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

IN THE NORTH WEST HIGH COURT, MAHIKENG

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

Case no: CA 29/2021

In the matter between:

STEPHEN KABELO PATSA APPELLANT

and

THE STATE RESPONDENT

CORAM: Petersen J, Khan AJ

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be 03 April 2024 at 10h00am.

ORDER

On appeal from: Regional Court Klerksdorp, North West Regional Division, (Regional Magistrate G S Nzimande sitting as court of first instance):

(i) Condonation for the late noting and prosecution of the appeal is granted.

(ii) The appeal against conviction and sentence is dismissed.

JUDGMENT

KHAN AJ

Introduction

[1] On the 29 January 2020, the appellant was convicted and sentenced to life imprisonment. The applicant exercises the right of automatic appeal to this Court under section 309(1)(a) read with section 309(1)(b) of the Criminal Procedure Act 51 of 1977 (“the CPA”).

[2] The appellant was charged with the crime of contravening the provisions of section 3 read with sections 1, 2, 50, 56(1), 56A, 57, 58, 59, 60 and 61 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape) read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended. It was alleged that the appellant ~~did~~ unlawfully and intentionally committed an act of sexual penetration with the complainant **M[...] S[...]** (a mentally challenged woman) by having sexual intercourse with her without her consent.[3] The appellant was arrested on the 18 October 2018 and remained incarcerated from this date until his conviction and sentence. The trial commenced on the 6 September 2019, the appellant pleaded not guilty and did not give a plea explanation. He was duly convicted as charged on all counts on the 29 January 2020 and sentenced to life imprisonment.

Condonation

[4] The appellant seeks condonation for the late filing of the appeal against his conviction and sentence. He indicates that on the day he was sentenced, he advised his then legal representative that he wished to lodge an appeal. His legal representative informed him that he would consult with him at the holding cells and obtain the necessary information for the purpose of an appeal. However, his legal representative did not arrive.

[5] On 31 January 2020 he was transferred to Klerksdorp Correctional Centre and was advised that all those who wanted to be assisted with an appeal would have a legal practitioner consult with them. The said legal practitioner was expected to come to the Correctional Centre on 26 February 2020. He was, however, transferred to the Rooigrond Correctional Centre on 26 February 2020 and never got a chance to consult with a legal practitioner. In January 2021 whilst still at Rooigrond Correctional Centre he was informed that officials from the local office of Legal Aid South Africa Mahikeng will be visiting the prisoners and

assisting them with any issues relating to appeals. He consulted with Mr Ntwasa from Legal Aid on 10 June 2021 who informed him that the matter would be transferred to Legal Aid Klerksdorp. On 14 June 2021 he telephonically contacted Legal Aid Klerksdorp and was informed that the transcribed records of his trial had been sent to the High Court, Mahikeng.

[6] Around July 2021 he was informed that his matter had been allocated to a Mr Babane of the Mahikeng local office. He was subsequently informed that Mr Babane was no longer working for the Mahikeng local office, and a new practitioner would be allocated to him. Around November 2022 he was advised that Mr Thuwe would be handling the appeal. He was able to consult with Mr Thuwe of Legal Aid Mahikeng on 14 February 2023.

[7] The appellant indicates that he relied on the advice of his legal representatives and believed that all that is necessary would be done for prosecution of his appeal. The delay was not due to fault on his part as he is incarcerated, and he does not have legal knowledge and the financial means to prosecute the appeal on his own.

[8] In **Uitenhage Transitional Local Council v South African Revenue Service**[1], the court held:

> *"…condonation is not to be had merely for the asking, a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'"*

[9] In **Mtshali NO and Others v Buffalo Conservation 97 (Pty) Ltd**[2] the court stated:

> *"The approach of this court to condonation in circumstances such as the present is well-known. In Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others & others [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) at para 11, Ponnan JA held that factors relevant to the discretion to grant or refuse condonation include 'the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice'. In Darries v Sheriff, Magistrate's Court, Wynberg & another* ***1998 (3) SA 34 (SCA) at 40H-41E,*** *these general considerations were fleshed out by Plewman JA when he stated:*

[1] 2004 (1) SA 292 (SCA) at para 6.

[2] (250/2017) [2017] ZASCA 127 at paras 37-38.

'Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the applicant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.'

[10] The respondent opposes the application for condonation on the basis that the appellant has not furnished a satisfactory and acceptable explanation for the delay and has failed to provide a detailed and accurate account of the causes of the delay. In particular, the respondent argues that during sentencing proceedings on the 29 January 2020 the court informed the appellant of his automatic right to appeal directly to the High Court and that he had 14 days from the date of sentence to launch such an appeal.

