IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

APPEAL NO: A46/2020

m

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

24 August 2020 _____
DATE SIGNATURE

Heard on: 17 August 2020
Judgment delivered on: 21 August 2020

In the appeal of:

MTHEMBU SIZWE NATION **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

VUMA AJ

INTRODUCTION

[1] The appellant was convicted by the regional court in Vosloorus on one count that he contravened the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007, read with the provisions of section 51 and Schedule 2 OF Part 1 of Criminal Law Amendment Act 105 of 1997 in that on or about 6 November 2016 in Vosloorus he committed an act of sexual penetration with the "complainant", an 8 year old girl, by inserting his penis into her vagina without her consent.

[2] The appellant was legally represented throughout his trial.

[3] The appellant pleaded not guilty to the above charge on 28 January 2019.

[4] On 24 May 2019 the appellant was convicted and on 15 July 2019 he was sentenced to life imprisonment. It was further ordered that:

4.1 in terms of section 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the appellant's name be listed in a national Register of Sex Offenders;

4.2 in terms of section 120(4)(a) of the Children's Act 38 of 2005, the appellant is declared unfit to work with children;

4.3 in terms of section 103(1)(g) of the Firearms Control Act 60 of 2000, the appellant is declared unfit to possess a firearm;

4.4 in terms of section 103(4) of the Firearms Control Act 60 of 2000 that a search and seizure of any firearms, permits and authorization the appellant may have in his possession be conducted.

[5] The appellant has an automatic leave to appeal in terms of section 309 of the Criminal Procedure Act 51 of 1977.

[6] The appellant now approaches this court on appeal against both his conviction and sentence.

POINT *IN LIMINE*

[7] The appellant was required to file Heads of Argument on 17 June 2020. No Heads of Argument were forthcoming and the respondent subsequently, on 2 July 2020, filed a Notice of intention to strike the matter off the roll. In opposing the aforesaid application and applying for condonation of the late filing of the appellant's Heads of Argument, counsel for the appellant stated in her opposing affidavit that she was not timeously

placed in possession of the record in this matter and only received same on 3 July 2020. On the basis of the reasons stated by the appellant in his opposing papers, the respondent stated that he would therefore not oppose the appellant's condonation application.

[8] In the result, the appellant's application for the condonation of the late filing of his Heads of Argument is granted.

APPELLANT'S GROUNDS OF APPEAL AD CONVICTION

[9] The appellant submits that the trial court erred in convicting him for the following reasons:

9.1 In finding that the state has proved its case beyond a reasonable doubt;

9.2 In finding that the contradictions in the state's case were not material;

9.3 In finding that the evidence of the complainant, a single witness, was satisfactory in every material respect;

9.4 In rejecting the accused's version as false;

9.5 In finding that the appellant's version was riddled with improbabilities and contradictions.

AD CONVICTION

[10] The following facts are common cause and not in dispute:

10.1 that on 6 November 2016 the complainant was 8 years of age;

10.2 that on 6 November 2016 the complainant and the appellant were both at the same time in the yard the appellant resides in;

10.3 that the appellant is also known as Alaska;

10.4 that complainant was taken to the police station on 6 November 2016 and thereafter to the Kids' clinic to be for a medical examination; and

10.5 that from the medical records, the *labia majora* indicates a bruise of 1cm x 1cm at 9o'clock and changes in the *vulva* area show there was friction over the area but no penetration beyond the hymen.

[11] The following admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 were made by the appellant:

11.1 that he (the appellant) is indeed referred to as "Alaska".

11.2 that he saw the complainant at some stage during the course of the day on which the incident occurred, namely 6 November 2016.

[12] A report by a medical practitioner, Dr Thabang Ndlela, which was handed in and read into record with the appellant's consent indicates the following:

12.1 that Dr Ndlela examined the complainant on 6 November 2016 at 15h45. Her date of birth is 15 December 2007.

