THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ✓

Date: ***21st January 2022*** Signature: _____

APPEAL CASE NO: A26/2021

COURT *A QUO* CASE NO: RC174/2017

DPP REF NO: 10/2/5/1-(2021/023)

DATE: 21st JANUARY 2022

In the matter between:

RASEHLAPA, DAVID Appellant

and

THE STATE Respondent

Coram: Adams J *et* Cowen AJ

Heard: 11 November 2021 – The matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 21 January 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 21 January 2021

Summary: Criminal Law – rape – appellant convicted on three counts of rape, read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 ('minimum sentence regime') – as a single witness, the complainant's testimony was

required to be satisfactory in all material respects, or there had to be adequate corroboration for it – did the State prove appellant's guilt beyond a reasonable doubt –

Factual findings of trial court – absent demonstrable, material misdirections and clearly erroneous findings, an appeal court is bound by the trial court's factual findings – appeal dismissed – conviction and sentence confirmed –

ORDER

On appeal from: The Westonaria Regional Court (Regional Magistrate R De Bruin sitting as Court of first instance):

(1) The appellant's appeal against his conviction is dismissed.

(2) The appellant's appeal against his sentence is dismissed.

(3) The appellant's conviction by the Westonaria Regional Court and his sentence be and are hereby confirmed.

JUDGMENT

Adams J (Cowen AJ concurring):

[1]. A disturbing and tragic tale – 'dark and grim' – of two members of the same Christian church, with the one member ironically accused of being a closet Satanist and the other a trusting young mother, who thought that she was about to be sacrificed in a satanic ritual when she found herself with the other member at his place of residence. This describes the story behind this appeal, which brings to mind the expression that 'one cannot make up this stuff'. In the end, so the one church member (the complainant) claims, she was not sacrificed and she did not have blood sucked from her and drunk by the Satanist, or boiled in a pot, as he had threatened to do. She was however raped three times on that fateful night, which, needless to say, left her devastated and traumatised beyond imagination.

[2]. The appeal by the appellant is against his conviction on three counts of rape by the Westonaria Regional Court, as well as against the effective sentence of life imprisonment imposed by the trial court. On 23 August 2018 the appellant, who was legally represented, was convicted on three charges of rape of the complainant, a 27-year-old female, during the late evening of Wednesday, 31 May 2017, into the early hours of Thursday, 1 June 2017, whilst holding her against her will. The rape charges on which the appellant was convicted was formulated as a contravention of sections of the Criminal Law Amendment Act (Sexual Offences and Related Matters), Act 32 of 2007 ('the Sexual Offences Act'), read with s 51 and schedule 2 of the Criminal Amendment Act, Act 105 of 1997. The 'minimum sentence regime' is therefore applicable.

[3]. For purposes of sentencing, the Court *a quo* took the three rape convictions together and on 19 September 2018 the appellant was sentenced to direct imprisonment for life.

[4]. In view of the appellant's sentence of imprisonment for life, the appeal is before us on the basis of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (introduced by s 10 of the Judicial Matters Amendment Act, Act 42 of 2013) in terms of which the appellant has an automatic right to appeal against both his conviction and sentence. The trial court has nevertheless granted the appellant leave to appeal, which, as I have already indicated, was not strictly necessary.

[5]. The appeal against conviction principally turns on the reliability of the evidence of the complainant and her witnesses as contrasted against the evidence of the appellant, who claimed, in a brief plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 ('the CPA'), that the sexual intercourse with the complainant was consensual. In essence, there are two mutually destructive versions of the material events which happened during the night and early morning in question – one being that of the State and the other being that of the defence.

[6]. The issue to be decided in this appeal is whether the trial court was correct in accepting the State's version and rejecting that of the appellant.

[7]. The complainant, who was originally from Mpumalanga, testified that she had only been in Gauteng for a mere two weeks when the incident in question

happened on the night of Wednesday, 31 May 2017. By then she had found employment in Johannesburg and was living on the premises of her Church in Zuurbekom. She had befriended the appellant, whom she had met at the church and he had agreed to accompany her, whenever it was necessary, from where she was dropped off by the taxi she boarded from work to her place of residence. The appellant agreed to do this because the complainant, who at the time worked a shift from 08:00 in the morning to 18:00 in the evening, arrived home from work late at night and after 20:00 in the evening, and the appellant was concerned on her behalf for the safety of the complainant.

