

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/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 NO.: CA 76/2019

REGIONAL COURT CASE NO.:RC2/116/2017

**IN THE CRIMINAL APPEAL OF:**

**SEBOTSA REUBEN LEKHOANA**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**JUDGMENT**

**CORAM: REID J *et* LAUBSCHER AJ:**

**LAUBSCHER AJ**

**BACKGROUND RELEVANT TO THIS APPEAL:**

[1] This is an appeal against both the conviction and the sentence imposed upon the Appellant on two counts of rape in the Klerksdorp Regional Court in the North-West Province on 29 May 2019.

[2] According to the record availed to this Court the Appellant was charged with the following two counts:

(a) Count 1: That the Appellant is guilty of the contravention of the provisions of section 3 read with section 1, 56(1), 57, 58, 59, 60 and 61 of the **Criminal Law Amendment Act (Sexual Offence and Related Matters), Act 32 of 2007** (hereafter “the SORM Criminal Law Amendment Act”) in that on or about 29 May 2016 and at or near Kanana in the Regional Division of the North-West the Appellant did unlawfully and intentionally commit an act of a sexual penetration with a female person to wit AS by having sexual intercourse without the consent of the said complainant. The Respondent also alleged that the provisions of section 51(1) and Schedule 2 of the **Criminal Law Amendment Act, Act 105 of 1997** (hereafter “the Criminal Law Amendment Act”) are applicable because the Appellant raped the complainant more than once.

(b) Count 2: That the Appellant is guilty of the contravention of the provisions of section 3 read with section 1, 56(1), 57, 58, 59, 60 and 61 of the SORM Criminal Law Amendment Act in that on or

about 27 August 2016 and at or near Kanana in the Regional Division of the North-West the Appellant did unlawfully and intentionally commit an act of a sexual penetration with a female person to wit IN by having sexual intercourse without the consent of the said complainant. The Respondent also alleged that the provisions of section 51(2) and Schedule 2 of the Criminal Law Amendment Act, are applicable as upon conviction the minimum prescribed sentence is to be applied.

[3] The Appellant pleaded not guilty to both the charges levied against him and the matter went on trial where the court a quo found the Appellant guilty on both counts and the Appellant was sentenced as follows:

- (a) in respect of count 1 the rape of AS: In terms of section 51(2) of the Criminal Law Amendment Act the Appellant was sentenced to 10 years imprisonment;
- (b) in respect of count 2 the rape of IN: In terms of section 51(1) of the Criminal Law Amendment Act the Appellant was sentenced to undergo life imprisonment;
- (c) it was ordered that in terms of section 280(2) of the **Criminal Procedure Act, Act 51 of 1977** (hereafter “the Criminal Procedure Act”), half of the sentence in respect of count 1 (i.e. 5

years imprisonment) will run concurrently with the sentence in count 2; and

- (d) the Appellant was declared unfit to possess a firearm in terms of section 103 of the **Firearms Control Act, Act 60 of 2000**.

[4] In terms of the provisions of section 309(1)(a) of the Criminal Procedure Act, as amended by the provisions of section 10 of the **Judicial Matters Amendment Act, Act 42 of 2023** the Appellant is entitled to an automatic right of appeal once the court a quo has imposed a sentence of life imprisonment. This appeal accordingly comes before this Court by virtue of the automatic right of appeal provided in the said section.

[5] The Appellant's appeal to this Court against his conviction is premised on the following grounds which apply to both counts:

- (a) The court a quo misdirected itself in convicting the Appellant by not taken into account the credibility of the witnesses against and for the Appellant.
- (b) The court a quo erred by not considering the inherent in probabilities in the version of the Respondent.
- (c) The court a quo accepted unsatisfactory evidence which of such a poor quality and nature and it have rejected that evidence in its totality.
- (d) The court a quo did not properly analyse or evaluate the evidence before it.

(e) The court a quo failed to put weight on the major discrepancies between the complainants as well as the defence witnesses.

[6] The Appellant's appeal to this Court against his sentence is premised on the following grounds which apply to both counts:

(a) The custodial sentence of life imprisonment is out of proportion to the totality of the accepted facts in mitigation.

(b) The court a quo disregarded the period of time which the Appellant spent in custody awaiting trial.

[7] The Respondent is opposing the Appellant's appeal.

[8] The Appellant in this appeal was represented by Adv S Nelani and the Respondent was represented by Adv AL Legong of the office of the Director of Public Prosecutions. Written heads of argument were submitted to this Court on behalf of both the Appellant and the Respondent, the contents of which assisted this Court in the adjudication of this appeal. This appeal is adjudicated in terms of section 19(a) of the **Superior Court Act, Act 10 of 2013**, by agreement between the parties on the documents filed in the court file without the presentation of oral argument.

**THE GENERAL PRINCIPLES APPLICABLE TO AN APPEAL ON CONVICTION AND SENTENCE:**

[9] A court of appeal must always observe the following trite principles when an appeal is adjudicated ad conviction:

(a) In the matter of R v Dhlumayo and Another<sup>1</sup> the Appeal Court (as it was then known) stated:

*“The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing the demeanor, but also their appearances and whole personality. This should not be overlooked”.*

(b) In the matter of A M and Another v MEC Health, Western Cape<sup>2</sup> the court referred to the matter of ST v CT<sup>3</sup> and reiterated the following “trite principles” as reaffirmed by the Constitutional Court : *“In Makate v Vodacom (Pty) Ltd*<sup>4</sup> *the Constitutional Court, reaffirmed the trite principles outlined in Dhlumayo, quoting the following dictum of Lord Wright in Powell and Wife v Streatham Nursing Home”: ‘Not having seen the witnesses puts the appellant judges in a permanent position of disadvantage against the trial judges, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the Higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own*

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<sup>1</sup> 1948 (2) SA 677 (A) at 705.