12.2 that he made the following observations:

12.2.1 the complainant was wearing blue jeans with soiled stains;

12.2.2 the panty was taken off by force;

12.2.3 the clitoris, frenulum of clitoris, para-urethral folds, labia minora and posterior fourchette were red in colour. The urethral orifice was red in colour and painful. There were no injuries to the mons pubis.

12.2.4 the labia majora showed a bruise of 1cm x 1cm at 9 o'clock.

12.2.5 changes in the vulva area show there were frictions over the areas but no penetration beyond the hymen.

THE EVIDENCE

[13] To prove its case the state called two witnesses, namely **Mr V M** ("M") and the "complainant". M testified that he is the grandfather of the complainant who was born on 15 December 2007. On 6 November 2016 he was at home when he heard a knock on his door. Upon opening the door, he saw the complainant who was in the company of his neighbour named Sandile. He noticed that the blue jeans the complainant was wearing were "upside down" and that she was crying. He then enquired from Sandile

about what transpired. Sandile informed him that he saw the complainant coming from his neigbour's yard. They then left to the police station from where they were sent to the hospital where the complainant was examined and the doctor then informed him that she was raped.

[14] They then returned to their house and the complainant subsequently informed him that whilst playing at the park she was called by the appellant who is known as Alaska. He took her to his house and put her on his bed and undressed her. She asked to go and urinate and then ran away to Sandile's house. That was then that Sandile saw her.

[15] Alaska is known to him, that is M, as they were staying in the same neighbourhood. He has known the appellant for more than 15 years ever since he moved to that area. The appellant was Sandile's neighbour and there was only an empty stand between the property of the appellant and Sandile's house. He also knew Sandile but only by sight. M indicated that the appellant is Alaska who stayed 10 houses away from his house.

[16] The appellant was arrested with the help of M's neighbour who is a police officer. M gave him the name of the appellant and it appeared that he was known to the said police officer. M testified that prior the complainant was a playful child but has since the

incident stayed at home. She received counselling.

[17] **The complainant** was the second and last witness who testified through an intermediary and by way of a close circuit television. She testified that on the day of the incident they were coming back from church and she, Bokang and Bokang's siblings were sent by Bokang's grandfather to go fetch porridge at Bokang's father. They left the house and proceeded to the park where they found Busisiwe's siblings and other boys. They then sent Busisiwe's siblings to ask for peaches at one of the house houses and they continued to play in the park after they left.

[18] A man who was passing by and who was holding a phone waved at her. At that stage the man was not known to her. She was seated on top of a wood and then went to the man who was calling her. This man was on the phone and he said: '*Ntanga, there is a child here. I just want to go buy KFC for her'*. They walked and passed a corner where she saw girls sitting and a man washing a car and at another corner they entered a yard and from there went into this man's room. He then locked the door. Inside the room, he then proceeded to charge his phone. He asked her what her name was and how old she was and she told him that she was 8 years old. She then went to the door and unlocked it but it wouldn't open. The appellant said she must come back but she told him she wanted to leave.

[19] They then went to the corner of the room where a bed was and he instructed her to undress. She refused and he undressed her. Thereafter he took off the long pants he was wearing and his underwear. He pulled her pants down and tore her panties and moved it to the side. He then instructed her to open her legs. Whilst lying on the bed and after opening her legs, he inserted his penis into her vagina and 'bumped' on top of her whilst lying on top of her. She afterwards told him that she wants to urinate and he then threatened her that he would fetch the knife in the wardrobe. He told her to urinate in the corner of the room. She took her pants, panties and shoes and when he did not look at her, she opened the door and ran away. The man followed her.

[20] There were girls seated at the corner and also a man washing his car and two boys sitting at the neighbour's. She then called out saying the appellant was raping her. The girls sitting at the corner said: "*Sies Alaska*". She then ran to the man who was washing the car and he told her to get into the car which as when they left. The man asked her to tell him what had happened and she told him what Alaska did to her. He drove her home from where she was taken by her grandfather and her aunt to the Police Station where she made a statement. The state closed its case.