[11] The respondent argues that the appellant has brought his appeal three years after he was convicted and sentenced and over four years after he was granted leave to appeal. The respondent further contends that there are gaps in the explanation provided by the appellant and that it appears that no attempt was made by the appellant between February 2020 and January 2021 to consult legal counsel. Further that it is unclear when the appellant was informed that Mr Babane was no longer working for the Mahikeng local office.

[12] The appellants explanation is that the delays were caused in being transferred from the Klerksdorp Correctional Centre to the Rooigrond Correctional Centre, the unavailability of legal aid practitioners who promised to consult and did not, the resignation of these practitioners and the fact that he was incarcerated and did not have access to funds to appoint a legal representative of his own. The court is of the view that a proper case for condonation has been made out and condonation is accordingly granted.

Grounds of appeal

[13] The appellant appeals both his conviction and sentence. In

respect of his conviction, it is alleged that the trial court misdirected itself by finding that the state approved its case beyond reasonable doubt. In respect of

sentence, it is alleged that the trial court misdirected itself by imposing a sentence of life imprisonment.

Conviction

[14] The complainant M[…] S[…], was assessed by a clinical psychologist, Lungiesele Mokwena ("Mokwena"). Mokwena compiled a report and subsequently testified on behalf of the respondent. Her report dated 27 March 2019 was accepted as Exhibit "A". Mokwena concluded that the complainant is mentally disabled and has the mental capacity equivalent to that of a 1- to 4-year-old child. She lacks the mental ability to know what sexual intercourse or rape is and cannot appreciate the consequences thereof. She is not able to consent to sexual intercourse and lacks the mental ability to be in a consensual relationship. Her behaviour is inappropriate and childlike, and she is unlikely to understand and follow court procedures and is mentally unfit to testify in court. The appellant did not object to this report and elected not to cross examine Mokwena.

[15] A[…] S[…] ("S[…]") testified on behalf of the State (respondent) as a single witness. He resides in the same house with the complainant who is his niece. The appellant, who was his neighbour, was well known to him. During the day when he worked at the Mines the complainant stays with his brother and

his parents (her grandparents).

[16] On 15 October 2018 he knocked off early and arrived home at 15h30pm. On the way home he met his father on the street coming from their home. He entered his home through the lounge, intending to first stop at the kitchen to drop off his lunchbox. He had to pass the bedrooms before getting to the kitchen. He passed the first bedroom which was his parents' bedroom, the second bedroom was his. He was surprised to find the door open as he usually closes the door before leaving for work. As he passed his bedroom, he could hear people talking inside the room.

[17] He went back to his room. When he peeped through the door he noticed that the complainant was holding the bed in a bending forward position and her panty was lowered down to her feet with her skirt pulled up. The appellant was standing behind her with one of his hands on the back of her neck and having sexual intercourse with the complainant. When he saw this, he entered the bedroom and asked them what was happening. The appellant apologised for what he was doing and said that he was sorry. The appellant's jeans were lowered, and he was wearing a condom.

[18] He assaulted the appellant and then walked with him to his house, asking the appellant what he was doing, and if he did not know that the complainant was mentally challenged. When

he arrived at the appellant’s house, the appellant’s brother, Dibuda was there. When Dibuda opened the door, he told him what the appellant had done. Dibuda indicated that he did not want to get involved and that S[…] should take the appellant to the police.

[19] In cross examination, it was put to S[…] that he had fabricated the allegation of rape as he S[…] ~~had~~ wanted to sleep with his girlfriends at the appellants home and park his car there and the appellant refused to allow this.

[20] The doctor who examined the complainant and completed the J88 medical report form, Dr Daniel Sauer (“Sauer”) was unavailable to give evidence. The State called the investigating officer, Sergeant Petrus Viljoen (“Viljoen”) to give evidence. Viljoen testified about his efforts to trace the doctor and referred to a letter written by Sauer as to his unavailability to testify. The state applied in terms of section 3 of the Law of Evidence Amendment Act for the J88 to be admitted and this application was granted. The court *a quo* found that there was no prejudice to the appellant if the J88 was handed in, given that the appellant had exercised his right to remain silent, had not given a plea explanation and had denied having sexual intercourse with the complainant. The court *a quo* found that the evidence would simply have revealed whether the complainant was penetrated or not. The findings were consistent with anal penetration. The state thereafter closed its case and the appellant testified.

