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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 429/2022

In the matter between:

SIMON MAILA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Maila v The State* (429/2022) [2023] ZASCA 3 (23 January 2023)

Coram: MOCUMIE, CARELSE and MOTHLE JJA and MJALI and SALIE AJJA

Heard: 14 November 2022

Delivered: 23 January 2023

Summary: Criminal law and procedure – evidence of a single child witness in a rape case – the double cautionary rule – contradictory evidence – admission of a warning statement obtained illegally – alibi defence – motive as a defence – sentence – whether there are substantial and compelling circumstances justifying a lesser sentence than life imprisonment.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Phatudi J and Ndlovane AJ, sitting as court of appeal):

The appeal against the conviction and sentence is dismissed.

JUDGMENT

Mocumie JA (Carelse and Mothle JJA and Mjoli and Salie AJJA concurring):

[1] Rape remains under-reported nationally, but there may be no rapes more hidden than those committed within families.¹ Sexual violence victims 'often experience a profound sense of shame, stigma and violation'.² These factors are compounded by attempts from family members of the victim or the perpetrator to influence the victims not to file charges or, if charges have been filed, to withdraw the case so that the families can resolve the problem amicably. Often the perpetrator offers to pay the medical costs for the victim's medical treatment, including psychological treatment, and even maintenance of the family in cases of indigent families.

[2] This appeal concerns the rape of a 9-year-old girl, who was raped in 2010, in her home, which she shared with her uncle (the appellant), his young son, her mother, her grandmother and her aunt. The rape occurred during the day when her mother, grandmother and aunt were not at home.

[3] The appellant was convicted by the Regional Court in the Regional Division of Limpopo, Lenyenye of the rape of his 9-year-old niece and sentenced to life imprisonment. In terms of s 309(1) of the Criminal Procedure Act 51 of 1977 (the

¹ See news24 article, <https://www.news24.com/health24/news/public-health/rape-within-families-remains-under-reported-20150821-2>.

² UNODC Handbook for the Judiciary on Effective Justice Responses to Gender-based Violence against Women and Girls at 25.

CPA), read with s 10 and s 43(2) of the Judicial Matters Amendment Act 42 of 2013 (JMA Act of 2013), once the regional court imposed the sentence of life imprisonment, the appellant was entitled to an automatic right of appeal to the full bench of the high court. The full bench of the Limpopo Division of the High Court, Polokwane (per Phatudi J and Ndlovane AJ) dismissed the appeal on both conviction and sentence. The appeal before us (in respect of both the conviction and sentence) is against the judgment of the full bench, with special leave of this Court.

[4] Both the trial court and full bench found that the appellant raped the complainant. Counsel for the appellant contended that the State did not prove its case beyond reasonable doubt; that the trial court misdirected itself materially by admitting a self-incriminating warning statement, which was purportedly made by the appellant before a police officer of the rank of a warrant officer; that the appellant was allegedly assaulted by the police and the complainant's mother to make that statement; and, furthermore, that the trial court did not take into account the discrepancies in the evidence of the complainant and also disregarded the alibi defence raised by the appellant.

[5] The issues for determination before this Court are whether the appellant was properly convicted on the evidence of a single witness; and whether the trial court correctly admitted the warning statement – which was illegally obtained – and in which he incriminated himself.

Background Facts

[6] The facts of this case are briefly as follows. On 6 December 2010, the complainant was home with her cousin, S[...], the appellant's young son (a year older than her). Both her mother and grandmother were not at home. Her mother had gone to another village to deliver documents. Her grandmother was working in the field. The appellant arrived home from another village. Upon his arrival, the appellant sent S[...] to fetch a newspaper for him from Mmakwena, Limpopo. In S[...]’s absence, the appellant raped the complainant twice. There were secretions or discharge from her vagina. Her vagina was ‘torn’, as she put it. She was treated by a medical doctor some four-to-six days after the rape.