[8]. On the evening of Wednesday, 31 May 2017, whilst the appellant was walking the complainant home, he offered to buy her something to eat, which they agreed to have at his place. The two of them walked to the local spaza shop, bought the food and then went to the appellant's house, where things, according to the complainant, took a sudden and unexpected turn – she never even got a chance to eat the food the complainant had so generously offered her.

[9]. Immediately after they arrived at his place and once they were inside, the appellant locked the door and when the complainant asked him why he did that, his response was in essence to the effect that she was way too trusting of people generally and in particular of him. Her evidence furthermore was as follows:

'I then became surprised, your worship, after hearing those words. And he further told me that today is the 31st and that it is the day for [him] to sacrifice. "I am a Satanist; I am practising Satanism".'

[10]. Needless to say, the appellant became scared – she was terrified. She expressed surprise to the appellant and enquired from him as to how that was even possible since they both were attending the same Christian church. His response was simply that, although he was attending church with her, he was a Satanist at heart. The complainant testified that she thereafter 'begged' him to let her go home, and explained to him that her family members would be worried about the fact that she had failed to arrive home from work. Her evidence was that she thereafter started crying and he warned her not to scream as that would be her last scream.

[11]. When she tried to phone her family members, they struggled and he took her cell phone from her. He also threatened to electrocute her with an electric

cable, which he had disconnected from the plug. Additionally, he warmed up a fork on a stove and indicated to her that he would stab her on the head with the heated fork. He did however not carry out any of his threats, but uttered the following words ostensibly to himself: ‘your mind is smarter than your face’, and thereafter changed into a black top, put on a black beret and put on a black pair of shoes. This he did, so the complainant testified, because that was the day on which, according to his Satanic beliefs, he had to make a sacrifice by drinking human blood.

[12]. All this time, so the complainant testified, she kept begging the appellant to let her go home, but he would have none of that. ‘The more I kept on begging him, the more I am delaying him to perform his rituals’, is how the appellant reacted, according to the complainant, to her request to be released. At some stage during all of the drama, the appellant advised her to cooperate with him and to become his sex slave. If not, so the appellant threatened, he would stab her with an iron bar and he graphically explained to her that with that iron bar he would pierce her shoulder from her front right through to her back, and he would leave the iron bar lodged in her body.

[13]. At some point, the complainant heard footsteps outside the house, and thought of screaming for help. She was however warned not to even think about drawing attention to herself as he would stab her so fast that she would already be stabbed to death by the time the person came to her assistance. She heeded the warning and, fearing for her life, she did not scream.

[14]. The appellant thereafter repeated to her that he was going to make her his sex slave, whilst pushing her onto the bed. He then undressed her and raped her by inserting his penis into her vagina without using a condom. She tried to resist, but he forced her down and proceeded to rape her. During this ordeal, she was crying and he told her to stop crying. Shortly thereafter, he raped her for a second time. On both occasions, the appellant ejaculated outside of her and on top of the front part of her body.

[15]. After the second rape, so the complainant testified, the appellant tried calming her down as she was still crying uncontrollably. He then apologised to her for what he had done. He explained to her that he did not want to lose her as

he could see that there were a number of other guys at church ‘eyeing’ her. He loved her, so the appellant proclaimed. He sought to show the appellant that he could do card tricks and showed her a personal photo album. And then he raped her for a third time. This time he used a condom.

[16]. Before the third rape, the complainant was however able to convince the appellant to give her back her phone after she explained to him that she wanted to check her *Facebook* messages. She then used the opportunity to call her mother in Mpumalanga and, because she did not want to unnecessarily alarm her mother, she only asked her not to forget to withdraw money for her children’s school transport. By then it was about 01:00 in the morning. After the call to her mother, the complainant also messaged her sister, explaining her ordeal to her. The complainant testified that she explained to her sister that the appellant had kidnapped her and was keeping her at his place against her will. He was threatening to kill her, so she told her sister, and that he had informed her that he was a Satanist. She also asked her sister to please look after her kids if she was not to make it out alive.