<sup>2</sup> 2021 (3) SA 337 (SCA) at para [8].

<sup>3</sup> 2018 (5) SA 479 (SCA) para [26].

<sup>4</sup> 2016 (4) SA 121 (CC).

***comparisons and criticisms of the witnesses and of their own view of the probabilities of the case***". (own emphasis)

- (c) A court of appeal can only reject the trial court's assessment of the evidence if the court of appeal is convinced that the trial court's assessment of the evidence was wrong. If the appeal court is in doubt, the trial court's judgment must remain in place.<sup>5</sup>
- (d) The appeal court must be careful in making decisions, which are purely based on paper and representations in court without the presence of the parties in the actual case.<sup>6</sup>
- (e) The above referred to principles were stated in a similar vein in the matter of S v Kebana<sup>7</sup> as follows:

*"It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings".*

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<sup>5</sup> S v Robinson 1968 (1) SA 666 (A) at 675 H.

<sup>6</sup> Bernert v ABSA Bank Ltd 2011 (3) SA 92 CC at para [106].

<sup>7</sup> S v Kebana [2010] 1 All SA 310 (SCA) para [12].

(f) In Khoza v S<sup>8</sup> it was confirmed that a “...court of appeal is not at liberty to depart from the trial court’s findings of fact and credibility unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.”

(g) Ponnann JA in the matter of S v Monyane and Others<sup>9</sup> confirmed the following regarding the powers of a court of appeal:

*“This court’s powers to interfere on appeal with the findings of fact of a trial court are limited... 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 (S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645 e-f).”*

[10] In dealing with an appellant’s appeal against conviction this Court’s must have regard to the following principles and methods of assessing the evidence before the trial court:

(a) It is trite that the onus of proof rests with the Respondent to prove the guilt of the Appellant beyond reasonable doubt. In the matter of Robinson and Others v S<sup>10</sup> the court stated the following in this regard:

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<sup>8</sup> (A222/2022) [2023] ZAGPPHC 1122 (8 September 2023) at para [16].

<sup>9</sup> 2001 (1) SACR 543 (SCA) at para 15 and also see S v Francis 1991 (1) SACR 198 (A) at 198 J – 199 A.

<sup>10</sup> (AR18/2017) [2018] ZAKZPHC 22 (25 May 2018) at para [11].



*“It is clear from the record that there are two conflicting versions on how the events unfolded on the day in question. The versions are completely different from each other. The second question which needed to have been considered by the court a quo was **whether on the totality of the evidence it can be said that the State had proved its case beyond any reasonable doubt. It is trite that in criminal cases the onus rests on the State to prove its case against the accused beyond reasonable doubt.** In *S v Van der Meyden*<sup>11</sup> the test is set out as follows: ‘The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example *R v Difford 1937 AD 370 at 373 and 383*).” (own emphasis)*

- (b) If the Appellant’s version is only reasonably possibly true, he or she would be entitled to an acquittal. The Supreme Court of Appeal in the matter of Shackle v S<sup>12</sup> stated:

*“The court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true, in substance, the court must decide the matter on acceptance of that version. Of course, it is permissible to test the*

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<sup>11</sup> 1999 (1) SACR 447 (W) at 448 F-G.

<sup>12</sup> 2001 (1) SACR 279 (SCA) at 288 E-F.

*accused's version against the inherent probabilities; but it cannot be rejected merely because it is improbable. It can only be rejected on the basis of inherent probabilities if it can be said that it will be so improbable that it cannot be reasonably possibly true".*

(c) In the matter of S v Munyai<sup>13</sup> the court stated:

*"A court must investigate the defense case with the view of discerning whether it is demonstrable false or inherently so improbable as to be rejected as false".*

(d) The Supreme Court of Appeal in the matter of S v Chabalala<sup>14</sup> stated:

*"The correct approach is to weigh up all the elements which points towards the guilt of the accused against all 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 to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post*

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<sup>13</sup> 1988 (4) SA 712 at 915 G.

<sup>14</sup> 2003 (1) SACR 134 (SCA) at page 140 A-B.

*facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture in evidence.”*

(e) In the matter of S v Sithole and Others<sup>15</sup> it was succinctly stated:

*“There is only one test in a criminal case and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that the accused is entitled to an acquittal if there is a reasonable possibility that there is an innocent explanation which he has proffered might be true”.*

(f) In S v Molaza<sup>16</sup> the court stated and confirmed the following test:

*“The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence that the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and*

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<sup>15</sup> 1999 (1) SACR 585 W at 590.

<sup>16</sup> (2020) 4 All SA 167 (GJ) 31 para [45].

*some of it might be found to be only possibly false or unreliable, but none of it may be simply ignored."*

- (g) Addressing the concept of "reasonable doubt" the Appeal Court (as it was then known) in the matter of R v Mlambo<sup>17</sup> started:

*"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man after mature consideration comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged. He must in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of the doubt that may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable influences which are not in conflict with, or outweighed by the proved facts of the case."*

- (h) The above referred to approach was confirmed by the Supreme Court of Appeal in the matter of S v Phallo and Others<sup>18</sup> referring to it as a "classic decision". The SCA went on to state that the approach of our law as represented by the said JUDGMENT

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<sup>17</sup> 1957 (4) SA 727 (A) at 738 A-C.