[7] The complainant gave a detailed description of the sexual assault. She stated that once S[...] had left, the appellant called her to sit next to him on a sofa in the lounge where he had found her and S[...] earlier on. Thereafter, the appellant went to his bedroom when he called her to join him. Once inside his bedroom, the appellant instructed her to undress. Initially the complainant said that she undressed herself, but later on said that she refused to undress (a discrepancy which she was challenged on during cross-examination). The appellant removed her skirt and panty. Thereafter, he threw the complainant onto the bed and penetrated her the first time. He withdrew his penis. At that stage, she saw secretions or a discharge coming out of her vagina. He then penetrated her for the second time. Every time the appellant penetrated the complainant, she experienced pain. She pushed the appellant off her and ran to her grandmother's bedroom, where she put her clothes back on. When she exited the house, she met S[...].

[8] It was common cause that the complainant did not report the rape to anyone on the day in question, including S[...], who she met shortly after the incident. Four-to-six days later, her grandmother observed that the complainant was walking with discomfort, and advised her mother to inspect her vagina. Upon this inspection, the mother noticed that her vagina was 'torn' and she had some secretions or discharge, which (it is common knowledge) was indicative of an infection of some sort. When her mother asked her what had happened to her vagina, she told her that the appellant had raped her. The mother cried.

[9] The complainant testified that the reason that she did not report the incident to anyone on the same day of the rape, or immediately thereafter, was because the appellant had threatened to beat her up if she did so. Pertinently, the complainant's version (on the rape) was not challenged or disputed. The only material question put to her was that someone will be called to tell the court that she hurt herself or was hurt (presumably on her vagina) when she was playing with other children.

[10] To support the complainant's evidence, the State led the evidence of the complainant's mother. Corroborating the complainant, her mother testified that the complainant reported to her that she was raped by the appellant when she was not at home and on the day when she had gone to deliver documents at another village.

Further testifying that the complainant's vagina was 'torn' and she found a discharge in it. Nothing too significant transpired during cross-examination, save for the fact that prior to this incident, she and the appellant got along like brother and sister. But since this incident, they no longer got along. She (the complainant's mother) agreed, adding that it was because of what the appellant had done to her daughter that the relationship soured.

[11] The appellant's defence was one of an alibi. In his evidence-in-chief, he stated that on 6 December 2010 he was at home, but denied that he raped the complainant. Furthermore, the appellant said that the first time that he heard about the allegations of rape against him was when he appeared in court. This is simply not true, as it was common cause that when he was arrested on 15 December 2010, he was informed of the charge against him. He stated that he was severely assaulted by the complainant's mother and the police when he was arrested for the rape of the complainant. The police kicked him several times with booted feet, at the scene of the crime and at the police station. In cross-examination, he denied that he raped the complainant. He seemed to suggest that it was someone else, but did not say who or why he said so. He maintained that the complainant falsely implicated him, because she was influenced by her mother and grandmother. This, according to him, was motivated by the bad blood between the parties.

[12] It is the appellant's version that the acrimony between him and his sister was because he did not want her boyfriend, who was unemployed, to live with them. He supported his entire family. He proffered no explanation as to why his version – that he had been assaulted by the police and his sister, and that there was bad blood between him and his sister – was not put to them during cross-examination. He conceded that he did not do so. And that he did not inform his legal representative about this version. He had no explanation for his silence in the face of such damning evidence against him, save to state that he did not know how court processes work and was not aware that he could inform his legal representative during the trial. Yet, it is on record that his legal representative approached him from time to time and there were breaks in between the proceedings, during which he could have informed his legal representative that he did not agree with the statements put to the witnesses or informed the legal representative of what else to put to the witnesses,

which the witnesses had (according to him) omitted to mention in their evidence-in-chief.

[13] Contradicting himself, the appellant stated during cross-examination that: 'I have already explained that on 6 December 2010 when this thing happened I was home'. He also called a witness, who testified that on 7 December 2010 the appellant was at work. The two interacted until they knocked off duty.

[14] In this Court, counsel for the appellant submitted that this was a typographical error for which the transcribers were to blame. Instead, the record should reflect the following: 'I have already stated that on 6 December 2010 when this thing happened *I was not home*'. (Emphasis added.)