[21] The appellant’s version was that on 15 October 2018, around 13h00pm or past 13h00pm he had gone to the residence of the

complainant to borrow a wheelbarrow from the complainant’s grandfather. He knocked and the door was opened by the complainant. He asked the complainant

about the whereabouts of her grandfather, whilst standing inside the dining room. Before the complainant could respond S[…] entered the dining room, grabbed him by his shirt and started pulling him and hitting him with clenched fists. S[…] demanded to know what the appellant wanted at his parental place when he, the appellant had chased S[…] away from the appellant's parental place on Sunday. He was then accused of raping the complainant. He denied that S[…] was his friend and confirmed that he knew that the complainant "was not right" and was a mentally challenged person. He denied that he apologised to S[…] for having raped the complainant.

[22] The appellant alleged that on 13 October 2018, at around midnight S[…] arrived at his home with two ladies and a gentleman called Phule and wanted a place to sleep with the ladies. He refused this request and told S[…] to leave. S[…] was angered by this refusal and stated that it ~~is~~ was not finished and left. According to the appellant, S[…] had previously parked his vehicle at his home. S[…]'s vehicle was removed on Sunday, 14 October 2018, after he had chased S[…] away the night before. This he maintains was the reason S[…] was making the allegation of rape against him.

[23] The appellant called Dr David Leburu, a medical practitioner at the Tshepong Hospital who testified that he knew Dr Sauer, who

was an intern medical officer but who had returned to Germany. Dr Leburu was shown the J88 medical form and confirmed that the date of the report was the 15

October 2018 and that the person examined was the complainant M[…] S[…]. Dr Leburu confirmed the conclusion recorded on the J88 was anal penetration externally and concluded that this was consistent with “penetration like Dr Sauer says”.

[24] The appellant called his brother Frans Tsholo Patsa (“Patsa”) to testify on his behalf. Patsa testified that on ~~the~~ 15 October 2018 he finished work and arrived home at 10h00am and went to sleep. He was awakened by a noise at around 13h20pm coming from the appellant’s room, where he found S[…] kicking the appellant. He asked S[…] what the problem was but S[…] walked out. He confirmed that the previous day the appellant had asked him where he could borrow a wheelbarrow and he had suggested from the S[…]. According to Patsa he had been informed by the appellant of the incident pertaining to S[…] who wanted to sleep at his home with girls, but that he did not witness this himself. He indicated that this incident occurred two weeks prior to 15 October 2018 and not on the Saturday before the incident, as testified by the appellant. And further that the S[…]’s vehicle was still parked at their home at the time of the incident.

[25] It would be remiss of me if I do not raise a concern that I had in this appeal, although not pertinent to the disposal of the appeal.

The discrepancy between what Patsa indicated was his working hours on the day of the incident, that he ordinarily works from 08h00am to 15h00pm but that on the day of the incident had only worked for 2 hours and was home by

10h00am, the trial court found that Patsa (referred to by this court as Frans) knocks off at half past three.

The Judgment of the court *a quo*

[26] The court *a quo* considered that the appellant did not deny that he was at the residence of the complainant on 15 October 2018 but at a different time, that is at approximately 13h30pm. His intention was to borrow a wheelbarrow. This evidence was weighed against that of S[…] who alleged that he found the appellant having sexual intercourse with the complainant. The court *a quo* singled out the time when the incident occurred as alleged by S[…], that is 15h30pm, that alleged by the appellant as 13h30pm and the evidence of the appellants brother, Patsa who indicated that he works at the Grace Kgomo Clinic from 08h00am until 15h00pm. The court *a quo* indicated that the time mentioned by Patsa that this incident occurred at 15h30pm tallies with the evidence of S[…] as he finishes work at 15h00pm.

[27] The court *a quo* considered the version of the appellant who indicated that he was simply assaulted for no reason and that he is being falsely accused by S[…] for refusing to allow S[…] to sleep with his girlfriend or to park his car at the appellant's home. This version was considered against the evidence of a

single witness (S[…]). The court *a quo* indicated that it was satisfied with the evidence of S[…] who did not contradict himself in any material aspect or at all. This was further confirmed by the J88 form which

confirmed anal penetration. The court *a quo* ultimately recorded that it was satisfied that the State had succeeded in proving the guilt of the appellant beyond a reasonable doubt.

[28] The appellant alleges in respect of his conviction that the court *a quo* misdirected itself by finding that the state approved its case beyond reasonable doubt. It is trite that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and that he must be acquitted if it is reasonably possible that he might be innocent.[3] In **R v Difford**[4], it was held *"it is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal*."