[21] **The appellant** took the witness and testified in his own defence. He denied that he raped the complainant and testified as follows:

21.1 That whilst busy locking the door of his place of residence, he saw the complainant knocking at the door of the main house. He approached her to

establish what she wanted and she told him that she was looking for Amor. Amor is niece. He asked her what her name is and where she was residing and she told him Seemi street.

21.2 He then asked her if she is not afraid she might be stolen or raped because he knows all of Amor's friends but she is not known to him. She then ran away and he followed her to see where she was heading to. He noticed that she was running towards a guy by the name of Sandile who was washing a car and they got into the car.

21.3 Sandile told him that that the complainant informed him that the appellant had raped her and that the police were on their way. At the time of his arrest he was no longer residing at his home because he had been receiving death threats. He denied that that the four ladies sitting by the tree called his name 'Alaska'. He testified that the complainant only screamed rape only because he scolded her because she was walking alone.

SUBMISSIONS ON BEHALF OF THE APPELLANT

[22] It is submitted on behalf of the appellant that the state failed to prove its case beyond a reasonable and thus the trail court erred in convicting the appellant as charged. It is disputed that the evidence proved beyond a reasonable doubt that the appellant took the complainant to his room and had sexual intercourse with her. The appellant argues that the state's evidence rests mainly on the evidence of the complainant who was 8 years old at the time of the incident, which in essence makes

her to be a child witness. Its submitted further that on this basis it is trite that when dealing with child witness cautionary rules have to be applied.

[23] The appellant further submits that the complainant's evidence is not satisfactory in the following respects:

23.1 If indeed there were people within the vicinity leading to the appellant's house who saw the complainant going to the yard with the appellant, them they ought to have seen the appellant and the complainant walking either into the yard or to the appellant's room.

23.2 Why, the complainant being only 8 years old, did not bleed from the sexual intercourse. The appellant casts doubt as to how the complainant got the keys from to unlock the room given her evidence that upon entering the room the appellant locked the door.

23.3 It is improbable that the appellant could have allowed the complainant to leave the room naked and to also allow her to leave with all her clothes. The complainant was never coerced by the appellant to follow him nor to leave her friends at the park without telling them where she was going.

23.4 The word rape as was screamed out by the complainant upon fleeing from the appellant's house is rather way too matured a vocabulary for an 8 year old child and that instead the appellant's version is more probable that he is the

one who brought it up on cautioning the complainant about the risk of either being kidnapped or raped.

23.5 The reaction of all the people allegedly within the vicinity of the appellant's house at the time the complainant was 'screaming rape' is rather strange, considering how even the said four ladies did not offer the complainant any help nor even confronted the appellant at all, other than to just saying 'sies Alaska'. Even worse, it is submitted, is the fact that no one knows what could have actually happened to the complainant at the time Sandile was driving her home. The appellant further raises questions regarding failure to testify at court by the alleged witnesses to the complainant's escape from the appellant's house, especially considering that the complainant mentioned some of them by name; and

23.6 The appellant's counsel decries the fact that the complainant narrated the incident to the grandfather only after they had reported the incident to the police.

23.7 The contradiction between the grandfather's evidence that the complainant was wearing jeans 'upside down' whereas she had testified that she was wearing black trousers. The appellant bemoans how an 8 year old could have forgotten what pants she was wearing on the day of the incident given

the fact that she could still vividly remember that she wore her clothes inside out on fleeing from the appellant.

[24] It is further submitted that in light of the fact the complainant was a single witness and that her evidence ought to be satisfactory in all material respects, that the complainant's evidence was not satisfactory and that the state has failed to prove the guilt of the appellant beyond a reasonable doubt.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

[25] The respondent submits that the state has proved its case beyond reasonable and that the appellant's appeal against both conviction and sentence lacks substance and therefore stands to be dismissed. It submits further that based on the common cause facts the only issue in dispute is whether the appellant took the complainant to his room where he committed an act of sexual penetration with the complainant by putting his penis into her vagina.