[17]. At more or less the same time, the complainant also received a call from her sister and the cell phone of a friend of hers: she answered the latter at the appellant’s insistence. She and her sister in fact lived with this friend at the time on the Church premises. The appellant assured the friend that she was alright and that she would see them the following morning. She did this, so the complainant explained, because she was scared and did not want to alert the appellant to the fact that she had sent messages, calling for help. She did however explain this in a subsequent message to her sister in which she told her that she was in fact not ok, but was unable to talk. The fact that the complainant told her friend on the phone that she was ok probably gave the appellant a sense of confidence and this led to the third rape.

[18]. During the third rape, there was a knock at the gate and the complainant said to the appellant that that may very well be her family members coming to look for her. By then it was the early hours of Thursday, 1 June 2017. As it turned out, the people knocking at the gate were her sister and two of her friends, accompanied by two security guards. They then knocked at the door to the appellant’s house.

[19]. The appellant then got off the complainant. Realising that these people were being persistent, the appellant went outside, armed with an iron rod, telling the complainant to get in a wardrobe. When he returned to the room, however, so the complainant testified, she made a run for it and escaped with all of her clothes and other belongings. She ran out of the house, whilst he was re-entering. She found a security guard outside, as well as her sister and her friend, with whom she was staying at the time, and the male friend. She then left the appellant's house in the security van. The appellant also left in the security van, sitting at the back. They went to the church, where she explained to the security guards what had happened to her.

[20]. During her evidence, the complainant testified that during her attack, she did not sustain any physical injuries, but, as she puts it '[she] was deeply hurt. Spiritually.'

[21]. At about 05:00, the police were called and the appellant was arrested. She accompanied the police to the appellant's residence and a used condom was retrieved. After having furnished her statement at the Bekkersdal Police Station, the complainant was taken to the Leratong Hospital, where she was examined and assessed by a professional nurse.

[22]. The second witness called on behalf of the State was one of the security guards, who had arrived at the appellant's place with the complainant's sister and the friends. As rightly pointed out by the learned Regional Magistrate, this witness was not a very good witness. His evidence contradicted most of what was testified to by the complainant regarding the circumstances when she was located. So, for example, his evidence was that they had gone into the appellant's house and retrieved the complainant, which was in direct contradiction to the evidence of the complainant and the other state witnesses who were on the scene, who both testified that the complainant ran out of the house by herself.

[23]. Most of the evidence of the security guard was disregarded, in my view rightly so, by the Regional Court. The Regional Court noted that the witness was trembling when testifying and appeared to be seeking to substitute the evidence of his colleague, who was no longer employed by the Church and could not be located to testify. It was his colleague, rather than him, who had played the more

active role on the night in question. This witness did however afford corroboration for that part of the State's version which relates to the fact that the complainant had sent to her sister a message, claiming that she was being held hostage by the appellant, which is what caused all of them to go looking for the complainant.

[24]. The complainant's sister was the next witness for the State. She corroborated the version of the complainant in material respects.

[25]. She testified that on the night of Wednesday, 31 May 2017, she went to bed as usual, only to be awoken in the early hours of Thursday, 1 June 2017, to find messages sent to her phone by her sister, which were to the effect that, should something happen to her (the complainant), she (the sister) should know that she had been kidnapped by the complainant, that her life was under threat and that she did not want people to know what had happened to her. The witness confirmed that, after reading the messages from her sister, she, together with her friend and another male person, went looking for the complainant. They then came across two security guards, who were busy patrolling the church premises, and they advised them of the fact that the complainant was in trouble. Thereafter, they, accompanied by the two security officers, went to the place of the appellant, where, as explained by the complainant, they found her in a state. The witness confirmed that the complainant came running out of the house after the appellant went back in after he had come out to speak to them, whilst brandishing an iron rod. The witness described this part of the story as follows:

'Then [the complainant] came out of that house, running. Her hair was mixed up. She was in possession of her shoes, her bag and her jacket. She got out of that room crying. [She was clutching all of that stuff to her chest]'.

