REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A256/2021

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

Date: 17 June 2022

In the matter between:

BUSO APPELLANT

v

THE STATE RESPONDENT

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JUDGMENT

Du Plessis AJ (Millar J concurring)

Factual background

[1] On 23 March 2021 the appellant, a 30-year-old male, was convicted in the Regional Court Pretoria on a charge of contravening provisions s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act,[1] read with the provisions of s 51(1)(a) and Schedule 2 of the Criminal Law Amendment Act, for raping a minor girl.[2] In line with section 51(1) of the Criminal Law Amendment Act 105 of 1997, he was sentenced to life imprisonment. An appeal was lodged against the conviction and sentence.[3]

[2] The appellant was legally represented throughout the proceedings. He pleaded not guilty and exercised his right to remain silent regarding disclosing the basis for his plea. The court explained that the minimum life sentence would be applicable should he be found guilty.

[3] The state called three witnesses: the complainant herself, her mother, and the doctor who examined her. The defence called four witnesses: the appellant and possible alibis Mr Kekai (a customer of the accused), Ms Shosha (the sister of the accused) and Mr Denver (the employee of the accused).

[4] The issues in this appeal are whether the trial court erred in accepting the evidence of the complainant[4] and dismissing the evidence of the appellant (the alibis);[5] and whether there were substantial and compelling circumstances that could affect the

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[1] 32 of 2007.
[2] 105 of 1997.
[3] In terms of section 309(1)(a) of the Criminal Procedure Act 51 or 1977 the appellant has an automatic right of appeal, following a sentence of life imprisonment.
[4] The defence points out various contradictions in the testimony of the complainant. The contradictions relate to how the claimant got to know the name of the appellant, the description of the appellant, the dates, whether the claimant screamed or not, and what discrepancies between the J88 report and the testimony of the child.
The defence states that the court erred in finding that the contradictions in the complainant's testimony are not material and that the complainant identified the appellant incorrectly. It argues that the complainant knew him as a neighbour, which is not enough to establish the identity of the perpetrator. The appellant does not deny that the complainant was raped, but he disputes that he raped her.
[5] The defence further avers that the court erred in finding that the alibi defence of the applicant is improbable and that the three witnesses' version supported the applicant's alibi defence. The finding that the defence witnesses were shielding the appellant, the appellant avers, is wrong. His version that he was fixing a motor vehicle next door is reasonably possibly true.

minimum sentence of life imprisonment for the rape of a person under the age of 16.

[5] The complainant testified about the rape and about the fact that the appellant threatened to shoot her and her family should she tell anyone about the incident. Her mother testified how she came to know about the incident: the complainant complained of abdominal pain three weeks later, which led to her confiding in her mother about the rape. Her mother then took her to the clinic, which referred her to the police station. A charge was laid, and the complainant was then examined by the doctor, who found that the complainant was raped and that she contracted a sexually transmitted disease in the process. Based on this evidence, the appellant was arrested after the complainant pointed him out to the police at his home.

[6] During evidence in chief, the complainant testified that she knew the accused's name and where he resides. When she was asked how she knew the accused's name under cross-examination, she replied that her sister had told her. The appellant argues that since the state did not call the sister to confirm that she told the complainant that the person who raped her was the appellant, the evidence of the complainant about her sister cannot be admitted.

[7] Mr Kekai, for the defence, testified that he came early to the appellant's house and parked his bakkie outside the gate around 07h00, after which the appellant's sister woke him up. Mr Kekai left the accused to buy food around 10h00 and then returned and left again at 10h45. Mr Kekai testified that the bracket of the motor vehicle's alternator was broken. It is put forth that this is then an alibi testifying that the accused was not in his room at the time of the rape, around 09h30.

[8] The appellant testified that he fixed the car next door on the driveway as there was no space left in his yard. The testimony is that he started stripping the car between 08h00 – 08h30 until the afternoon and that he never moved to another place.

