentence is shockingly inappropriate or disproportionate to the crime, the offender and the interests of society."*

[23] It is argued on behalf of the appellant that the court *a quo* had his personal feelings eschew the objective duty of sentencing on an appropriate measure, in that the court *a quo* referred to the appellant as "a wild animal". Whilst such references are frowned upon by this Court of appeal, I do not

agree that the court *a quo* had his/her personal feelings interfere with the execution of his/her duties as Magistrate. The court *a quo* referred to the conduct of the appellant in abducting a minor of 13 year of age, keeping her overnight and repeatedly raping her both vaginally and anally as akin to that of a wild animal. This ground of appeal can therefore not be upheld.

[24] In relation to the remaining grounds of appeal, I cannot find that the court *a quo* erred in over-emphasising any of the following factors: the seriousness of the offence, the interest of society, the prevalence of the offence, the deterrent effect of the sentence, or the retributive element of sentencing.

[25] In my view, the court *a quo* balanced all the relevant facts and applied the law to the facts correctly in relation to the sentencing of the appellant.

[26] For the reasons set out above, the appeal against the sentence of the appellant is dismissed as well.

Order:

[27] In the premises I make the following order:

i) The appeal is dismissed.

ii) The sentence of 25 years' imprisonment is confirmed, which is ante-dated to the date of imprisonment of 31 March 2016.

iii) The remaining sentences of the appellant remains in place as ordered by the court *a quo.*

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FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

I agree

_____

NG LAUBSCHER
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

DATE OF HEARING : 30 NOVEMBER 2023

DATE OF JUDGMENT : 16 APRIL 2024

APPEARANCES

ON BEHALF OF THE APPELLANT: ADV M OFENTSE

INSTRUCTED BY: LEGAL AID SOUTH AFRICA

ON BEHALF OF THE RESPONDENT: ADV A MZAMO

INSTRUCTED BY: NATIONAL PROSECUTING AUTHORITY
MEGACITY
MMABATHO
TEL: 082 974 6591
EMAIL: amzamo@npa.gov.za
REF: ADV MZAMO
(10/2/5/1-09/22)