<sup>18</sup> (1999) (2) SACR 558 (SCA) at 562g to 563e.

corresponds with that adopted and stated by the English Courts. Olivier JA in the SCA went on to quote from *Miller v Minister of Pensions* [1937] 2 All EL 272 (KB) wherein the following was stated:

*"The evidence must reach the same degree of cogency as required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man to leave only a remote possibility in his favour, which can be dismissed with a sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice."*

- (i) The above referred to measurement must be applied by having regard to the general principle in evaluating evidence in a criminal case. This principle was stated in the matter of S v van der Meyden<sup>19</sup> to which reference was already made in a quote above, as follows:

*"The onus of proof in a criminal case is discharged by the State. If the evidence establishes the guilt of the accused beyond*

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<sup>19</sup> Supra at 448 F-H.

*reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from the opposite perspective. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other ... in whatever the form the test is expressed, it must be satisfied upon a consideration of all the evidence. **A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt and so too, it does not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.**" (own emphasis)*

- (j) The evaluation of evidence in a criminal trial comprises of the evaluation of the “*mosaic of evidence as whole*” as aptly stated in the matter of Khumalo v S<sup>20</sup> as follows:

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<sup>20</sup> (723/2020) [2022] ZASCA 39 (4 April 2022) at para [19] and also see R v Blom 1939 AD 188 at 202, Cornick and Another v S 2007 (2) SACR 115 (SCA) at para 42, S v Van den Meyden supra at 449d-e, cited with approval in S v Van Aswegen 2001 (2) SACR 97 (SCA) at 101a-f.

*“Considering all the circumstances of this case, I am of the view that **the evidence tendered by the State weighs so heavily as to exclude any reasonable doubt about the applicant’s guilt.** Expressed differently, the mosaic of the evidence as a whole is, beyond reasonable doubt, inconsistent with the applicant’s innocence. The inescapable inference is that the applicant was the aggressor on the night of the incident; that he shot at the complainant, chased him into a yard, fired more shots at the complainant and then robbed him of his money.” (own emphasis)*

**THE GENERAL PRINCIPLES APPLICABLE TO AN APPEAL AGAINST SENTENCE:**

[11] First and foremost, in the adjudication of an appeal against sentence this Court must have regard to the general and overarching principles which have been laid down in this regard by the Supreme Court of Appeal. These are the following:

- (a) An appeal court must be loath to interfere with the sentence of a trial court. As far back as 1920, the Appellate Division (as it was then known) in the case of R v Maphumulo and Others<sup>21</sup> stated that:

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<sup>21</sup> 1920 AD 56 at 57.

*"The infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal. And we should be slow to interfere with its discretion."*

- (b) In S v Barnard<sup>22</sup> the Supreme Court of Appeal stated: *"A court sitting on appeal on sentence should always guard against eroding the trial court's discretion ... and should interfere only where the discretion was not exercised judicially and properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably."*
- (c) The above quoted phrase succinctly states the general and overarching principle which must be adopted by this Court in the adjudication of appeals on sentence and hence in this appeal.
- (d) In S v Hewitt,<sup>23</sup> Maya DP held that: *"It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other*

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<sup>22</sup> 2004 (1) SACR 191 (SCA) at para [9].

<sup>23</sup> 2017 (1) SACR 309 (SCA).



*words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a “striking” or “startling” or “disturbing” disparity between the trial court’s sentence and that which the appellate court would have imposed. And in such instances the trial court’s discretion is regarded as having been unreasonably exercised.”<sup>24</sup>*

- (e) In S v Bogaards,<sup>25</sup> Khampepe J in the Constitutional Court held the following, that:

*“It can only do so [i.e. interfere with the sentence imposed] where there has been an irregularity that results in the 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.”*

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<sup>24</sup> At paragraph [8].

<sup>25</sup> 2013 (1) SACR 1 (CC) at para [41].

[12] Consequently, the court in the present matter can only interfere with the sentence where the trial court's exercise of its discretion was patently incorrect. The sentence must otherwise be left undisturbed.

[13] This principle was also echoed by and phrased by Du Toit<sup>26</sup> as follows: "*The sentence will not be altered unless it is held that no reasonable court ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial judge had not exercised his discretion properly, or that it was in the interest of justice to alter it.*"<sup>27</sup>

[14] The court a quo "...enjoys pre-eminent discretion and the court of appeal will not lightly interfere with the exercise of same."<sup>28</sup> A court of appeal will not interfere lightly with the trial court's exercise of its discretion.<sup>29</sup> In S v Singh<sup>30</sup> Tshiqi JA held that: "*The task of imposing an appropriate sentence is in the discretion of the trial court. A court of appeal may only interfere if the sentence is shockingly inappropriate.*"

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<sup>26</sup> Commentary on the Criminal Procedure Act (Jutastat, 31 January 2021) at 30-41.

<sup>27</sup> Also see S v Fhetani 2007 (2) SACR 590 (SCA), Director of Public Prosecutions, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA), S v Anderson 1964 (3) SA 494 (A); Nevilimadi v S (545/13) [2014] ZASCA 41 (31 March 2014) and S v Asmal (20465/14) [2015] ZASCA 122 (17 September 2015).

<sup>28</sup> Gqika v S (CA&R 112/2021) [2022] ZAECGHC 15 (1 March 2022) at para [20].

<sup>29</sup> See S v Rommer 2011 (2) SACR 153 (SCA), S v Hewitt 2017 (1) SACR 309 (SCA) and S v Livanje 2020 (2) SACR 451 (SCA).

<sup>30</sup> [2016 \(2\) SACR 443](#) at para [23].