[9] Ms Shosha testified that she got up on the day in question to do laundry in the washing machine outside the house. She remembers this day as a washing day, as she was preparing to travel to the Eastern Cape the following weekend. She testified that the appellant did not return home until "past seven" (in the evening). This is put forth as corroboration of the evidence of Mr Kekai.

[10] Mr Denver testified that he was fixing the truck (not a bakkie) belonging to Mr Kekai, testifying that he was with the accused from 08h00 till 18h00 in the afternoon. According to Mr Denver, they were fixing the clutch plate and not the alternator. However, when confronted with Mr Kekai's version, he admitted that he is no longer sure.

[11] When the prosecutor questioned why the alibis could recall what they were doing on 17 November 2018 in such detail but none of the other dates mentioned, they could provide satisfactory answers to the question.

Ad conviction

[12] *R v Dhlumayo*[6] makes it clear that a court of appeal will be reluctant to interfere with the trial court's evaluation of oral evidence unless there is misdirection by the trial court. The trial court has the advantage of seeing and hearing witnesses, which is not the case in the appellate court. A trial court is thus better suited to make credibility findings. An appellate court will be hesitant to interfere unless there is a misdirection in applying the law to the facts, in which case the appellant court will interfere. This court thus needs to consider whether there is such a misdirection.

[13] The argument about the appellant's identity not being known by the complainant is rejected. It is clear from the claimant's evidence that she knew the appellant as a neighbour and where he lived. He was a familiar person. She just did not know his

[6] 1948 (2) SA 677 (A).

name. From the record, she did not ask "who raped me", but rather what is the neighbour's name.

[14] It is so that later on, she testified that she did not know the appellant's name but knew him "facially". In other words, he is a familiar person to her. She then testified that she described the perpetrator to her mother, and her mother said it is Vusi. The defence argues that this contradicts the statement that it was her sister who told her the appellant's name.

[15] However, how she came about to know his name is not material. The contradiction about how she came to know his name is not material. The fact remains that the complainant knew the appellant as a neighbour three houses down the road, and she testified that the same neighbour raped her. On the day of the arrest, she could also point him out to the police. That is linking the appellant to the crime. The trial court found that "there was no way she could have been mistaken of the identity of the accused that she knew for so long". I agree.

[16] Likewise, the discrepancy between the complainant describing the appellant as small in body, tall and brown and not able to explain how his lips or mouth is, and her mother describing the accused as medium in height, was answered by her mother: for an adult person, the appellant will be medium. For a child, he will be tall. The defence argues that this is the mother trying to put the correct description of the accused to the child as she was not asked how the child described the accused. This argument is rejected: the complainant already described the appellant, and the mother merely explained the difference in the description, which seems logical.

[17] The case *of R v Dladla*[7] that the defence quotes to seemingly bolster the case of the appellant is on point:

> "one of the factors which in our view is of greatest importance in a case of identification, is the witness's previous knowledge of the person sought to be

[7] 1962 (1) SA 307 (A) 310 C-E.

identified. *If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased.* [...] What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made." (own emphasis)

[18] This court also accepts that the complainant could identify the accused accurately, even if she only found out his name after the rape. The trial court did not err on this.

[19] The defence made other arguments about contradicting evidence on the dates on which she informed her mother of the rape; the question of whether she did or could scream or not during the rape; and the discrepancies between the doctor's report that indicated penetration in the mouth and her statement (and then later another affidavit) that there was no oral penetration. None of these is material.

[20] As for the alibi witnesses, the magistrate rejected the evidence of the appellant and the alibi witnesses. The magistrate found that they were trying to shield the appellant. The trial court noted various improbabilities in the version of the appellant and his alibis, such as that they knew exactly what they were doing on the date without being able to substantiate it. The accused could also not explain how the victim would point out the appellant if he did nothing to her. I agree with this finding of the magistrate that their versions were improbable.

[21] As for the caution of a single child witness, again, the authority cited by the defence is relevant here. Quoting *Woji v Santam Insurance Co Ltd*[8]

> The question that the trial Court must ask itself is whether the young witness evidence is trustworthy. 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 testified.