[29] In **S v M**[5] it was held that the court must look at the totality of evidence as a whole to make a determination regarding the guilt or not of an accused person and in **S v Chabalala**[6] in assessing the evidence in a criminal trial, the court held that, the trial court must:

[3] 1999 (2) 79 (W) at para 82.

[4] 1937 AD 370 at 381. See too: S v V 2000 (1) SACR 8 453 (SCA) at para 3.

[5] 2006 (1) SACR 135 (SCA) at para 189.

[6] 2003 (1) SACR 134 (SCA).

"…weigh up all the elements which point 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 to exclude any reasonable doubt about accused's guilt."

Evidence of a single witness

[30] In **S v Stevens**[7] the court held as follows in respect of the approach to the evidence of a single witness:

"In terms of s 208 of the Criminal Procedure Act, an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (see, for example, S v Webber 1971 (3) SA 754 (A) at 758G-H). The correct approach to the application of this so-called 'cautionary rule' was set out by Diemont JA in S v Sauls and Others 1981 (3) SA 172 (A) at 180E-G as follows:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Webber. . .). 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

[7] (417/03) [2004] ZASCA 70; [2005] 1 All SA 1 (SCA) (2 September 2004) at para 17-20.

defects or contradictions in the 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 1932 OPD 79 at 80] 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 witnesses' evidence were well-founded" (per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[31] In **Michael Jantjies v S**[8], the Supreme Court of Appeal held that:

"…the court must assess the credibility and reliability of the complainant's evidence in light of all other evidence presented. It must weigh the potential risks associated with relying exclusively on the complainant's account as a single witness and seek corroborative evidence from other sources when available."

[32] It is clear that the court *a quo* considered the evidence in its entirety and treated the evidence of S[…] with caution, weighing such evidence and concluding that the witness did not contradict himself in any material respect or at all. The appellant's version on the other hand that he was standing in the dining room at the home of the complainant and was simply assaulted for no reason was correctly rejected by the court *a quo*. More so in view of the testimony of Patsa that the alleged incident had occurred two weeks before and not on 13 October 2018,

[8] 532/2022) [2024] ZASCA 3 (15 January 2024) at para16.

and on the fact that the appellant does not deny that he was at the home of the complainant, was aware that she is mentally challenged, and the medical evidence both from the J88 and doctor David Leburu who testified on behalf of the appellant which concluded that the complainant was anally penetrated.

[33] I therefore conclude that the version of the appellant was correctly rejected by the court *a quo* and that his guilt was established beyond a reasonable doubt. In sum, all of the pieces of the evidence from the various witnesses, when sewn together, create an impregnable mosaic of proof against the appellant.[9]

Sentence

[34] The court *a quo* imposed the prescribed sentence of life imprisonment. It is common cause that the provisions of s51 of the Criminal Law Amendment Act 105 of 1997 ('the CLAA') are applicable. Section 51 of the CLAA provides:

> *"51. Discretionary minimum sentences for certain serious offences–*
>
> *(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.*

[9] Tshiki v The State (358/2019) [2020] ZASCA 92 (18. August 2020), at para 67.

(2) …

(3) (a) 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 must thereupon impose such lesser sentence. . .”

[35] Part I of Schedule 2 of Act 105 of 1997 provides for offences including *inter alia*:

“Rape - (a)

……..

(b) where the victim -

(ii) is a physically disabled woman who due to her physical disability is rendered particularly vulnerable or

(iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act. 1973 (Act No. 18 of 1973) or …..”

This case, accordingly, falls squarely within s 51(1) read with Part I of Schedule 2 of Act 105 of 1997, as ~~the trial~~ court *a quo* correctly found.

[36] The appellant alleges that the court *a quo* misdirected itself by imposing a sentence of life imprisonment. The appellant testified that he was turning 40 years old, was single with no

children, unemployed

and achieved grade 11 at school. In response to the question ~~of~~ whether there were any circumstances that would justify a deviation from a sentence of life imprisonment, the appellant volunteered the following information. He lives with his siblings that no one amongst them was working and that he was trying to help all of them survive. Also, that he was 40 years old and wanted to get his life straight.

[37] The court *a quo* considered that even though the complainant was 18 years old at the time of the incident, according to Mokwena, the complainant is severely mentally diabled and has the mental capacity of a 1 to 4 year old child.