[15] In the matter of Chitumbura and Another v S<sup>31</sup> the court quoted the above referred to phrase from du Toit with approval and proceeded to referred to the Supreme Court of Appeal matter of S v Kgosimore<sup>32</sup> and stated the following: *“Regard may be had also to the judgment of Scott, JA in S v Kgosimore, 1999(2) SACR 238 (SCA), relied on by the State, where his lordship held that if the discretion of the trial court was properly and reasonably exercised, there was no scope at all for interference in the sentence. This collection of expressions of resistance to interference in lower court sentencing underscores just how jealously our judicial hierarchy protects the prerogative below, and it is difficult to add to it.”*

#### **THE EVIDENCE BEFORE THE COURT A QUO**

[16] Having regard to the above set out principles, this Court must accordingly proceed to consider the contents of the evidence adduced on behalf of both the Respondent and the Appellant during the trial in this matter. The Court now proceeds to do so.

[17] In respect of count 1:

- (a) In respect of this count the Respondent led the evidence of AS and her brother M[...] S[...]. The Appellant testified about the incident as well as a police officer Teletsane who took the victim’s statement and Aaron Mongezi Menge (aka “Menar”). The

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<sup>31</sup> (A190/201) [2017] ZAGPJHC 274 (14 September 2017) at para [9] and [10].

<sup>32</sup> 1999(2) SACR 238 (SCA).

Respondent also handed in the J88 Medical examiners report in respect of AS as Exhibit C. The J88 reflects a “*small tear*” in the “*fossa navicularis*” of AS “*compatible with forceful penetration*”.

- (b) The victim AS testified that she knew the Appellant and he gave a hug earlier the same evening on which the rape event occurred. She referred to the Appellant as Sebotse.
  
- (c) It was the evidence of the victim AS that after visiting a tavern, she returned to her parental home where she was residing at the time. She testified that the Appellant and Aaron Mongezi Menqe appeared whilst she was on her way home. They went with her inside the erf of her parental home, she asked them to leave but they did not. Before she went into the house, she went to the toilet which was outside of the house to relief herself. The toilet was outside of the house. Whilst in the toilet the Appellant entered the toilet and raped her in the toilet initially wearing a condom and later without the condom.
  
- (d) The evidence of the victim AS that she was raped by the Appellant in the toilet outside of the house in which was staying is in part corroborated by her brother M[...] S[...] who testified that AS reported the rape to him directly after it has occurred. She expressly stated and reported it to her brother that it was the Appellant who raped her. She reported to him that the rape took

place in the outside toilet. The brother also testified that when AS reported the rape to him she was shivering and scared.

- (e) This evidence is in stark contrast to the evidence of the Appellant that he had consensual intercourse with the victim inside the “... *shack that I use as my bedroom...*” at the Appellant’s parental home. The next morning AS asked the Appellant to give her R 200.00, which he did not have. The Appellant denied that he raped AS.
- (f) The Appellant testified that AS was a prostitute and that she was the first person he had sexual intercourse with after he was released from prison. The Appellant stated that AS is making the rape allegations against him because he did not give her the R 200.00 that she asked for the morning after they had sexual intercourse.
- (g) The Appellant testified that Menar (Aaron Mongezi Menqe) was not with him, as testified by AS.
- (h) Aaron Mongezi Menqe denied that he and the Appellant went with AS to her home and denied knowing anything about the rape of AS in the outside toilet. He confirmed that he is a friend of the Appellant.

- (i) The police officer who wrote AS statement was called on behalf of the Appellant in order to testify about the contents of AS statement to the police.

[18] In respect of count 2:

- (a) In respect of this count the Respondent led the evidence of IN and Maria Mofokeng, who evidence did not contribute much to the matter – according to the court a quo. The Appellant testified about the incident as well as Tshediso Isaac Sokoti (aka “Soshanguve”). The Respondent also handed in the J88 Medical examiners report in respect of IN as Exhibit D. The J88 reflects the following injury: “...*shallow tear of the perianal -anal orifice at 11H00 due to blunt trauma penetration of the anus.*”
- (b) The evidence of the victim IN was that she went to a tavern to seek the assistance of friend to attend to her sick child. She did not go inside the tavern. When she left the Appellant grabbed her and “carried” her to the street. Her cell phone fell on the ground when she was grabbed by the Appellant. She did not know the Appellant at the time but identified the Appellant in court. She referred to the Appellant as Sebotse. She screamed and people emerged from the tavern. One of the people who so emerged is one Soshanguve. He followed the Appellant who was forcing IN to go with him to a water tower, where the Appellant ordered IN at

knife point to undress. After raping IN again at knife point, the Appellant ordered Soshanguve who was still present to also have intercourse with IN. Soshanguve laid on top of IN. Whilst Soshanguve was on top of IN the Appellant went to fetch another knife. This did not take very long, and the Appellant was back within a short time.

- (c) The Appellant then instructed IN to go with him to his parental home. At the Appellant's parental home, in his "shack" the Appellant again raped IN for a period of approximately four hours. The next morning the Appellant walked IN to a block from her home. She then met her father and told her father whilst crying that she was raped.
- (d) The Appellant testified that he had sexual relations with IN at a previous occasion at "Seiko's place" when his girlfriend was not with him. On the date of the incident 26 August 2016, the Appellant and IN left Moses Tavern together. Soshanguve was not with them. They went to the Appellant's parental home where they had consensual sex. The next morning IN was concerned as to how she is going to explain to her boyfriend where she spent the night.
- (e) The Appellant went with IN to her parental home, but she asked him to leave her before they got there in order for her father not to

see him. The next thing the police was looking for him on account of him being accused of rape by IN. The Appellant denied IN's version of events.