[8] 1981 (1) SA 1020 (A).

[22] A child is not an inherently unreliable witness. In *S v Dyira*[9] the court laid down guidelines for how the evidence of a child witness, who is also a single witness, must be approached.[10] The general guidelines require a court to

> (a) [...] articulate the warning in the judgment, and also the reasons for the need for caution in general and with reference to the particular circumstances of the case;
>
> (b) [...] examine the evidence in order to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in all material respects;
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> (c) although corroboration is not a prerequisite for a conviction, a court will sometimes, in appropriate circumstances, seek corroboration which implicates the accused before it will convict beyond reasonable doubt;
>
> (d) failing corroboration, a court will look for some feature in the evidence which gives the implication by a single child witness enough hallmark of trustworthiness to reduce substantially the risk of a wrong reliance upon her evidence.

[23] The magistrate did consider these guidelines when considering the evidence of the single child witness. I am satisfied that the child could recall the incident and what followed with sufficient clarity and with adequate observation. She gave evidence of the crime of rape with maturity and composure, despite her young age and the trauma that she experienced. Her evidence was clear and satisfactory, and where there were some inconsistencies, it was not material to the case. Her merit as a witness was superior to the witnesses of the defence. Her evidence has intrinsic worth, even if evaluated with caution. There is no reasonable possibility that her identification of the appellant was mistaken or made up.

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[9] 2010 (1) SACR 78 (ECG).

[10] *Skoti v S* [2009] JOL 24602 (ECG) with facts like this case, the court dismissed the idea that the cautionary rule of a single child witness requires corroboration of her evidence of identification before the court could accept the testimony. *S v Artman* 1968 (3) SA 339 (A) 340H the court warned that the cautionary rule is a rule of practice and not of law and that the ultimate requirement is whether there is proof beyond a reasonable doubt. This requires guarding against formalistic reasoning at the expense of common sense.

[24] Furthermore, her mother and the doctor corroborated her evidence. The trial court found the victim's version reliable. It noted that "[d]espite the inconsistencies that were highlighted, the victim was found to be confident, and her testimony was devoid of any exaggerations. Despite being extensively cross-examined she stood her ground". I find no compelling reason to deviate from that finding.

[25] Thus, I find no basis for concluding that the state did not discharge the onus of proving the appellant's guilt beyond a reasonable doubt or that the magistrate erred in her finding. This court can therefore see no reason to interfere with the finding of the trial court on the conviction.

Ad sentencing

[26] As for the sentencing, the appellant submits that the sentence of life is harsh, disproportionate, unjust under the circumstances and induces a sense of shock. The court further erred in finding that there are no substantial and compelling circumstances and that the appellant's personal circumstances and the circumstances cumulatively constitute substantial and compelling circumstances.

[27] The rape of a child below 16 years of age carries a minimum sentence of life imprisonment. "Substantial and compelling circumstances"[11] must be present for a court to depart from the prescribed measure.[12]

[28] The prescribed sentence is the point of departure – the court starts the sentencing process with legislatively prescribed periods of imprisonment. The assumption is that these sentences are ordinarily appropriate[13] and should not be lightly departed from. These minimum sentences are meant to send out a strong message that there are certain crimes that society finds so repugnant that lenient sentences will not be tolerated.[14]

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[11] Section 51(3)(a).
[12] Criminal Law Amendment Act 105 of 1997 s 51(3).
[13] *S v Shaik* 2007 (1) SACR 247 (SCA) par 225.
[14] *S v M* 2007 2 SACR 60 (W) par 13.