[26] The respondent submits that the evidence of the complainant is corroborated by the following:

26.1 **By M** her grandfather, that after the incident she was brought home by a person who was washing his car, later to be known as Sandile;

26.2 By M that when he saw the complainant when she was brought home by Sandile, her clothes were worn 'upside down'.

26.3 **By the appellant himself** who in his evidence confirmed that the complainant indeed screamed and said that they are raping her and that he saw her getting into the car with Sandile;

26.4 The appellant further testified that he indeed has a room in a yard next to Sandile's as indicated by the complainant;

26.5 **By Dr Ndlela**'s medical report which confirms that he panty was torn and that there was sexual penetration although the penetration did not go beyond the hymen.

[27] With regard to the appellant's version, the respondent submits that it is improbable that the complainant would have screamed rape just on the basis of the appellant scolding her for walking alone except if the appellant had indeed raped her as she had testified.

LEGAL PRINCIPLES AD CONVICTION

[28] Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 defines sexual penetration as:

"*any act which causes penetration to any extent whatsoever by-*

(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus

of another person; or

(c) *the genital organs of an animal, into or beyond the mouth of another person*".

[29] It is trite that a court of appeal will not interfere with or temper with the trial court's judgment or decision regarding either conviction or sentence unless the court of appeal finds that the trial court misdirected itself regarding its findings of fact or the law (See ***R v Dhlumayo and Another 1948 (2) SA 677 (A)***.

[30] In **S v Trainor 2003 (1) SACR 35 (SCA)**, it was held that:

"a conspectus of all the evidence was required. Evidence that was reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supported any of the evidence tendered. In considering whether evidence was reliable, the quality of that evidence of necessity had to be evaluated, as had to be corroborative evidence, if any. Evidence, of course, had to be evaluated against the onus on any particular issue or in respect of the case in its entirety."

[31] In the matter of ***S v ML 2016 (2) SACR 160 (SCA)***, the Court held the following at paragraph 7:

"*In the present case where the complainant is a very young child and the only witness implicating the appellant, her evidence must not only be treated with caution, but a degree of corroboration is required to reduce the danger of relying solely upon her evidence to convict the appellant.*"

[32] In the matter of ***S v Mahlangu and Another 2011(2) SACR 164 (SCA)***, the Court held the following at paragraph 21:

"[21] Section 208 of the Criminal Procedure Act 51 of 1977 provides that: 'An accused may be convicted of any offence on the single evidence of any competent witness.'

The court can base its finding on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration……."

[33] In ***S v Sauls and Others 1981 (3) SA 172 (A)*** it was held that '*caution in the context means applying common sense to assess whether the truth has been told and the evidence is trustworthy and that caution cannot displace common sense. Credibility must be assessed 'in light of all the evidence"*.

ANALYSIS AD CONVICTION

[34] Section 208 of the Criminal Procedure Act 51 of 1977 permits a conviction on the evidence of a single witness. Such evidence should however be substantially satisfactory in every material respect or there should be corroboration. Regarding the actual act of rape or sexual penetration, it is common cause that the complainant is a single witness.

[35] The nub of the appellant's grounds of appeal turns on the alleged inconsistences and contradictions between the state's witnesses and the improbabilities on the version of the complainant. The appellant particularly highlights the contradiction regarding the pants the complainant was wearing on the relevant date in that her grandfather testified that she was wearing jeans whereas she testified that she was wearing black trousers. It is common cause that Dr Dlela's report corroborates the grandfather's evidence in that it states that the complainant was wearing jeans inside out. However, in my view the kind of pants the complainant was wearing is neither here nor there nor material. What I find to be material is the fact that all the state witnesses corroborate one another regarding the fact that the complainant was wearing her pants inside out following her escape from the appellant's room.