[26]. They then all left with the complainant, so the witness testified, in the vehicle of the security guards, with the appellant, who also came along. Later on, so the witness testified, the South African Police were summoned, who then proceeded to arrest the appellant. The complainant's sister's evidence was materially unchallenged.

[27]. The next witness called by the State was the male friend who accompanied the complainant's sister and the friend, when they went looking for the complainant after the sister had received the SOS messages. This witness corroborated the version of the complainant's sister in material respects. He

confirmed that, in the early hours of Thursday, 1 June 2017, he received a call from the complainant's sister, advising him that the complainant was in trouble. He then went to the sister's house, where she showed him the messages which she had received from the complainant. Incidentally, this witness subsequently became the owner of this phone after a swop deal with the complainant's sister. His evidence was that the messages could no longer be displayed on the phone as he had deleted them by mistake after he acquired the phone from the complainant's sister. The messages were also written in Zulu, so the witness explained, which is another reason why he deleted them from his phone – he is not fluent in Zulu, and was unable to produce them at the time of the hearing of the matter in the Regional Court.

[28]. The evidence of the witness was of great assistance to the court *a quo*. Importantly, his testimony, which in the main was not challenged by the appellant, confirms the events which occurred immediately after the complainant had been raped. The extract from the record relating to the relevant portion of the evidence of the witness, which, I emphasise, was undisputed, reads thus;

'He then asked as to what were we wanting. That security officer then responded by saying we want that girl whom you have kidnapped inside there. He first pretended to be surprised, but from there he walked back into the house. When they both came back or walked out, I am talking about him and [the complainant], she then got out running. She got out there, running and crying, she was in possession of some stuff. I was left with that security officer and we asked [the appellant] to get into the car so that he could go with us. We then walked to the gate and from there went to the offices. When we got to the offices, then police were phoned.'

[29]. The last State witness was the arresting officer, who in a nutshell confirmed the arrest of the appellant in the early hours of Thursday, 1 June 2017, after the complainant reported to him that she had been raped by the appellant. The extract from the appeal record, which relates to the important part of the evidence of the Police Sergeant, which was uncontested and unchallenged by the appellant, reads as follows:

'We got to that church, inside the premises of that church next to the gate. We found security members of the church and some other church members there. There was a young lady who was alleging that she was raped. She alleged that she was raped by the accused [before court] and at that stage the accused was standing next to us.

She alleged that she was raped in a house which is situated there in Zuurbekom, that is where the accused is staying, according to her. That is when we took the accused and arrested him and placed him inside our motor vehicle.'

[30]. That then brings me to the version of the appellant, whose evidence was that, at the relevant time, he 'had a love relationship' with the complainant, who he had met for the very first time about two weeks or so before the 31st of May 2017. His evidence was that he had 'proposed love to her' on 19 May 2017, which proposal she accepted gleefully the very next day, whereafter they met almost on a daily basis. He would collect her from the point where the taxi dropped her off after her trip from work in Johannesburg. They would then go and buy some food ('bunny chows'), which they would enjoy together, whereafter the appellant would walk her back to her place on the church premises.

[31]. This was also the case, according to the appellant, on the night of 31 May 2017. He collected the complainant at about 20:00 from the taxi drop-off point. It was already dark and they walked together to his place of residence to get some money so that the appellant could go and buy the complainant food as had become their daily routine. Thereafter they went to the shop, bought food and returned to his place, to enjoy the food and to spent some time together as they had agreed, according to the appellant, the previous day. They arrived at his place at about 22:00, and the appellant started preparing the meal.

[32]. The appellant confirmed that he had locked his room and his explanation for doing so was simply that the door to his room opened into a communal kitchen, which he was sharing with other occupants. Locking the door, I understand, was to give them some privacy.

[33]. After they had eaten, the evidence of the appellant was that they started kissing. One thing led to another and soon, so the evidence of the appellant went, they were engaged in 'passionate' sexual intercourse without the use of a condom as he had none. The appellant did however explain that the complainant insisted that he was not to impregnate her. After they were done, they were just chatting, and shortly thereafter they engaged in sexual intercourse for a second time. After the second round, so the appellant testified, the two of them randomly decided on a game of playing cards.