[29] The accused must prove that "substantial and compelling circumstances" are present. *S v Malgas,*[15] the locus classicus on the interpretation of "substantial and compelling circumstances", stated that only the factors traditionally considered when an appropriate sentence is determined cumulatively justify a departure from the statutory prescribed minimum should a court consider imposing a lesser sentence.[16] Said the court:

> "Substantial and compelling circumstances" may arise from a number of factors considered together – taken one by one, these factors need not be exceptional. If the sentencing court considers all the circumstances and is satisfied that the prescribed sentence would be unjust, as it would be "disproportionate to the crime, the criminal and the needs of society," a court may impose a lesser sentence.[17]

[30] There is, however, no concrete guidance in the Act itself on how to interpret "substantial and compelling". There are some guidelines in section 51(3)(3A) on what should *not* be taken into account, but other than that it is up to a court in each case to decide whether there are enough substantial and compelling circumstances to depart from the minimum sentence. Of course, if the seriousness of the crime of rape was the only consideration, every rape of a young girl would compel a court to impose the full wrath of the law on the rapist.[18] But it is not.

[31] Each case on its own facts, with all the aggravating and mitigating factors considered cumulatively. When determining whether a departure is called for, the court should weigh all the considerations that are traditionally relevant to sentencing.[19]

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[15] 2001 (2) SA 1222 (SCA).
[16] A court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. (T)hose circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. *S v Malgas* 2001 (2) SA 1222 (SCA).
[17] *S v Malgas* 2001 (2) SA 1222 (SCA) par 10.
[18] *Skoti v S* [2009] JOL 24602 (ECG) at 12.
[19] *S v Mabuza* 2009 (2) SACR 435.

[32] This court should approach the appeal on minimum sentencing with caution, and it cannot be departed from lightly. The focus should be on whether the facts the sentencing court had considered had been substantial and compelling.[20]

[33] *S v Zinn*[21] laid down the sentencing triad to take into account when determining the appropriate sentence: the crime, the offender, and the interest of society. To this Van der Merwe[22] added a fourth category, namely the harmful effects of the crime on the victim. What follows is a discussion on the aggravating and mitigating factors referring to the i) circumstances related to the commission of the crime; ii) the offender; iii) the society's interest, and iv) the interest of the child victim.[23]

[34] When focussing on the crime, aggravating factors include the fact that the victim was a 10-year-old child;[24] the accused lured her to his premise[25] and used force by grabbing the victim and closing her mouth with his hands;[26] he threatened to kill her family should she tell them what happened.[27]

[35] The defence attempted to argue that the absence of the use of violence or bodily injury should be considered a mitigating factor. The court informed the defence that no notice will be taken of that. Rape is inherently a violent crime,[28] and the fact that there was no *additional* violence does not constitute a mitigating factor.

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[20] *S v PB* 2013 (2) SACR 533 (SCA) at 20.
[21] 1969 (2) SA 537 (A).
[22] Van der Merwe A "In search of sentencing guidelines for child rape: An analysis of case law and minimum sentence legislation" 2008 (71) *THRHR* 595.
[23] See *S v M* 2007 2 SACR 60 (W) par 18; for the study referred to see Van der Merwe A *Aspects of the sentencing process in child sexual abuse cases* (2005) .
[24] *S v M* 2007 2 SACR 60 (W) par 116. *Skoti v S* [2009] JOL 24602 (ECG) at 12; *S v Zitha* 1999 (2) SACR 404 (W) stated that rape of vulnerable victims is always aggravating.
[25] *S v Jackson* 1998 1 SACR 470 (SCA) 478a.
[26] *S v Jackson* 1998 1 SACR 470 (SCA) 478b
[27] *S v M* 2007 2 SACR 60 (W).
[28] Spies A "Perpetuating harm: the sentencing of rape offenders under South African Law" 2016 (133) *South African Law Journal* 397. S v E 1992 (2) SACR 625 (A) the appellant division, as it then was, made it clear that the absence of violence or coercion is not a mitigating factor. See also *S v Kwanape* 2014 (1) SACR 405 (SCA) at 21; *S v PN* 2010 (2) SACR 187 (ECG) at 192H-193B, S v Radebe 2019 (2) SACR 381 (GP) at 48.