[36] Other than the above-mentioned contradiction which is immaterial, I find no other contradiction nor inconsistencies as alleged on behalf of the appellant. It is common cause that Dr Dlela's medical report corroborates the complainant's evidence in all material and relevant respects, being *inter alia*, her state of mind, that she had been sexually penetrated and suffered injuries resultantly and that her panties were torn and of course the fact that she wore her 'jeans' inside out.

[37] The appellant on the other hand in her Heads of argument raises what she calls improbabilities which I find to be nothing more than a red herring. It is my view that the complainant cannot be faulted nor be expected to speculate or explain as to why the identified individuals who witnessed her fleeing from the appellant's place did not come

to her assistance, although the record shows that they did to a point where Sandile drove her to her home and even warning the appellant that the police were coming to arrest him. This is after the complainant had screamed rape against the appellant to the complainant's witnesses' hearing shot. Much of the improbabilities highlighted on behalf of the appellant do not take the appellant's case any further. For a subtle suggestion to even be made on behalf of the appellant that Sandile could have been the person who in fact raped her is preposterous to say the least.

[38] In my view, the appellant's version is not reasonably possibly true considering how impossible it is for any 8 year girl, as alleged by the appellant, who just on being warned of the possibility of her being raped and kidnapped by strangers, she flees from her alleged attacker's house, in broad day light, half naked and holding her clothes in her hands. It is my view that the trial court correctly rejected the appellant's version as false.

[39] On the other hand, the fact that an 8 year old girl flee from the home of the appellant half naked and screaming that the appellant was raping her, her whole account regarding how they met and what transpired inside the appellant's room and the consistency of her pointing out the appellant who was chasing after her upon her fleeing from his place all prove only one thing, namely, that the appellant is the person who raped the complainant. Furthermore, when regard is had to her evidence as corroborated by that of grandfather's, including Dr Dlela's medical findings, and

comparing same to the appellant's version, the one result one arrives at is that the complainant was a credible and reliable witness.

[40] It is on the basis of the above that I find no evidence of any misdirection on the part of the trial court's finding that the state has proved its case beyond a reasonable doubt and the appellant's subsequent conviction. From the record, I am satisfied that the trial court was aware of the dangers of accepting the evidence of a single witness who is also a child witness and that it accordingly applied the necessary cautionary rules. It is my further view that the trial court correctly considered the applicable legal principles, that is section 208 of the Criminal Procedure Act 51 of 1977 and the relevant decisions. The trial court properly cautioned itself regarding the assessment of the evidence of a young child and in weighing her evidence, thus satisfying itself that it could be accepted as trustworthy and reliable. As stated above, the complainant had provided an in-depth detail of the rape and her testimony remained consistent throughout, without contradictions which in itself, is corroboration.

[41] Given the conspectus of facts herein, I am satisfied that the trial court correctly convicted the appellant as charged. In the result, the appellant's version is highly improbable and all his grounds of appeal *ad* conviction stand to be dismissed.

AD SENTENCE

GROUNDS OF APPEAL AGAINST SENTENCE

[42] The appellant submits that the life sentence imposed by the trial court is shockingly inappropriate for the following reasons:

1. The appellant is a first offender;
2. The appellant is capable of rehabilitation;
3. The appellant has a minor child.

[43] The respondent submits that the sentence imposed by the trial court is neither severe nor inappropriate and the appeal against sentence should therefore be dismissed.

LEGAL PRINCIPLES ON SENTENCE

[44] The enquiry regarding the imposition of sentence on appeal is not whether the sentence is right or wrong but whether the court acted reasonably or properly in the exercise of its discretion, as was held in ***S v Obisi 2005 (2) SACR 350 (W)*** **para 8**.