[34]. After the card game, the appellant took out a box containing some personal photographs and they looked at them together – all lovey-dovey. Whilst going through the box of photographs, the appellant stumbled onto a condom, which, so the appellant testified, was the trigger for the next round of passionate sexual intercourse.

[35]. Thereafter, they sat chatting on the bed. It was during this chat, so the appellant stated, that things went wrong, especially after he mentioned to the complainant that he was getting married to his fiancé during December of that year. This infuriated the complainant and she accused him of using her for sex and as a sex slave. This, so the evidence of the appellant went, was the reason for the complainant making up the whole story about him raping her. She felt humiliated and was intent on getting back at him.

[36]. Under cross-examination, the appellant gave a further explanation as to why, according to him, the complainant fabricated her story and made the serious accusations of rape against him. The extract from the record relating to that part of his testimony under cross-examination reads as follows:

'*Accused*: Your worship, when I look at the fact that she made mention of the fact that I am a Satanist, she chose that route, your worship, or idea, because she knew that at the Church they are totally against Satanism and that will hit me hard. The fact that I have raped her, it only came later on her mind, after she had spoken about that with the security guard.

… … …

Prosecutor: Did you hear when the witnesses said that … … from your place they all left, including yourself, you all left with the bakkie … … to the guardroom, I think where you were ultimately arrested?

Accused: Yes.

Prosecutor: Now, if all of you were together, do you not think if this thing was planned, somehow it will (indistinct), other people would have heard it, including yourself?

Accused: Your worship, when we left my place, myself [and two other persons] were at the back of the bakkie and the two security guards were in the front with [the complainant]. I even explained to the court that when we left my place we went to the elder's house, seemingly they were going to lodge a complaint that I kidnapped [the complainant].'

[37]. In sum, the appellant denied that he raped the complainant at his place. He admitted that they had sexual intercourse on three occasions during that fateful night, but claimed that it was consensual. His explanation for the fact that she stormed out of his place when help arrived, is that she became extremely

agitated by the fact that, after their passionate lovemaking, he had nonchalantly announced to her that he was getting married to another woman later that year. He proffers no explanation, let alone an acceptable one, for the fact that, by all accounts, the appellant had sent messages to her sister during the course of the night to the effect that she had been kidnapped by him and that she felt in mortal danger.

[38]. The evidence on behalf of the State I have summarised above. The question is whether this evidence is sufficient to prove the guilt of the appellant beyond a reasonable doubt. Put another way, the question is whether, at the end of the trial, the evidence as a whole was sufficient to ground the conviction of the appellant.

[39]. To determine whether the state had proved the guilt of the appellant beyond a reasonable doubt, the whole mosaic of evidence must be considered. This evidence as a whole should be considered in deciding whether the version of the appellant that he had consensual sexual intercourse with the complainant in his room, is reasonably possibly true.

[40]. It is trite that the State bears the onus of establishing the guilt of the appellant beyond a reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (*R v Difford*[1]). In *S v Van der Meyden*[2], which was adopted and affirmed by the SCA in *S v Van Aswegen*[3], it was reiterated that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true.

[41]. In the context of this matter, the version of the appellant fails to account for the evidence of the events which occurred during that night in question – the SOS messages sent by the appellant to her sister, whilst or shortly after she had

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[1] *R v Difford* 1937 AD 370 at 373, 383

[2] *S v Van der Meyden* 1999 (2) SA 79 (W)

[3] *S v Van Aswegen,* 2001 (2) SACR 97 (SCA)

been engaged in passionate sexual intercourse with the appellant, according to him; the fact that, in response to those messages, people came looking for the complainant in the dead of night; and that very shortly after she was rescued, the complainant told the security guards and the police that she had been raped three times by the appellant.

[42]. Additionally, the claim by appellant that the complainant fabricated and concocted a rape story, in the hour or so after she was rescued by the security guards, prompted by a security guard, is far-fetched.