[36] In any case, section 51(3)(aA) prohibits the court from taking the apparent lack of physical injury to the complainant into account. Therefore, this court is unwilling to consider this factor as a possible mitigating factor.

[37] The defence argued further that the accused had been in custody for three years before being found guilty. They argue that case law (without citing which cases) stated that the court should always consider the time awaiting trial as a form of double punishment, which means that the three years should be calculated as six years. Based on this, they argue that this was already sufficient punishment for the rape. *S v M*[29] held that traditionally, time spent in custody awaiting trial had been considered for sentencing purposes. However, a life sentence was theoretically indeterminate, and the date on which it commenced should have no impact on its duration. Whether or not the accused might be eligible for parole after 25 years should also not be considered by the court,[30] as those are policy arrangements of the Department of Correctional Supervision.[31]

[38] When the focus is on the offender, the following is relevant: Correctional services submitted a document on the appellant in terms of section 276A(1) of the Criminal Procedure Act[32] to ascertain whether the appellant is a suitable candidate for correctional supervision. The note the following:

[38.1] The appellant is 30 years old.

[38.2] The appellant passed grade 11 and, before his arrest, fixed cars and earned an income of around R5000 pm.

[38.3] He is one of four siblings. He is not married, he does not have children, and his parents are still alive and working. He has a good and healthy relationship with his family members.

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[29] 2007 (2) SACR 60 (W) at par 111.
[30] *S v Mhlongo* 1994 (1) SACR 584 (A) at 589f; *S v Mhlakaza* 1997 (1) SACR 515 (SCA) ([1997] 2 All SA 185); *S v S* 1987 (2) SA 307 (A).
[31] *S v M* 2007 2 SACR 60 (W) par 112.
[32] 51 of 1977.

[38.4] He maintains his innocence, and he has no other previous convictions.

[38.5] He does not take drugs, and he only drinks occasionally.

[39] The report also notes that he will benefit from participating in therapeutic programs.[33] The correctional officer considered him a suitable candidate for house arrest.

[40] The psychosocial report noted the following:

[40.1] He stated that he was wrongly arrested as he did not commit the offence;

[40.2] His mother thinks that he was wrongly arrested and mistaken for another person;

[40.3] The accused appears to be a responsible and respected person in his family and the community;

[40.4] The accused seems embarrassed by the offence committed, as he knows the consequence of the crime committed and tries to maintain his innocence to escape the offence's consequences and maintain respect from the community and his family.

[41] The probation officer, thus, could not find compelling circumstances to deviate from the minimum sentence.

[42] The trial court found that the appellant showed no remorse (because he denied raping the complainant). There are two views on this, the one stating that a lack of remorse is an aggravating factor,[34] while the other holds that the absence of remorse simply means that remorse cannot be used as a mitigating factor.[35] The

[33] Listing those presented by Social Workers of Randburg Community Corrections, the Sexual Offender Treatment Program, Life Skills Program, Self-Image, and Responsibility Acceptance Programme.
[34] *S v R* 1996 2 SACR 341 (T) 344j; S v M 1994 2 SACR 24 (A) 30h.
[35] *S v Njikelana* 2003 2 SACR 166 (C) 175d.

latter approach is probably correct when an accused pleads not guilty. A lack of remorse should then not be held against him during the sentencing phase after a plea of not guilty.[36]

[43] The potential for development or rehabilitation can be a mitigating factor.[37] Rehabilitation of sex offenders is not only in the interest of the accused himself but also in the interest of society, considering the possibility that he might be released on parole eventually. Imprisonment should not *only* focus on punishment but should ideally give the accused an opportunity to reflect on his crime and its impact on the victim. However, an offender is not likely to rehabilitate himself – he will need the help of psychologists, social workers, and educator staff.[38]

[44] Rehabilitation should ideally instil a sense of responsibility on offenders for their criminal acts so they don't commit the crime again. It also encourages offenders to learn work skills and go through educational programmes to ensure their reintegration into society once released.[39]

[45] A study conducted by the South African Law Commission[40] found that imprisonment *on its own* is ineffective in rehabilitating sexual offenders, as the prison environment is not conducive to developing and altering sexual offending behaviours.[41] However, doubts about the prevalence of rehabilitation programmes in South African prisons have also been raised.[42] This perhaps explains the high recidivism rate of offenders upon release.