[15] The fallacy in this submission is that, when an appeal record is prepared, it is the responsibility of the appellant and his legal representative(s) to go through it thoroughly to ensure that the record is correct and to set out the grounds of appeal relied upon. None of the grounds of appeal refer to this alleged 'typo' in the judgment. Nonetheless, this argument was never raised during the hearing before the full bench. In any event, the complainant's evidence that on 6 December the appellant was at home when he raped her was not challenged during cross-examination.

[16] The full bench accepted the findings of the trial court. The full bench, like the trial court, admitted the warning statement that the appellant purportedly made to the police, in which he admitted that he raped the complainant. At the outset of the appeal hearing in this Court, counsel for the State, correctly, conceded that the statement was illegally obtained – that the trial court as well as the full bench were wrong to admit the statement as evidence. On the strength of this concession made on behalf of the State, that should be the end of the inquiry.

Ad Conviction

[17] The evidence in this case was based on the evidence of a single witness, the complainant. Apart from being a single witness to the act of rape, the complainant was a girl child, aged 9 years at the time of the incident. For many years, the

evidence of a child witness, particularly as a single witness, was treated with caution. This was because cases prior to the advent of the Constitution (which provides in s 9 for equality of all before the law) stated *inter alia* that a child witness could be manipulated to falsely implicate a particular person as the perpetrator (thereby substituting the accused person for the real perpetrator). To ensure that the evidence of a child witness can be relied upon as provided in s 208 of the CPA,³ this Court stated in *Woji v Santam Insurance Co Ltd*,⁴ that a court must be satisfied that their evidence is trustworthy. It noted factors which courts must take into account to come to the conclusion that the evidence is trustworthy, without creating a closed list. In this regard, the court held:

'Trustworthiness . . . depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. . . . His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has the "capacity to understand the questions put, and to frame and express intelligent answers."' (Emphasis added.)

[18] This Court has, since *Woji*, cautioned against what is now commonly known as the double cautionary rule.⁵ It has stated that the double cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single child witness's evidence, tested through (in most cases, rigorous) cross-examination, should be 'trustworthy'. This is dependent on whether the child witness could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers. Furthermore, the child witness's evidence must not have changed dramatically, the essence of their allegations should still stand. Once this is the case, a court is bound to accept the evidence as satisfactory in all respects; having considered it against that of an accused person. 'Satisfactory in all respects' should

³ Section 208 of the CPA provides: 'An accused may be convicted of any offence on the single evidence of any competent witness'.

⁴ *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028B-D. Note the caution courts are advised to take note of when they consider the reliability of a child witness in rape cases: *Woji* by M Bekink 'Defeating the anomaly of the cautionary rule and children's testimony – *S v Haupt* 2018 (1) SACR 12 (GP).

⁵ See *Vilakazi v S* [2016] ZASCA 103; 2016 (2) SACR 365 (SCA) and cases cited therein.

not mean the evidence line-by-line. But, in the overall scheme of things, accepting the discrepancies that may have crept in, the evidence can be relied upon to decide upon the guilt of an accused person. What this Court in *S v Hadebe*⁶ calls the necessity to step back a pace (after a detailed and critical examination of each and every component in the body of evidence), lest one may fail to see the wood for the trees.⁷ This position has been crystallised by the Legislature in s 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which provides that:

‘Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.’

[19] As indicated, in his defence the appellant raised an alibi that he was at work when the complainant was raped. However, this was not put to the witnesses. Nor was it stated in his plea explanation, as the plea tendered on his behalf by his counsel was that of a bare denial.

[20] It is trite that an accused person is entitled to raise any defence, including that of an alibi – that at the time of the commission of the crime, they were not at the scene of the crime but somewhere else. They can also lead evidence of a witness(es) to corroborate them on their whereabouts at the critical time. Nevertheless, it is trite that an accused person who raises the defence is under no duty (as opposed to that of the State) to prove his defence. If the defence is reasonably possibly true, they are entitled to be discharged and found not guilty.⁸

[21] The only responsibility an accused person bears with regards to their alibi defence is to raise the defence at the earliest opportunity. The reason is simple: to give the police and the prosecution the opportunity to investigate the defence and bring it to the attention of the court. In appropriate cases, in practice, the prosecution can even withdraw the charge should the alibi defence, after investigations, prove to be solid.

⁶ *S v Hadebe and Others* 1998 (1) SACR 422 (SCA).