- (f) Tshediso Isaac Sokoti (Soshanguve) denied that IN left the tavern where they were all at under duress and he testified that IN lied when she told the court a quo that the Appellant ordered him to also rape IN.
- (g) During the proceedings in the court a quo, IN was confronted with Sokoti and confirmed under oath that Sokoti is in fact "Soshanguve" the person who the Appellant instructed to also rape IN. IN denied Sokoti's version of events as referred to above.
- (h) The Appellant's version of events is that the sexual intercourse with IN was consensual and that IN did not want her boyfriend to know that she was having relations with the Appellant. The Appellant denied that he ordered "Soshanguve" to also rape IN, as testified to by IN.
- (i) At one stage after the incident Shosanguve and the Appellant approached IN and requested her to withdraw the charge against the Appellant. The family of the accused also approached IN requesting her to withdraw the charge against the Appellant.



[19] The Appellant's defence to both counts are that the sexual intercourse with AS and IN was consensual.

[20] In the JUDGMENT of the court of quo the court proceeded to analyse all the evidence which was adduced before the court a quo. The court a quo in dealing with the evidence adduced before the court a quo:

(a) stated that: *"I am mindful that with regard to both counts I am dealing with the evidence of single witnesses, that is with regard to count 1, the complainant there AS is indeed a single witness, similarly in count 2 the complainant there IN is a single witness."*

(b) the court a quo recognised that the evidence of the Respondent and that of the Appellant are "poles apart" and as such that the court a quo was confronted with conflicting versions of events;

(c) the court a quo stated: *"Besides looking at the credibility of the witnesses the Court has to look at the probabilities. We have a complainant year who was in my view a paste to the accused person. She was pestering the accused so that they can have sex, immediately she had heard that the accused had been out in custody she became interested about the rumours she had heard about how those people perform despite the accused discouraging heard that now you are still young and so on she did*

*not mind. After all it had happened she now says that she has been raped, okay the motive is this issue that she asked for R200.00 which of the accused did not refuse to give, according to his testimony at that stage he did not have it, but later he could have it. Now how probable is it that this person then will rush to the police and say I am raped?"*

- (d) it thus evident that the court a quo evaluated the conspectus of evidence looking not only at the credibility of the witnesses, but also the probabilities in respect of all the evidence before the court a quo;
- (e) after a detailed analysis of all the evidence which was adduced before it the court a quo proceeded to state: ***"Finally I conclude that both complainants in count 1 and count 2 were credible witnesses. Both of them were credible witnesses. As a result I found that the explanation of the accused person that the complainant in count 1 consented and also the explanation that the complainant in count 2 consent that is not reasonable possible true therefore the accused's version is dismissed."*** (own emphasis)

[21] It is of importance to note that the court a quo approached the evidence of the two victims (AS and IN) who testified in respect of count 1 and count 2 respectively with caution because their evidence constitutes for all intents

and purposes evidence by a single witness. In this regard the court a quo referred to the matter of S v Sauls<sup>33</sup> wherein the following was stated:

*“There is no rule of thumb test or formula to apply when it comes to consideration of a witness. The trial judge will weigh his 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 his testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932(in R v Mokoena), may be a guide to a right decision but it does not mean ‘...that the appeal must succeed if any criticism, however slender, of the witness’ evidence where well founded...’. It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.”*

[22] In essence in this matter the court a quo convicted the Appellant on each count of rape premised upon the evidence of the victims, who can be regarded as single witnesses in respect of the said counts.<sup>34</sup> The court a quo found the two single witnesses to be credible and the court a quo rejected the Appellant’s version that the sexual relations with both the victims were consensual.

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<sup>33</sup> 1981 (3) SA 172 (A) AT 180 E to G.

<sup>34</sup> See section 208 of the Criminal Procedure Act.

[23] In the matter of Nong and Masingi v The State<sup>35</sup> the Supreme Court of Appeal stated the following regarding the evidence of single witness.

*“It is trite that an accused can be convicted on the evidence of a competent single witness. In some instances, contradictions in the evidence of a single witness maybe fatal, whilst in others they may not.”*

[24] The Supreme Court of Appeal proceeded to state:<sup>36</sup>

*Taking the aforesaid into account, the reliability of the evidence of a complainant must be tested, even though he or she comes across as being an honest witness. In the case at hand, the proximity of the complainant to the appellants during the incident and thereafter on the scene, the corroboration by Simphiwe on the apprehension of the appellants, coupled with the evidence advanced by the appellants themselves ‘must be weighed up one against the other, in the light of the totality of the evidence, and the probabilities’.*<sup>37</sup>

[25] Accordingly, the court a quo proceeded to find the Appellant guilty on both count 1 and count 2.

[26] The court a quo then proceeded to sentence. AS, the victim in count 1 although penetrated more than once was not raped more than once by the

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<sup>35</sup> (787/2021) [2024] ZASCA 25 (20 March 2024) at para [12].

<sup>36</sup> Supra at para [12].

<sup>37</sup> See S v Mthetwa 1972 (3) SA 766 (A) at 768C.

Appellant. The position in respect of the victim in count 2, IN is different. She was raped at the water tower and later at the Appellant's shack at his parental home. In respect of count 2 it is clear that the Appellant committed two separate acts of rape.<sup>38</sup>

[27] In respect of sentence the court a quo:

- (a) had regard to the seriousness of the offences of which the Appellant was convicted;
- (b) appreciate the fact that in respect of the incidence of the multiple rape of IN the court must have regard to the question of whether

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<sup>38</sup> See S v Ncombo 2017 (2) SACR 683 (ECG), S v Tladi 2013 (2) SARR 287 (SCA) par [13] and S v Blaauw 1999 (2) SACR 295 (W) at 300a-d wherein the following was stated by the Court: *"Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against a tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against the tree. He was not committing another separate act of rape. Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (i.e. the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place."*

there is substantial and compelling circumstance present which bar the court from imposing the prescribed minimum sentence;