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[36] Van der Merwe A "In search of sentencing guidelines for child rape: An analysis of case law and minimum sentence legislation" 2008 (71) *THRHR* 598.
[37] *S v R* 1996 2 SACR 341 (T) 346b; *S v V* 1996 2 SACR 133 (T) 138j-139a.
[38] Williams H and Fouche A "Rehabilitation of adult sexual offenders: A management programme" 2008 (21) *Acta Criminologica: African Journal of Criminology & Victimology* 153.
[39] Murhula PBB, Singh SB and Nunlall R "A Critical Analysis on Offenders Rehabilitation Approach in South Africa: A Review of the Literature" 2019 (12) *African Journal of Criminology and Justice Studies: AJCJS* 23.
[40] Commission SAL *Sexual offences: Adult prostitution* (2002).
[41] Williams H and Fouche A "Rehabilitation of adult sexual offenders: A management programme" 2008 (21) *Acta Criminologica: African Journal of Criminology & Victimology* 150.
[42] Williams H and Fouche A "Rehabilitation of adult sexual offenders: A management programme" 2008 (21) *Acta Criminologica: African Journal of Criminology & Victimology* .

[46] Still, there is a duty on the state to provide programmes and activities to meet the rehabilitation needs of offenders. Section 41(1) of the South African Correctional Services Act,[43] makes rehabilitation a right and not just a luxury for offenders albeit subject to accessible resources.[44] The aim of this Act is to ensure that sentenced offenders do not re-offend upon release.

[47] As for the argument that the appellant has no previous convictions, in cases involving the rape of a girl under the age of 16, there is no provision for treating first-time offenders differently.[45] In *S v M*[46] the court, in line with other cases dealing with a departure of the minimum sentence,[47] stated that a previously clean criminal record can be considered when determining whether there are "substantial and compelling circumstances" present, but warned that this is merely *one* of the considerations to take into account in conjunction with other facts.[48]

[48] When focussing on society's interest, it is noted that gender-based violence is South Africa's second pandemic.[49] Crime statistics of the second quarter of 2021/2022 showed a 7,1% increase in rape reporting, with 3951 of the rape incidents taking place at the home of the victim or the rapist. Between July and September, 9 556 rapes were reported. Rape is an underreported crime which means that the true extent of the crime is not known,[50] but it is reported that only 1 in 25 rapes in Gauteng are reported to the police.[51] One in ten cases opened result

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[43] 111 of 1998.
[44] Murhula PBB, Singh SB and Nunlall R "A Critical Analysis on Offenders Rehabilitation Approach in South Africa: A Review of the Literature" 2019 (12) *African Journal of Criminology and Justice Studies: AJCJS* 22.
[45] *S v M* 2007 2 SACR 60 (W) par 65, *S v Abrahams* 2002 1 SACR 116 (SCA)
[46] *S v M* 2007 2 SACR 60 (W).
[47] *S v Abrahams* 2002 (1) SACR 116 (SCA), *S v Swartz* 1999 (2) SACR 380 (C).
[48] *S v M* 2007 2 SACR 60 (W) par 69.
[49] https://www.gov.za/speeches/dialogue-mark-16-days-activism-26-nov-2020-0000
[50] Machisa M, Jina R, Labuschagne G, Vetten L, Loots L, Swemmer S, Meyersfeld B and Jewkes R "Rape Justice in South Africa: A retrospective study of the investigation, prosecution and adjudication of reported rape cases from 2012" 2017 *Pretoria, South Africa: South African Medical Research Council, Gender and Health Research Unit.*
[51] Machisa M, Jina R, Labuschagne G, Vetten L, Loots L, Swemmer S, Meyersfeld B and Jewkes R "Rape Justice in South Africa: A retrospective study of the investigation, prosecution and adjudication of reported rape cases from 2012" 2017 *Pretoria, South Africa: South African Medical Research Council, Gender and Health Research Unit* 114.

in a guilty verdict. The fact that this rape was reported, leading to a successful conviction, is the exception rather than the norm.