⁷ *Ibid* at 426F-H.

⁸ *Tshiki v S* [2020] ZASCA 92 (SCA) with cases cited therein.

[22] The alibi defence has received the attention of our courts, in particular that of the Constitutional Court in *Thebus v S*,⁹ where it is stated:

‘. . . [A] *failure to disclose an alibi timeously* has consequences in the evaluation of the evidence as a whole [and] is consistent with the views expressed by Tindall JA in *R v Mashelele*. After stating that an adverse inference of guilt cannot be drawn from the failure to disclose an alibi timeously, Tindall JA goes on to say:

“But where the presiding Judge merely tells the jury that, as the accused did not disclose his explanation or the alibi at the preparatory examination, the prosecution has not had an opportunity of testing its truth and that therefore it may fairly be said that *the defence relied on has not the same weight or the same persuasive force as it would have had if it had been disclosed before and had not been met by evidence specially directed towards destroying the particular defence*, this does not constitute a misdirection.”¹⁰ (Emphasis added.)

[23] Having said that, and taking into consideration the concession by the State, undoubtedly, the admission of the warning statement by both courts was a material misdirection which would (ordinarily) have vitiated these proceedings, as it was not in the interests of justice or public interest for the warning statement to have been admitted. This means that the evidence of the State should have been considered without the warning statement.

[24] Without this evidence, the question that must be determined is whether the evidence of a single witness (in this case, a 9-year-old girl child) was satisfactory in all material respects. At the same time, whether or not the appellant’s version was reasonably probably true.

[25] Applying the *Woji* principles to this case, I find that the evidence of the complainant is trustworthy and, thus, (supported by *aliunde* evidence of the mother and medical doctor) satisfactory beyond reasonable doubt. Despite her young age, the complainant’s evidence was consistent and clear. She was able to respond to statements put to her and questions posed by the defence with certainty and clarity; intelligently and without difficulty. The cross-examination of the complainant was rigorous and to some extent unnecessary. Where she did not understand the

⁹ *Thebus and Another v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC).

¹⁰ *Ibid* para 63.

question, the question was repeated and she responded appropriately. During cross-examination, the complainant broke down in tears but she composed herself and remained adamant that the appellant was her rapist.

[26] The complainant was consistent to the extent that her evidence was supported by independent medical evidence set out in the J88 form as well as the report she made to her mother. The medical doctor who examined the complainant noted that there was penetration of the hymen. The appellant on his own (although not admitting that it was him) agreed that the complainant was raped and could not have fabricated a story of having being raped. The version that was put to the complainant that she hurt herself or was hurt (presumably) when she was playing with other children, was abandoned in the light of the complainant's clear evidence. She was observed by elderly people that she was walking with discomfort. The mother noted her vagina 'torn' and the medical doctor confirmed it. The complainant had an infection as a result of the act of penetration and she was given medication to treat the infection. The complainant only reported the rape to her mother when her mother examined her and asked her what had 'torn' her vagina. The complainant's mother and grandmother did not threaten her.

[27] As Milton states,¹¹ reluctance on the part of rape survivors, or some of them, to report the rape at the first opportunity is a firmly recognised fact. It is also generally accepted that with young children the reluctance is compounded. The complainant testified that the appellant threatened to beat her if she told anyone about the rape. She was not challenged with another version or shown to be lying through cross-examination. The explanation she gave was spontaneous and 'has a ring of truth' to it.

[28] As I indicated, after rigorous cross-examination, the complainant's evidence remained unshaken except for the two discrepancies mentioned above. It is evident that she did not report the rape on the same day, but it cannot be said that she was motivated to do so later by her mother and grandmother. A first report statement refers to the statement by a person to whom the victim of rape first reported the

¹¹ J R Milton *South African Criminal Law and Procedure* Vol II 3 ed at 461.