[43]. Section 208 of the CPA provides that a Court is entitled to convict an accused person on the evidence of a single witness. Although the complainant was a single witness in respect of the rape incidents, the court *a quo* evaluated her evidence with caution in accordance with well-established judicial practice regarding single witnesses. See: *S v Stevens*[4]. I am of the view that to the extent that the appellant was convicted upon the evidence of a single witness, it was satisfactory in all material respects. Indeed, it was corroborated in important ways, specifically regarding her rescue, what led to it and the photographic evidence.

[44]. Section 60 of the Sexual Offences Act provides: '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.' While the Magistrate was alive to possibilities of fabrication on the part of both appellant and complainant, this provision was not breached. Nevertheless, the Court *a quo* correctly found that the complainant's version is substantially corroborated by independent evidence, notably the evidence of her sister and the sister's friend. I have quoted an extract from the friend's evidence *supra*. That evidence was not disputed by the appellant. The complainant, when she got the opportunity, hurried out of the appellant's place and shortly thereafter told people that she had been raped. In my view, this is not the natural behaviour of a young woman who had consensual sexual intercourse. In any event, what are the chances of the complainant making up a story, as claimed by the appellant, as elaborate,

[4] *S v Stevens* 2004 JDR 0505 (SCA) at 17

complicated and dramatic as the version she gave? As I indicated in the introduction and as the cliché goes, a story like that of the complainant one just cannot make up – a Christian church member (the keyboard player no less), turning out to be a practising Satanist, with a scar across his back and who reads Satanic literature, who was preparing to perform his belief's ritual.

[45]. I am of the view that the court *a quo*, after considering all the probabilities and improbabilities and particularly the fact that there is no onus on the appellant to convince the court of the truth of his explanation, correctly held that the evidence of the appellant was not reasonably possibly true and was false beyond a reasonable doubt. The learned Regional Magistrate's finding that sufficient corroboration existed for the evidence of the complainant cannot be faulted. The improbability or implausibility of the appellant's version, particularly the fact that on his version the facts as testified to by the other state witnesses is not accounted for, is starkly apparent, and the motive of the appellant contended for is far-fetched. The version of the appellant also does not explain any of the events and occurrences playing themselves out outside of the confines of his story of all being well in the land between him and the complainant on the night.

[46]. In her written heads of argument, Ms Nel, who appeared on behalf of the appellant, submitted that there are a number of discrepancies and material contradictions in the State's case, which were not considered by the trial court in its assessment of the evidence. These include the fact that complainant mentioned and referred to certain important occurrences for the first time during her cross-examination. Those included: the fact that the appellant had shown her a collection of his personal photographs and in fact discussed them with her; the fact that the appellant had explained to her that he was able to perform magic supposedly because of his Satanic powers, which he demonstrated with the assistance of playing cards; and that she had telephonically spoken to her sister's friend and told her that she was ok.

[47]. Ms Nel submitted that these facts and details were purposefully omitted by the complainant in her evidence-in-chief in order to fit in with her allegations of non-consensual sexual intercourse.

[48]. There were also other discrepancies, so it was submitted on behalf of the

appellant, notably the contradictory versions given by the complainant and the other State witnesses relating to the SOS messages transmitted by the complainant. On the basis of these discrepancies in the State's case, we were urged to find that the version of the complainant should have been rejected and that that of the appellant is reasonably possibly true, which entitled him to an acquittal.

[49]. I am not persuaded by these submissions. There are almost always some contradictions to be found in and between the evidence of state witnesses. If the inconsistencies and differences which exist are of a relatively minor nature, which, in my view, is the case *in casu*, and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction, if anything the contradictions points away from dishonesty or any type of conspiracy between the witnesses. See: *S v Mkohle*[5]. Moreover, the Regional Court was alive to the various discrepancies, addressed in the judgment in the section 174 application made after the State closed its case.

[50]. As regards the criticism levelled against the evidence of the complainant for her failure to shout out for help and the fact that, at least on one of her versions, she did not mention the rape incidents to anyone until they had all gathered near the security offices, I am of the view that there is no merit in such critique. The first point is that, in evaluating the evidence before the court *a quo*, one should guard against adopting an armchair critic approach. As correctly pointed out by the Regional Court, the complainant was fearing for her life. She thought that she would never see her children again. And this fear for her would have been real. This is aptly demonstrated by the following excerpt from the appeal record relating to her evidence-in-chief:

'[Complainant]: I explained to her, your worship, that where I am at the moment, I am at [the appellant's] place, he kidnapped me and he is threatening to kill me, he is informing me that he is a Satanist. Should anything happen to me that I do not come back at all, please take care of my kids at home.'