(c) was clearly alive to the correct interpretation and implementation of the applicable provisions of the Criminal Law Amendment Act – as dealt with in detail herein below;

(d) referred to and took into account the personal circumstances of the Appellant as provided to the court by the Appellant, the seriousness of the offences and the interest of society;

(e) stated: *“What is aggravating in your case is that you are not a first offender. It would seem from your previous convictions though the SAP69's handed in by the state only reveal assault GBH, however during the address the attorney also informed the Court that you are serving for murder as well as the report compiled by the Correctional Services at your request show that you are currently serving a sentence of murder. It appears that you committed this offences while you work on parole. It is clear that there are no prospect of rehabilitation if one looks at your circumstances.”*

[28] The court a quo accordingly found that there were *“...no substantial and compelling circumstances for this Court to deviate from the prescribed*

*minimum sentence...*” as per the provisions of section 51(1) of the Criminal Law Amendment Act.

[29] The court a quo accordingly proceeded to sentence the Appellant as set out in paragraph [3] above.

### **THE PRESCRIBED MINIMUM SENTENCE**

[30] 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.**”* (own emphasis)

[31] Section 51(3)(a) of the Criminal Law Amendment Act contains a redeeming provision and states 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.”* (own emphasis)

[32] 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.”* (own emphasis)

[33] The provisions of section 51(1) refer to Schedule 2, Part 1. In respect of this matter the applicable provisions of this Part of Schedule 2 is the part which deals with “rape”. This part reads as follows:

*“Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 —*

(a) *when committed—*

(i) *in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;*



- (ii) *by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;*
- (iii) *by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or*
- (iv) *by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;*

(b) *where the victim—*

- (i) *is a person under the age of 16 years;*
- (iA) *is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);*
- (ii) *is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable;*  
*or*
- (iii) *is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or*

(c) *involving the infliction of grievous bodily harm.”*

**THE PERTINENT ISSUES IN THIS APPEAL IN RESPECT OF CONVICTION AND SENTENCE**

[34] In respect of the conviction of the Appellant it is clearly evident that the court a quo did consider in some detail the mosaic of evidence before it and adjudicated the version of AS and IN to be credible. Upon a proper consideration of the contents of the record and the principles as set out in detail above which should guide a court of appeal, this Court has no reason to interfere with the trial court's finding in this regard. There is no ground of appeal advanced by the Appellant against his conviction which has not been considered by this Court before this Court came to the above referred to conclusion.

[35] As to the conviction of the Appellant, the court a quo in the view of this Court correctly found that the full conspectus of evidence placed before it established the guilt of the Appellant beyond reasonable doubt. The conclusion reached by the court a quo rationally and meticulously accounted for all the evidence before it. There is no reason for this Court of appeal to interfere with the finding of the court a quo in respect of the conviction of the Appellant on the counts of rape as per the charge levied against him.

[36] In respect of the sentence which the Appellant has received in respect of count 1 as referred to in paragraph [3] above, there is, again having regard to all the facts placed before this Court, no reason advanced by the Appellant or otherwise evident why this Court should interfere with the

sentence imposed by the court a quo. In this regard this Court again applied the principles as set out in detail herein above.

[37] In respect of the sentence which the Appellant has received in respect of count 2 as referred to in paragraph [3] above a number of considerations find application. It is evident from the record that the court a quo applied the provisions of section 51(1) of the Criminal Law Amendment Act and sentenced the Appellant to life imprisonment in respect of count 2, having found no “substantial and compelling circumstances” as contemplated in section 51(2) of the Criminal Law Amendment Act, to trigger the redeeming effect of the last mentioned section.

[38] Having regard to the fact that the court a quo, following and implementing the provisions of section 51(1) of the Criminal Law Amendment Act and sentenced the Appellant as aforestated in respect of count 2, the crisp issue in this appeal in respect of the Appellant’s appeal against his sentence in respect of count 2 is whether the court a quo was correct in its finding that there are no “...*substantial and compelling circumstances justifying the imposition of a lesser sentence...*” than life imprisonment.

[39] Accordingly, one needs to turn to the content and interpretation which was given in the past by the courts to the phrase “...*substantial and compelling circumstances...*”.

[40] Turning to the prescribed minimum sentences imposed by the court a quo. In the matter of S v Malgas,<sup>39</sup> the following was stated by Marais JA in the SCA regarding sentencing and the implementation of the provisions of section 51 of the Criminal Law Amendment Act and the concomitant imposing of prescribed minimum sentences brought about thereby:

*“...The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be “business as usual” when sentencing for the commission of the specified crimes.*

*In what respects was it no longer business as usual? 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 unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily*

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<sup>39</sup> 2001 (1) SACR 469 (SCA).

*attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.*

*Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in *Flannery v Halifax Estate Agencies Ltd* by the Court of Appeal, 'a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based- than if it is not'. Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. **The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them.** But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders..."<sup>40</sup> (own emphasis)*

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<sup>40</sup> At paragraph [7] to [9].

[41] In the matter of S v GN,<sup>41</sup> Du Plessis J stated in respect of the Malgas JUDGMENT:

*“...As I understand the Malgas judgment, the prescribed minimum sentence may be departed from if, having regard to all the factors that play a role in determining a just sentence, the court concludes that the imposition of the prescribed minimum would in the particular case constitute an injustice or would be “disproportionate to the crime, the criminal and the legitimate needs of society” ...”*<sup>42</sup>

[42] The Supreme Court of Appeal has recently confirmed that certain mitigating personal circumstances of an accused and even the fact that an accused person may be a first offender (which is not the case in casu) do not constitute “substantial and compelling circumstances” as contemplated in section 51(2) of the Criminal Law Amendment Act. The SCA in the matter of Mthanti v The State<sup>43</sup> of which the facts to a limited extent resonates with the facts in this matter, stated the following:

*“[19] The last issue is whether there were substantial and compelling circumstances that justified deviation from the minimum prescribed sentences in this case. It is apparent from the above description of the events that took place on the three occasions that the aggravating circumstances present when committing the crimes by far outweighed the*

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<sup>41</sup> 2010 (1) SACR 93 (TPD).