incident.¹² Authors and experts in the field of psychology and criminology state that '[e]ach victim reacts differently after a violent act. [They] may try to dismiss or ignore what happened and even normalise it by having contact with the perpetrator in the future. [They] may only decide to report once [they are] supported by a family member or when a friend confirms that this behaviour is indeed wrong. If the perpetrator is considered as a trustful person, victims may take years to link their situation to violence and recognise it as such. Sexual violence victims often experience a profound sense of shame, stigma and violation'.¹³ What is important is that the first report is made at the first opportunity available to the victim of sexual violence. In most cases, when they feel safe to do so, or they do not fear reprisals. Failure of the complainant to report an alleged rape as soon as possible cannot be 'the benchmark for determining whether or not a woman has been raped'.¹⁴

[29] This Court, in *Vilakazi v S*,¹⁵ stated:

' . . . [O]ur courts have not considered the lack of evidence of a voluntary complaint (also referred to as a "first report") to be fatal to a charge of rape. In this regard, Milton, in *South African Criminal Law and Procedure*, says:

"It is not mandatory that there should be evidence that the woman has complained that she has been raped. However, if she has, such [a] complaint is admitted in evidence *to show consistency and to negative a defence of consent, but not as proof of their contents nor to corroborate the complainant*. But it is not essential that consent should be in issue; the complainant may, for instance, be a girl of under 12 years of age.

The purpose of admitting evidence of a complaint is that it serves to rebut any suspicion that the woman has lied about being raped. The corollary is, of course, that should a woman not complain, or not complain timeously, the conclusion may be drawn that she is lying in her evidence that she was raped. The conclusion may well be unfair to the victim, since women may hesitate to complain of rape for reasons of shame, embarrassment or fear.'" (Emphasis added.)

[30] On its own, the complainant's evidence was satisfactory in all material respects. I am in agreement with the trial court that the discrepancies in her evidence

¹² See D T Zeffertt & A P Paizes *The South African law of evidence* 2 ed (2009) at 971.

¹³ UNODC Handbook for the Judiciary on Effective Justice Responses to Gender-based Violence against Women and Girls, at 25.

¹⁴ See *Monageng v S* [2008] ZASCA 129; [2009] 1 All SA 237 (SCA) para 24.

¹⁵ *Vilakazi v S* [2016] ZASCA 103; 2016 (2) SACR 365 (SCA) para 15.

on the two aspects relied upon are not a material misdirection. Whether the appellant undressed her or she undressed herself and whether, after the rape, she ran to her grandmother's bedroom or outside the house or her room are irrelevant and immaterial to whether she was indeed raped, when and by whom.

[31] I, therefore, undoubtedly find that the trial court was correct to accept the evidence of the complainant as satisfactory in all material respects. And, thus, the appellant was properly convicted on the evidence of a single witness.

[32] Coming to the appellant's version. It is trite that the proper approach to evidence is to look at the evidence holistically to determine whether the guilt of the accused has been proven beyond reasonable doubt.¹⁶ This approach was reaffirmed by this Court in *Tshiki v S*¹⁷ as follows:

'In a criminal trial, a court's approach in assessing evidence is to weigh up all the elements that point towards the guilt of the accused against all that which is indicative of their innocence taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'¹⁸

[33] There are improbabilities in the appellant's version in general and, in particular, his alibi. The version put to the complainant was stated as follows: 'if someone can tell you that the reason for you not walking properly is that you injured yourself while playing with other kids, what will you say?'. In reply, the complainant said: 'I say that's not true'. It was further put to the complainant that she was falsely implicating the appellant, because of some ill feeling between him and his sister (the complainant's mother) and her grandmother. The complainant denied that. Moreover, this motive was not even put to her mother or the social worker, who compiled the victim impact statement (VIS) in respect of the complainant, during cross-examination. There is no evidence that there was any other person at their home, other than the appellant and his son, Shaun, who was not present when the rape occurred. Crucially, the appellant did not disclose the alibi timeously for the

¹⁶ *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448.

¹⁷ *Tshiki v S* [2020] ZASCA 92 (SCA).

¹⁸ *Ibid* para 23.

police and the prosecution to follow it up in the three years before the trial commenced. Nor was this alibi taken up with any vigour by the defence during cross-examination of the mother and the social worker. The defence witness called could hardly corroborate him. Suffice to state that the appellant was indeed at work on 7 December 2010, although, he could not remember if it was a Monday or Tuesday.