Prosecutor: Is it all that you wrote in the SMS? … …

Court: Do you want to take a short break? Yes,

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[5] *S v Mkohle* 1990 (1) SACR 95(A) at and see too, e g, *S v Sithole* (54/06) [2006] ZASCA 173 (28 September 2006).

Court: I think so. I see the witness has become a little [emotional], let us just have a short break so that she can recompose herself.'

[51]. Secondly, as the complainant explained during her testimony, the appellant threatened her that if she screamed, that would be her last scream ever. In the face of these threats, it could hardly be expected of the complainant to be a brave heart. So she decided to comply.

[52]. The version of the complainant is, in my view, to be believed. The same cannot be said of the version of the appellant, who is compelled to contend that the appellant's version is fabricated on a motive of revenge of an angry lover and by a conspiracy of her family and friends.

[53]. In any event, as was pointed out by Majiedt JA in *Naidoo v S*[6], it is essential for an appeal court to remain cognisant of the strictures on it as far as the trial court's factual findings are concerned. Absent demonstrable, material misdirections and clearly erroneous findings, an appeal court is bound by the trial court's factual findings. (*S v Hadebe & others*[7]; *S v Modiga*[8]). As was held by the Constitutional Court in *Mashongwa v PRASA*[9], it is not for an appellate court 'to second-guess the well-reasoned factual findings of the trial court'. We, as the appeal court, are not the triers of fact at first instance.

[54]. The point is that, even if an appeal court has reservations about certain aspects of a trial court's factual findings, it shall interfere in those findings only in limited circumstances, and only when there are demonstrable, material misdirections and clearly erroneous findings. In this case, I cannot come to such a conclusion.

[55]. I am accordingly of the view that there is no reason for disturbing any of the factual findings made by the court *a quo*. The case against the appellant was overwhelming and the Regional Magistrate was correct in his finding that the appellant raped the complainant three times, as per her evidence.

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[6] *Naidoo v S* (333/2018) [2019] ZASCA 52 (1 April 2019)

[7] *S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645E-F

[8] *S v Modiga* [2015] ZASCA 94; [2015] 4 All SA 13 (SCA) para 23

[9] *Mashongwa v PRASA* [2015] ZACC 36; 2016 (3) SA 528 (CC) para 45

[56]. I am therefore satisfied that the appellant's conviction should be confirmed.

Sentence

[57]. I now turn to deal with sentence. The appellant was sentenced effectively to direct imprisonment for life. It is trite that an appeal court can interfere with sentence only where the sentence is affected by an irregularity or misdirection entitling this court to interfere.

[58]. Rape is a serious offence. Starkly so in this case. A young woman was forcibly held against her will by the appellant, whom she trusted, at his place of residence, where he subjected her to rape on three occasions.

[59]. A convenient starting point is the fact that the provisions of s 51(1) of the CLAA, read with Part I of schedule 2 of the said Act, apply. This means that a minimum sentence of imprisonment for life finds application.

[60]. Section 51(1) of the CLAA reads as follows:

'(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.'

[61]. Section (3) of the said Act provides as follows:

'(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: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;

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

(iii) an accused person's cultural or religious beliefs about rape; or

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

[62]. Part I of Schedule 2 list the crime of 'Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

'(a) when committed-

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

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

(iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) … … ' [My emphasis].

[63]. For purposes of sentence, the learned Regional Magistrate took the three convictions on the charges of rape as one and imposed a compulsory minimum sentence of direct imprisonment for life by virtue of part I(a)((i) and (iii) of schedule of Schedule 2. The question to be asked is whether there were any substantial and compelling circumstances justifying a deviation from such minimum sentence.