[45] In addition to the above, a court of appeal will interfere with a sentence of a trial court in a matter where the sentence imposed was disturbingly inappropriate or when the court, when imposing the sentence, committed a misdirection (see ***S v Salzwedel and Another*** **1999 (2) SACR 685 (SCA) para 10**).

[46] Since ***S v Rabie* 1975 (4) SA 855 (A) at 865B-C**, the courts have consistently held that the discretion to impose a sentence is pre-eminently that of the court imposing the sentence and that an appeal court should be careful not to erode such a discretion. The test then is whether the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate (see ***Rabie*** above at 857D-F).

[47] In ***Salzwedel*** above at 591G the Supreme Court of Appeal held that an appeal court can only interfere with a sentence of a trial court in a case where the sentence is disturbingly inappropriate or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably.

[48] According to the triad formulated by the Appellate Division in ***S v Zinn 1969 (2) SA 537 (A) 537A-541B**,* the personal circumstances of the criminal and the interests of the community are the relevant factors determinative of an appropriate sentence.

[49] In ***S v Malgas* 2001 (1) SACR 469 (SCA) at para 25** the court held that '*all factors …..traditionally taken into account in sentencing* (*whether or not they diminish moral guilt) continue to play a role' when considering the question whether substantial and compelling circumstances as contemplated in section 51(3) exist* '.

[50] In ***S v Abrahams* 2002 (1) (6) SA 353 (SCA)**, the court held that '*some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust*'.

[51] In ***S v Vilakazi* 2012 (6) SA 353 (SCA),** Nugent JA held that "*One should guard against the danger of heaping 'excessive punishment…..in the despairing hope of that it will arrest the scourge".*

APPELLANT'S PERSONAL CIRCUMSTANCES

[52] The appellant's personal circumstances are the following:

a. He was 28 years old at the time of sentencing.

b. He is a single father of a then 3 year old.

c. He went to school until Grade 10.

d. He was gainfully employed at the time of his arrest as a contractor and he supported his child.

e. He abused drugs.

f. He suffers from epilepsy and at the time of sentencing, he was not receiving treatment for his illness.

g. He was in custody for almost a year and a half awaiting finalization of the trial.

h. He is a first offender.

SUBMISSIONS ON BEHALF OF THE APPELLANT

[53] It is submitted that this court sets aside the trial court's sentence and substitute it with a prison term of 20 years' imprisonment and or/ a just sentence, which will still be harsh and further punish the appellant and also serve as a deterrent. It further submitted that the appellant is a first offender and can still be rehabilitated.

ANALYSIS

[54] It is common cause that the imposition of sentence falls within the discretion of the trial court and the Court of appeal can only interfere when the discretion was not properly exercised.

[55] It is further common cause that the society is appalled by the unabated sexual assaults on women, no less on children, hence the introduction of the minimum sentence regime to, *inter alia*, address and reduce this scourge. The complainant in this matter was only 8 years old when she was sexually attacked by the appellant. Her grandfather's evidence is that she has since become withdrawn following her despicable ordeal. Her innocence has been abruptly taken away and there is nothing to mitigate

that. From Dr Dlela's medical report, the complainant's physical injuries are stated as follows:

'*1. The clitoris, frenulum of clitoris, para-urethral folds, labia minora and posterior fourchette were red in colour. The urethral orifice was red in colour and painful. There were no injuries to the mons pubis.*

2. The labia majora showed a bruise of 1cm x 1cm at 9 o'clock.

3. Changes in the vulva area show there were frictions over the areas but no penetration beyond the hymen'.

[56] It is common cause that the appellant was sentenced in terms of the minimum sentence regime which provides for a sentence of life imprisonment except where it is found that substantial and compelling circumstances exist. In imposing the sentence of life imprisonment, the trial court found that no substantial and compelling circumstances exist for it to deviate from imposing the sentence as it did.

[57] It is common cause that the seriousness of the offence which the appellant has been convicted of can never be overemphasized. It is further common cause that the appellant pleaded not guilty, protesting his innocence until the end. The appellant's personal circumstances speak for themselves as they appear in paragraph 50 above.