<sup>42</sup> At paragraph [6].

<sup>43</sup> (Case no 859/2022) [2024] ZASCA 15 (8 February 2024) at paras [19] to [21].

*mitigating factors. The high court was correct in considering that the appellant's criminal conduct was not 'fleeting and impetuous'; that it was 'calculated and callous', and that there was no reason to deviate from the prescribed minimum sentences.*

*[20] The only submission made on appeal was that the appellant's mother died when he was 7 years old. The suggestion was that the appellant was troubled by the fact that his mother died without revealing the identity of his father. But all of this was considered by the high court. The court also considered in the appellant's favour, his personal circumstances - that he was gainfully employed at the time of his arrest for the offences in question and supporting his two minor children. It considered that although he lost his only biological parent early in his life, his uncle and aunt gave him 10 a 'good and warm upbringing' until he abandoned his post matric studies without telling them'. The court considered that the appellant was a first offender.*

*[21] The appellant ruthlessly exploited the vulnerabilities of the most exposed members of our society. He preyed on those most affected by the high levels of unemployment in the country. He deceived women, causing them to leave the security and comfort of their homes. He caused them to use their meagre financial resources to travel to Pietermaritzburg. He robbed them of their scant belongings and then humiliated the second and third complainants by raping them. In respect of the third complainant the rape happened in the most degrading manner, in the presence of a third person. He then left the complainants to their own devices in remote places*

*at night. This he did repeatedly, as the high court correctly found. In all three incidents there was no basis for a departure from the prescribed minimum sentences.”*

[43] The above referred to case (as confirmed in the Malgas matter) confirms that certain mitigating factors from the Appellant’s personal circumstances are in isolation not sufficient to justify a departure from the imposition of a minimum sentence. There must be substantial and compelling reasons to do so. The court a quo in casu did not find substantial and compelling circumstances to deviate from the minimum prescribed sentence.

[44] Counsel for the Appellant in the heads of argument argued that because the rape of which the Appellant was found guilty in count 2 cannot be regarded as “...a very brutal rape and therefore, substantial and compelling circumstances exist in order to convince the court to deviate from the prescribed minimum sentence.” This argument runs directly contrary to the express provisions of section 51(3)(aA) of the Criminal Law Amendment Act (as quoted above) and which states that in giving content to the phrase “substantial and compelling circumstances” certain facts shall not constitute “substantial and compelling circumstances”, one of these facts are: “...*(ii) an apparent lack of physical injury to the complainant;...*”. Therefore, the fact that a rape was not “*very brutal rape*” cannot constitute “substantial and compelling circumstances” as argued on behalf of the Appellant.



[45] From what was stated above in respect of issues considered by the court a quo, it is evident that the court a quo also dealt with the trite “*triad of Zinn*”, being the triad of the crime, the offender, and the interests of society, as enunciated in S v Zinn<sup>44</sup> were considered by the court a quo and this Court. This Court shall deal in more detail with the requirement of proportionality below.

[46] The Appellant was found guilty on two counts of rape, the one being a rape committed more than once as stated in respect of count 2. With regard to the offence of rape, which are disturbingly prevalent in our country, this Court deems it appropriate to make reference to the following:

(a) The court in the matter of Vilakazi<sup>45</sup> held as follows:

*“...The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important. From those*

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<sup>44</sup> 1969 (2) SA 537 (A) at 540G to H.

<sup>45</sup> 2009 (1) SACR 552 (SCA) at para [21].

*who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound.”*

- (b) Most recently, in the matter of Director of Public Prosecutions, Kwazulu-Natal Pietermaritzburg v Ndlovu<sup>46</sup> the Supreme Court of Appeal Stated:

*“Rape is an utterly despicable, selfish, deplorable, heinous and horrendous crime. It gains nothing for the perpetrator, save perhaps fleeting gratification, but inflicts lasting emotional trauma and, often, physical scars on the victim. More than two decades ago, Mohamed CJ, writing for a unanimous court,<sup>47</sup> aptly remarked that: ‘Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear,*

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<sup>46</sup> (888/2021) [2024] ZASCA 23 (14 March 2024) at para [73] and [74].

<sup>47</sup> With reference to S v Chapman 1997 (3) SA 341 (SCA) at paras [3] to [4].

*the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'*

*In similar vein Nugent JA, writing for a unanimous court<sup>48</sup>, in equal measure described rape in these terms: 'Rape is a repulsive crime, it was rightly described by counsel in this case as an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity.'*"

(c) In Tshabalala v S (Commissioner for Gender Equality and Centre for Applied Legal Studie sas Amici Curiae); Ntuli v S<sup>49</sup> the Constitutional Court stated "...rape is not rare, unusual and deviant. It is structural and systemic..."

(d) In Masiya v Director of Public Prosecution Pretoria and Another (Centre for Applied Legal Studies and another as Amici Curiae)<sup>50</sup> the Constitutional Court said the following of rape:

*"Today rape is recognised as being less about sex and more about the expression of power through degradation and concurrent violation of the victim's dignity, bodily integrity and privacy. Regrettably, 26 years, since the decision of this Court in*

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<sup>48</sup> With reference to S v Vilakazi supra at para [1].

<sup>49</sup> 2020 (2) SACR 38 (CC) at para [67].