[64]. Before I get to that issue, it may be appropriate at this juncture to deal with a point raised by Ms Nel in her heads of argument, which relates to the fact that at the commencement of the trial, according to the appeal record, the appellant was not warned by the Court or the prosecution that he faced a sentence of direct imprisonment for life. This argument, which concerns fair trial rights, can be dealt with simply because the charge sheet expressly referred to the provisions of s 51 and schedule 2 of the CLAA. Additionally, during the trial the appellant was at all times legally represented.

[65]. In any event, as correctly submitted in his written heads of argument by Mr Market, Counsel for the State, in *S v Khoza and Another*[10], the Supreme Court of Appeal held that a sentencing Court should consider whether any prejudice had been suffered by the fact that the provisions of the minimum sentence legislation had not been brought to the attention of an accused. The court held that prejudice would exist if there was a reasonable possibility that the defence

[10] *S v Khoza and Another* 2019 (1) SACR 251 (SCA) at paras 10 to 12

or response of the accused would have been different to that adopted during the trial. *In casu*, I am satisfied that a reasonable possibility does not exist that the appellant would have conducted his defence differently had he been informed at the outset of the trial of the applicable provisions. This legal point should therefore fail.

[66]. That brings me back to whether or not any substantial and compelling circumstances existed in the case of the appellant.

[67]. I take into consideration what was stated by the SCA in *S v Vilakazi*[11]. Nugent JA had this to say at par [58]:

'In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that *Malgas* said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment. In this case the appellant had reached the age of 30 without any serious brushes with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character.'

[68]. It was necessary for the court to find the existence of substantial and compelling circumstances before it was entitled to impose a lesser sentence. In considering whether substantial and compelling circumstances were present, the learned magistrate had regard to the appellants' personal circumstances and the fact that the appellant was not a first offender.

[69]. I understand Ms Nel's contention in her written Heads of Argument to be that the cumulative effect of the appellant's personal circumstances should be regarded and treated as substantial and compelling circumstances.

[70]. Those personal circumstances are the following: When he was sentenced, the appellant was 31 years old, with one minor dependent child, for whose

[11] *S v Vilakazi* 2009 (1) SACR 552 (SCA).

maintenance he was solely responsible; before he was arrested for the offences in question, the appellant earned a living as a self-employed carpenter, earning approximately R4000 per month; he was a first offender, having had no previous brushes with the law; as regards his level of education, he did not complete Grade 12, but instead obtained a certificate in Governance; and, by the time he was sentenced, he had been in custody, awaiting trial, for a period in excess of one year.

[71]. Therefore, so the argument on behalf of the appellant went, substantial and compelling circumstances existed in his case, which ought to have resulted in a deviation from the compulsory minimum sentence of life imprisonment. I cannot agree with this submission. To borrow from *S v Vilakazi* (supra), because of the seriousness of the crimes of which the appellant had been convicted, his personal circumstances, by themselves, will necessarily recede into the background.

[72]. I am satisfied that, the learned Regional Magistrate properly considered whether there were substantial and compelling circumstances to deviate from the minimum sentences provided for in respect of the offences under the relevant provisions of section 51(1) of the CLAA as read with part I of schedule 2 thereof, and also carefully considered the triad of factors relevant to sentencing, namely the nature of the offence, the personal circumstances of the appellant, including his moral blameworthiness and the interests of society by which I include the interests of the victim.

[73]. The appellant's appeal against his sentence should therefore also fail.

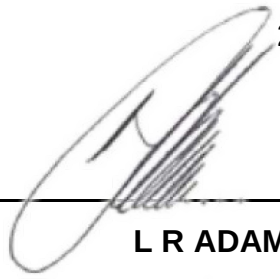
Order

In the result, the following order is made: -

(1) The appellant's appeal against his conviction is dismissed.

(2) The appellant's appeal against his sentence is dismissed.

(3) The appellant's conviction by the Westonaria Regional Court and his sentence be and are hereby confirmed.



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	11th November 2021 – The matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.
JUDGMENT DATE:	21st January 2022
FOR THE APPELLANT:	Adv A Nel
INSTRUCTED BY:	Thomas Nel Attorneys, Krugersdorp
FOR THE RESPONDENT:	Adv G E Market
INSTRUCTED BY:	The Office of the National Director of Public Prosecutions, Johannesburg