[49] A rape survivor's fundamental rights to dignity, privacy, security of person and freedom of abuse are infringed by rape.[52] It is dehumanising, invasive and humiliating for the rape victim, with a psychological impact that will stay with the victim for life.[53] It has a severe impact on the mental health of the victim. It commonly results in depression and post-traumatic stress disorder, which will impact the child's emotional well-being and her ability to form various relationships. *S v MDT*[54] stated that "child rape is a national scourge that shames us as a nation". The court must send out a strong message that rape is unacceptable.[55]

[50] Yet, in *S v Skenjana*[56] the court found that public interest is not necessarily best served by imposing very long sentences of imprisonment. The court stated that the deterrent effect of a prison sentence is not always proportionate to its length. Thinking that harsher sentences deter crime is a facility. What *does* deter crime is the capability of the state to identify, arrest, prosecute, convict, and punish the majority of serious offenders.[57] This threat must be credible, and the state must communicate this credible threat of having the capacity to lock up criminals. The Constitutional Court in *S v Makwanyane*[58] stated that

> "[t]he greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the state must seek to combat lawlessness".

[51] We arguably sit with a capacity problem in South Africa.

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[52] *S v M* 2007 2 SACR 60 (W) par 57.
[53] Chetty N "Testimonies of child-rape victims in South African courts" 2006 (47) *Codicillus* 25.
[54] 2014 (2) SACR 630 (SCA) par 7.
[55] *S v Swartz* 1999 (2) SACR 380 (C).
[56] 1985 (3) SA 51 (AD) at 54 I – 55 D.
[57] Schönteich M "Does Capital Punishment Deter?" 2002 (11) *African Security Studies*.
[58] 1995 (3) SA 391 (CC) at 442 – 43 (Chaskalson).

[52] Yet it seems like the bulk of the obligations are shifted to the court to *ensure* that these minimum sentences are meted out. In isolation from the whole criminal justice process, this does not make sense and seems to place a disproportionate burden on the accused to be "seen" to be punished, even if, in the bigger picture of punishment and the role it plays in society, it simply does not deter other criminals from doing the same.

[53] Again, I want to reiterate: what the appellant is accused of is a hideous crime, and he deserves to be punished and bear the consequences for that. But if the state only wants to deal with this scourge of rape inflicted in South Africa by imposing minimum sentences,[59] then the exercise is futile.

[54] The other role that sentencing can play in reducing crime is through incapacitation and rehabilitation. Half of the men who rape does so on multiple occasions.[60] Punitive measures aimed at interrupting the pattern of re-offending are therefore important. As far as incapacitation is concerned, if the capacity to arrest, prosecute and convict sexual offenders is low, it follows that the impact that convicting and imprisoning a sexual offender will have on the bigger picture is small.

[55] As for rehabilitation, probably the biggest concern when imposing the minimum life sentence is the problem that it leads to overcrowded prisons, adding to the inhumane conditions in prisons coupled with very little scope for rehabilitation. Life imprisonment leaves an offender with very little to hope for and thus less likely to be rehabilitated. This leads me to the issue of the sentencing regime.

[56] The rape of a 10-year-old child is atrocious, and our country suffers from a plague of child rape. The law rightly punishes offenders severely for this crime. But it is time that we ask ourselves if these minimum sentences (that were meant to be temporary measures)[61] are effective, whether it serves us as a society, or whether

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[59] *S v Mabunda* 2013 (2) SACR 161 SCA.