[34] To bolster his alibi, the appellant took issue with the date on which the complainant alleged he had raped her as reflected in the J88 form: 7 December instead of 6 December as she alleged. It is correct that the medical doctor noted 7 December as reported to him. However, there is no evidence as to who provided the doctor with that information: the complainant or the police or the mother or whoever took her for medical examination. This ignores the fact that on the same J88 form the police noted that the incident occurred on 6 December 2010.

[35] Furthermore, the plea tendered on behalf of the appellant was one of a bare denial; not an alibi. It was pertinently put to the complainant that she hurt herself (presumably on her vagina) when she was playing with other children. It was never put to her or any of the witnesses that the incident that the complainant is alleged to have hurt herself when she was playing, did not occur on 6 December but 7 December. The only reasonable inference to draw is that the alibi is a made-up story. Additionally, that the appellant built his defence as the case proceeded to dovetail the evidence of the complainant in an attempt to take advantage of her young age and any confusion which may emerge and lead to contradictions, if viewed in isolation.

[36] The improbability of this alibi further lies in the following. The appellant was legally represented by an attorney from 30 December 2010. From 31 January 2013 until the end of the trial, he was represented by an advocate, on a brief by a firm of attorneys. The charge sheet, annexure A Case No RN 102/2010 alleged that 'on or about 06.12.2010'. When the charge was put to the appellant, on 1 March 2013, the State alleged that the rape took place on 6 December 2010. When the complainant was called to testify, she was asked to tell the court what happened on 6 December 2010. From the commencement of the trial, there was no objection from the defence on the date and day given by the complainant in her evidence-in-chief and on her

statement to the police. The only challenge raised with the complainant concerned the discrepancy on the date mentioned in her statement and the J88 form. The complainant responded by sticking to her version that it was on a Monday when the incident happened, it was the day her mother had gone to another village to deliver documents, which, according to the record, was 6 December 2010.

[37] The defence witness that was called to testify in this regard was not very impressive. Besides stating that on 7 December the appellant was at work, there was no substantiation. When he was cross-examined on the simple issue of what day it was on which the appellant was at work, he could hardly remember whether it was a Monday or a Tuesday. Having regard hereto, the trial court was correct to reject the appellant's version.

[38] This Court warned in *Thebus*¹⁹ that a court cannot attach much weight to an alibi that is raised later; in this case, three years later. This is because such an alibi is prone to fabrication, as evidenced in this case.

[39] As a result, the evidence, when viewed in its totality and excluding the warning statement of the appellant, proves the appellant's guilt beyond reasonable doubt and, accordingly, the trial court rightly convicted the appellant as charged. Consequently, the appeal against the conviction must fail.

Ad Sentence

[40] I now turn to the question of sentence. The trial court imposed the prescribed minimum sentence of life imprisonment. It is common cause that the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (Act 105 of 1997) are applicable. Section 51 of Act 105 of 1997 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.

. . .

¹⁹ *Thebus and Another v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) para 65.

(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. . .’

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

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

(a) . . .

(b) where the victim –

(i) is a person under the age of 18 years;

. . .

(iv) is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused.’²⁰

[42] 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 correctly found.

[43] It is trite that sentencing or punishment is pre-eminently a matter of discretion of the trial court. A court exercising appellate jurisdiction cannot, in the absence of a 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.

[44] Where, however, a 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.

[45] Nevertheless, even in the absence of a *material misdirection*, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It

²⁰ In terms of the Domestic Violence Act 116 of 1998, ‘domestic relationship’ means ‘a relationship between a complainant and a respondent in any of the following ways: . . . (d) they are family members related by consanguinity, affinity or adoption; . . . (f) they share or recently shared the same residence’.

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'.²¹

[46] The sentence imposed by the regional court is one that is prescribed by the legislature – that of life imprisonment – as it found that the appellant raped the complainant more than once and the complainant was under the age of 18 years. 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*'.²² (Emphasis added.)