<sup>50</sup> 2007 (5) SA 30 (CC) at para [51].

*Chapman, the scourge of rape has shown no signs of abating. On the contrary, it appears to be on an upward trajectory.”*

- (e) In recent times, this “...upwards trajectory...” referred to by the Constitutional Court in 2007 seems to be continuing unabated, notwithstanding numerous efforts from government and society at large to address violence committed against women and children.
- (f) It is not only this Court that is saying this. In the matter of Director of Public Prosecutions, Grahamstown v T M<sup>51</sup>

*“The reality is that South Africa has five times the global average in violence against women. There is mounting evidence that these disproportionately high levels of violence against women and children, has immeasurable and far-reaching effects on the health of our nation, and its economy. Despite severe underreporting, there are 51 cases of child sexual victimisation per day. UNICEF research has found that over a third (35.4%) of young people have been the victim of sexual violence at some point in their lives. **What cannot be denied is that our country is facing a pandemic of sexual violence against women and children. Courts cannot ignore this fact. In these circumstances the only appropriate sentence is that which has been ordained by statute.**” (footnotes omitted and own emphasis)*

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<sup>51</sup> (131/2019) [2020] ZASCA 5 (12 March 2020) at para [15].

[47] Against this background, the courts in this country must not shy away from its role to address and discount the fact that violence committed against woman and children must be condemned in the strongest terms, eradicated and the seriousness of this task must be reflected in the manner in which the courts address same. This must be done whilst striking a balance with the court's compelling duty to ensure that the punishment fits the crime and, of course, the offender.

[48] In the matter of Ndou v S<sup>52</sup> Shongwe JA stated that:

*“Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly. In rape cases, for instance, where a minor is a victim, more information on the mental effect of the rape on the victim should be required, perhaps in the form of calling for a report from a social worker. This is especially so in cases where it is clear that life imprisonment is being considered to be an appropriate sentence. Life imprisonment is the ultimate and most severe sentence that our courts may impose; therefore a sentencing court should be seen to have sufficient information before it to justify that sentence”.*

[49] The information placed before the court a quo on behalf of the Appellant, in the discretion of the court a quo, did not present substantial and compelling circumstances to have justified the imposition of a lesser sentence than the prescribed minimum sentence. There exists no reason for this Court to

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<sup>52</sup> [2012] JOL 29522 (SCA) at para [14].

interfere with this finding made by the court a quo in this appeal. This is also apparent from a consideration of recent case law that deals with incidents of rape.<sup>53</sup>

[50] If one then has regard to the manner in which the court a quo dealt with the sentencing of the Appellant it is evident that a proportioned, balanced and all-inclusive approach was adopted by the court a quo, taking into account all the relevant evidence placed before it. The court a quo was clearly alive to the fact that there must be a separate and distinct enquiry as the absence of any substantial and compelling circumstances before the court can proceed to impose the prescribed minimum sentence, in casu, life imprisonment in respect of count 2.

[51] The imposition of life imprisonment is, however, the most severe sanction available to the court. It is imperative, therefore, that this Court is satisfied that the sentence is indeed proportionate in casu.

[52] In S v Dodo<sup>54</sup> Ackermann J dealt with the “concept of proportionality” and stated the following:

*“...The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as*

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<sup>53</sup> See, for example S v FM 2016 JDR 1564 (GP), S v Mgandela 2016 JDR 1748 (ECM), S v Redebe 2019 JDR 1257 (GP) and S v Daile 2021 JDR 1879 (GP) and Director of Public Prosecutions, Grahamstown v Mantashe supra at para [11] and [12].

<sup>54</sup> 2001 (5) BCLR 423 (CC) at paras [37] and [38].

here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. This was recognized in *S v Makwanyane*. Section 12(1)(a) [of the Constitution] guarantees, amongst others, the right “not to be deprived of freedom... without just cause.” The “cause” justifying penal incarceration and thus the deprivation of the offender’s freedom, is the offence committed. “Offence”, as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender’s freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence.

...To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in paragraph 37 above) the offender is being used essentially as a means to another end and the offender’s dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender

*sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.*"<sup>55</sup>

[53] The principle of proportionality was also addressed in Vilakazi v S,<sup>56</sup> where Nugent JA observed that a prescribed sentence cannot be assumed, *a priori*, to be proportionate in a particular case. This was an issue to be determined upon consideration of all the circumstances in the matter. In casu the court a quo did so, and as stated above, there is no reason for this Court to interfere with the sentence imposed by the court a quo.

[54] In this matter this Court is satisfied that the imposition of the prescribed minimum sentence would most definitely not constitute an injustice, neither would it be disproportionate to the crime, the criminal and the legitimate needs of society.

#### **CONCLUSION AND JUDGMENT:**

[55] Having had regard to the record and the arguments led on behalf of the Appellant and Respondent, respectively, this Court is satisfied that there is

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<sup>55</sup> At paragraphs [37] and [38].

<sup>56</sup> [2008] 4 All SA 396 (SCA).



no basis upon which to interfere with the conviction and sentence imposed by the court *a quo*.

[56] Accordingly, the Appellant's appeal against both conviction and sentence is dismissed.

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**N G LAUBSCHER**

**ACTING JUDGE OF THE HIGH COURT, NORTH-WEST DIVISION, MAHIKENG**

**I agree and it is so ordered.**

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**F REID**

**JUDGE OF THE HIGH COURT, NORTH-WEST DIVISION, MAHIKENG**

**DATE OF APPEAL: 1 December 2023**

**DATE OF JUDGMENT: \_\_\_\_ April 2024**

**For the Appellant: Adv S Nelani**

**For the Respondent: Adv A L Legong**