[38] The court *a quo* took into account the seriousness of the offence, the fact that rape is one of the most prevalent crimes in the country and that woman and children are raped almost daily if not hourly. The court *a quo* found that there were no substantial and compelling circumstances that would warrant deviating from the prescribed minimum sentence of life imprisonment.

[39] It is trite that *"a court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the*

trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses

sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".[10]

[40] In considering "substantial and compelling reasons", the Supreme Court of Appeal in Malgas[11] stated that:

"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.

[10] S v Malgas (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001) at para 12.

[11] S v Malgas at paras 9-12.

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.

The use of the epithets "substantial" and "compelling" cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely, by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration.

To the extent therefore that there are dicta in the previously decided cases that suggest that there are such factors which fall to be eliminated entirely either at the outset of the enquiry or at any subsequent stage (eg age or the absence of previous convictions), I consider them to be erroneous. Equally erroneous, so it seems to me, are dicta which suggest that for circumstances to qualify as substantial and compelling they must be "exceptional" in the sense of seldom encountered or rare. The frequency or infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not they are substantial and compelling.

Some of the courts which have had to deal with the problem have resorted to the processes of thought employed and the concepts developed by the courts in considering appeals against sentence. In my view such an approach is problematical and likely to lead to error in giving effect to the intention of the legislature. The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence."

[41] The sentence of life imprisonment imposed by the regional court is prescribed by the legislature as the court *a quo* found that the appellant raped the complainant who is a mentally ill woman. When setting out minimum sentencing for certain offences:

> "*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"[12].

[12] S v Malgas (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001) at para 8.

[42] In **S v Matyityi**[13] the Supreme Court of Appeal stated as follows:

> *"I turn now to the central issue in the appeal, namely whether, given the facts of this case, the trial court was correct in its conclusion that substantial and compelling circumstances as contemplated by that expression were indeed present. S v Malgas is where one must start. It, according to Navsa JA, is 'not only a good starting point but the principles stated therein are enduring and uncomplicated' (DPP KZN v Ngcobo). Malgas, which has since been followed in a long line of cases, set out how the minimum sentencing regime should be approached and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. To paraphrase from Malgas: The fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer 'business as usual'. A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed unless substantial and compelling circumstances were found to be present."*

[43] In **Maila v S**[14], the Supreme Court of Appeal stated that:

> *"Taking into account Jansen, Malgas, Matyityi, Vilakazi and a plethora of judgments which follow thereafter as well as regional and international protocols which bind South Africa to respond effectively to gender-based violence, courts should not shy away from imposing the ultimate sentence*

[13] (695/09) [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA) (30 September 2010)

at para 11.

[14] (429/2022) [2023] ZASCA 3 (23 January 2023) at paras 59-60.

in appropriate circumstances, such as in this case. With the onslaught of rape on children, destroying their lives forever, it cannot be 'business as usual'. Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. Reasons such as lack of physical injury, the inability of the perpetrator to control his sexual urges, the complainant (a child) was spared some of the horrors associated with oral rape, which amount to the acceptance of the real rape myth, the accused was drunk and fell asleep after the rape, the complainant accepted gifts (in this case, sweets) are an affront to what the victims of gender-based violence, in particular rape, endure short and long term. And perpetuate the abuse of women and children by courts. When the Legislature has dealt some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-based violence against women and children and promote what Thomas Stoddard calls 'culture shifting change'. The message must be clear and consistent that this onslaught will not be countenanced in any democratic society which prides itself with values of respect for the dignity and life of others, especially the most vulnerable in society: children. For these reasons, this Court is not at liberty to replace the sentence that the trial court imposed."

[44] In **S v Jansen**[15] the court stated it thus:

"Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society… The

[15] *S v Jansen* 1999 (2) SACR 368 (C) at 378G-379B.

community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution."

[45] The appellant was the complainant's neighbour and he was aware at all times that the complainant was a mentally disabled person. This crime is particularly heinous when one considers that the mental functioning of the complainant is that of a 1-4 year old child. This court is not persuaded that the court *a quo* erred in imposing the ultimate sentence of life imprisonment or otherwise stated, that this Court should deviate from the sentence imposed by the court *a quo*. The sentence is not disproportionate to the serious offence that the appellant committed and is justified in the circumstances.

Conclusion

[46] There was no misdirection on the part of the court *a quo*

on both conviction and sentence and the appeal accordingly stands to be dismissed.

Order

[47] In the result, the following order is made:

(i) Condonation for the late noting and prosecution of the appeal is granted.

(ii) The appeal against conviction and sentence is dismissed.

J L KHAN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

I agree.

A H PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

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