[47] Counsel for the appellant submitted that the trial court did not take into account the appellant's personal circumstances. It also, according to counsel, did not take into account that this was not one of the 'brutal cases', as the complainant was not physically injured. Counsel was taken to task during the exchange with the members of the bench on this submission, but he could not take the argument further. Correctly so, because apart from this minimising the traumatic effects of rape on any victim and more so a child, it is well documented that 'irrespective of the presence of physical injuries or lack thereof, rape always causes its victims severe harm'.²³

[48] The Legislature has specifically amended the Criminal Law Amendment Act to provide categorically that the fact that a complainant was not injured during a rape cannot be considered as compelling or substantial. In terms of s 51(3)(aA) of Act 105 of 1997, which came into operation in December 2007:

'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:

....

(ii) an apparent lack of physical injury to the complainant;

²¹ *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

²² *Ibid* para 8.

²³ Amanda Spies 'Perpetuating Harm: Sentencing of Rape Offenders Under South African Law' (2016) (2) *SALJ* 389 at 399.

....

(iv) any relationship between the accused person and the complainant prior to the offence being committed.'

[49] In its judgment on sentence, the trial court took into account two reports: a victim impact statement (the VIS) in respect of the complainant to reflect her voice in proceedings that affect her directly; and a pre-sentence report in respect of the appellant. The State led the evidence of the social worker who compiled the VIS after interviewing the complainant, the appellant and their family members.²⁴ She stated that the appellant did not use a condom during the rape. As a result, the complainant suffered an infection which was not medically treated until she was examined some days later. That is why she walked with discomfort.

[50] Furthermore, the social worker stated that the rape had impacted negatively on the complainant to the extent that her school performance dropped. She was afraid of the appellant and feared to be left alone with him. She was withdrawn. As a result of counselling, the complainant was able to talk to the appellant and even asked him to buy her sweets. Both the complainant and her mother were deeply hurt, emotionally scarred, confused and felt a sense of hopelessness as a result of the rape. She finds it difficult to trust people. They were relieved only when the appellant was arrested and held in custody. Family members were taken through counselling to deal with this incident. It is not clear if this therapy is still ongoing.

[51] It must be noted that even without a psychological assessment, from reported cases of rape based on literature and evidence of experts in court, rape has a devastating impact on anyone, let alone a child. Although the complainant seemed to be coping better at school, individuals are impacted differently. The experts have noted certain features common in all rape cases: post-traumatic stress disorder (PTSD), including flashbacks, nightmares, severe anxiety, and uncontrollable thoughts. Depression, including prolonged sadness, feelings of hopelessness, unexplained crying, weight loss or gain, loss of energy or interest in activities previously enjoyed. Suicidal thoughts or attempts. Dissociation, including not being

²⁴ The prosecutor did well to request and obtain a Victim Impact Statement. A victim has its own interests which must be reflected to give them a voice in their own proceedings.

able to focus on work or on schoolwork, as well as not feeling present in everyday situations.²⁵

[52] The trial court had regard to the basic triad of sentencing and also warned itself to balance the various interests.²⁶ It took into account the appellant's personal circumstances. He was a first offender. He was gainfully employed. He had three children of his own. The children lived with their respective mothers, except for one, whose mother had passed on, but was staying with relatives and not with the appellant. It clearly took into account the best interests of the appellant's children with reference to sentencing an accused person who has minor children,²⁷ taking into account that the children have relatives and that the Department of Social Development can be approached to provide for the children under social grants and such facilities available to children in need of care.

[53] The trial court noted the following as aggravating circumstances: the appellant was the complainant's maternal uncle and in a position of trust – who is 'supposed to protect and love' the complainant and not abuse her. The trial court did not note specifically that the appellant took advantage of the presumably long absence of the mother and grandmother (as alluded to earlier on)²⁸ to abuse the complainant. A factor ordinarily present in rapes committed within families or by those close to the families to commit these violent crimes, knowing well that the victims are left on their own at particular times of the day or on certain days.

[54] The regional court took into account the seriousness of the offence and the prevalence of rape in the Napuno Magistrate's Court District (four cases on the court roll on 23 August 2013, when sentence was imposed).

[55] All these factors, in the view of the regional court, were not compelling and substantial enough to justify a lesser sentence.

²⁵ See footnote 1 above.

²⁶ The basic triad: the seriousness of the offence, the offender's personal circumstances and the interests of society, and, lately, a fourth element distinct from the three: the interests of the victim of the offence.