[58] From Dr Dlela's medical report I am of the view that comparatively speaking, the complainant's physical injuries were not severe and that this factor should by itself have swayed the trial court to reconsider the question relating to the existence of substantial and compelling circumstances in order to justify his deviation from imposing a sentence life imprisonment. I premise this view primarily on what the SCA held in ***Abrahams*** above that '*some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust*'.

[59] I am of the further view that the cumulative effect of the appellant's age at the time of the commission of the offence, him being a first offender and accordingly the minimal extent in respect of the physical injuries suffered by the complainant constitute substantial and compelling circumstances and that the trial court should have so found. It is for this reason that I find that the trial misdirected itself in finding that no substantial and compelling circumstances exist for it to impose a lesser sentence. In my view, the trial court failed to take into account what was held in ***Malgas*** above that '*all factors …..traditionally taken into account in sentencing* (*whether or not they diminish moral guilt) continue to play a role' when considering the question whether substantial and compelling circumstances as contemplated in section 51(3) exist* '.

[60] It appears that the trial court overemphasized the interests of the community or the seriousness of the offence and the deterrence aspect of a sentence at the expense of the rehabilitative aspect a sentence is supposed to carry. In my view, the facts in *casu*

do not justify the overemphasis of any of the factors relevant for sentencing purposes head and shoulders above the others, which is what the trial court did. In my further view, the imposition of life imprisonment sentence in *casu* appears to have negated to balance the main three factors relevant in sentencing, namely, the personal circumstances of an accused, the interests of the community and the offence in question. Given the accused's personal factors, it is my view that he can rehabilitated.

[61] It may well be so that one factor relating to the appellant's personal circumstances, as a stand-alone, does not constitute a substantial and compelling circumstances *per se*. However, I am of the view that 'the substantial and compelling circumstances' test should be approached by considering all the relevant facts cumulatively in order to achieve justice.

[62] As was cautioned against by Nugent JA in ***S v Vilakazi* 2012 (6) SA 353 (SCA),** "*One should guard against the danger of heaping 'excessive punishment…..in the despairing hope of that it will arrest the scourge".* The importance of assessing each case on its own peculiar facts and circumstances can never be overemphasized. This approach effectively calls for the importance of assessing each case on its own peculiar facts and circumstances.

[63] On the basis of the above I am of the view that the trial court's misdirection

vitiates its resultant shockingly inappropriate sentence which then calls for this court's interference. I am of the view that the substitute sentence by this court will still carry both the desired retributive and deterrent effect in it and satisfy the societal interest while also guarding against what has been cautioned against by Nugent JA (as he then was), being '*the danger of heaping 'excessive punishment…..in the despairing hope of that it will arrest the scourge'*.

[64] In the result I make the following order.

ORDER

1. The appeal on conviction does not succeed and is dismissed.
2. The appeal on sentence succeeds and is substituted with the following:

'*Order on Sentence*:

2.1 The accused is sentenced to 20 (twenty) years imprisonment backdated to 15 July 2019.

2.2 In terms of section 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the appellant's name be listed in a national Register of Sex Offenders;

2.3 In terms of section 120(4)(a) of the Children's Act 38 of 2005, the appellant is declared unfit to work with children;

2.4 In terms of section 103(1)(g) of the Firearms Control Act 60 of 2000, the appellant is declared unfit to possess a firearm'.

_____

L. VUMA
Acting Judge of the High Court

I agree

_____

F. DIPENNAAR
Judge of the High Court

Heard on: 17 August 2020
Judgment delivered on: 24 August 2020

Appearances:
For appellant: Ms. M. Leoto
Instructed by: Legal Aid Board, Johannesburg

For Respondent: Adv. M. Van Heerden
Instructed by: Office of the DPP (GLD, Johannesburg)