²⁷ As guided by the Constitutional Court in *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) paras 28-36.

²⁸ Paragraphs 2 and 10 above: The mother had gone to another village to deliver documents. The grandmother was working in the field.

[56] Having considered the reasons for sentence, taking into account the now well documented and known psychological impact of victims of rape, especially children, the regional magistrate did not commit any misdirection in imposing the prescribed sentence. Counsel could not point to any. Had the trial court found otherwise, it would have been to deviate for no sound reasons.²⁹

[57] Rape of women and children is rampant in South Africa. It has reached alarming proportions despite the heavy sentences which courts impose. South Africa has one of the highest rape statistics in the world, even higher than some countries at war. The country's annual police crime statistics confirms this: in 2019/2020, there were 42 289 rapes reported as well as 7 749 sexual assaults. This translates into about 115 rapes per day.³⁰

[58] The appellant infringed the right to dignity and the right to bodily and psychological integrity of the complainant, which any democratic society (such as South Africa) which espouses these rights, including gender equality, should not countenance for the future of its children, their safety and physical and mental health. In *S v Jansen*,³¹ 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 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.'

[59] Taking into account *Jansen*, *Malgas*, *Matyityi*, *Vilakazi* and a plethora of judgments which follow thereafter as well as regional and international protocols

²⁹ *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA).

³⁰ Amada Gouws 'Rape is endemic in South Africa. Why the ANC government keeps missing the mark' 9 August 2022, *Mail & Gaurdian*, <https://mg.co.za/opinion/2022-08-09-rape-is-endemic-in-south-africa-why-the-anc-government-keeps-missing-the-mark/>.

³¹ *S v Jansen* 1999 (2) SACR 368 (C) at 378G-379B.

which bind South Africa to respond effectively to gender-based violence, courts should not shy away from imposing the ultimate sentence in appropriate circumstances, such as in this case. With the onslaught of rape on children, destroying their lives forever, it cannot be 'business as usual'. Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. Reasons such as lack of physical injury, the inability of the perpetrator to control his sexual urges, the complainant (a child) was spared some of the horrors associated with oral rape, which amount to the acceptance of the real rape myth, the accused was drunk and fell asleep after the rape, the complainant accepted gifts (in this case, sweets) are an affront to what the victims of gender-based violence, in particular rape, endure short and long term. And perpetuate the abuse of women and children by courts. When the Legislature has dealt some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-based violence against women and children and promote what Thomas Stoddard calls 'culture shifting change'.³²

[60] 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. For an uncle, who is in the position of trust just as a father, to rape his own niece is unconscionable and deserves no other censure than that imposed by the trial court: life imprisonment. The sentence is not disproportionate to the serious offence that the appellant committed on a 9-year-old child, his niece. The sentence is, thus, justified in the circumstances.

[61] 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 clear discrepancy between the J88 form and the statements of the witnesses as well as their evidence-in-chief

³² Thomas B Stoddard 'Bleeding heart: Reflections on using the law to make social change' (1997) 72 *New York University LR* 967 at 971.

was just swept under the carpet. Linked to that, on one hand, the responsibility of the prosecutor(s) to address the defect, and, on the other hand, the responsibility of the court(s) to address the same when assessing evidence. Where there is a clear discrepancy between the dates mentioned in the charge sheet or indictment, the J88 form (as in this case) and the evidence relied upon by the State, the prosecutor(s) must address the defect at the relevant stages of the trial. Sections 86, 88 and 270 of the CPA make provision for this anomaly. This gives the defence the opportunity to address the anomaly adequately. And the trial court to include it in its assessment of the evidence to come to the conclusion of whether the accused person is guilty or not. The test is always the prejudice that the accused may suffer in his defence.

[62] In the result, the following order is granted:

The appeal against the conviction and sentence is dismissed.

B C MOCUMIE
JUDGE OF APPEAL

Appearances

For the appellant:	L M Manzini
Instructed by:	Legal Aid South Africa, Polokwane Legal Aid South Africa, Bloemfontein

For the respondent:	A R Sithada
Instructed by:	Director of Public Prosecutions, Polokwane Director of Public Prosecutions, Bloemfontein