[60] Machisa M, Jina R, Labuschagne G, Vetten L, Loots L, Swemmer S, Meyersfeld B and Jewkes R "Rape Justice in South Africa: A retrospective study of the investigation, prosecution and adjudication of reported rape cases from 2012" 2017 *Pretoria, South Africa: South African Medical Research Council, Gender and Health Research Unit* 114.

[61] Terblanche SS *A guide to sentencing in South Africa* (2016) 51.

imposing minimum sentences merely creates the mirage that we are *doing* something about the crime.[62]

[57] The minimum sentencing regime for rape also distinguishes between different kinds of rape. Part I rape (involving a child under 16, multiple perpetrators, multiple rapes, an HIV-positive offender or extreme bodily harm) requires a life sentence. If not one of the Part I criteria is present in a rape, it is a Part III rape that requires a minimum sentence of ten, fifteen or twenty years. In other words, with the addition of one criterion in Part I, a judge must then, per default, impose life instead of ten, fifteen or twenty years.

[58] As stated, judges can then exercise their discretion to depart from mandatory sentences if there are "substantial and compelling circumstances" but must then, out of necessity, focus on the possible factors that will justify a lower sentence rather than on what makes the crime a horrific act. That places a judge in an impossible position, where it seems as if judges make excuses for offenders when interrogating the factors that might justify a lower sentence rather than focusing and spending the bulk of their judgment discussing why the crime is so hideous that it deserves the punishment that the judge deems fitting.[63]

[59] I would have preferred to focus the bulk of my judgment on the offender's actions that require moral indignation and should be condemned by the court. Instead, I am asked to consider whether there are "substantial or compelling" circumstances that permit a lessor than a life sentence.

[60] The dicta in *S v Dodo*[64] is important in this context, where Ackerman J stated:

> [38] To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the

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[62] See the speech by Justice Cameron https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf ; Scurry Baehr K "Mandatory minimums making minimal difference: ten years of sentencing sex offenders in South Africa" 2008 (20) *Yale JL & Feminism* 214.

[63] Scurry Baehr K "Mandatory minimums making minimal difference: ten years of sentencing sex offenders in South Africa" 2008 (20) *Yale JL & Feminism* 239.

[64] *S v Dodo* (CCT 1/01) [2001] ZACC 16.

> proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.

[61] Seen in its totality, taking specific cognisance that humans are not a means to an end but an end in themselves while likewise condemning the appellant's actions, I am of the view that the sentencing should also focus on rehabilitating the appellant. On this point, I cannot entirely agree with the court a quo that "there are slim chances of rehabilitation on the side of the accused",[65] because of a lack of remorse after a plea of not guilty.

[62] Lastly, the impact on the victim should also be considered. The complainant was interviewed two years after the incident, and she was still experiencing trauma. She reported having flashbacks of the incident, questioning why she had to experience the traumatic event.

[63] She lived in fear that the appellant would harm her and her family if she confided in them about the rape. She further contracted a sexually transmitted disease after the rape. She often isolates herself from her family, leaving her mother distressed.

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[65] Court record on CaseLines 003-205.

[64] She appears to be successfully developing the basic skills that her peer attains, which the social worker attributes to her strong personality and determination.

[65] She is aware of the charges of rape and is relieved that the accused was arrested for his crime. She is, however, fearful that he or his family members might harm her and her family members should he be released. From the victim's perspective, it is good that justice is also seen to be done.

Conclusion on sentencing

[66] Section 2(c) of the Correctional Services Act[66] states that the "purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by promoting the social responsibility and human development of all prisoners and persons subject to community corrections". Therefore, the vision is that imprisonment will not only remove the offender from society but also be a place where offenders are rehabilitated.

[67] I have noted that the appellant is a first-time offender and spent three years in custody before his conviction. I have considered various factors individually and collectively.

[68] The complainant is a child who went to the shops to buy Achar and was lured by the appellant to the gate of the premise, whereafter she was forced into the appellant's room and raped. What was supposed to be a regular outing to the shop turned out to be violent and traumatising, something that will stay with her for the rest of her life.

[69] The appellant threatened the complainant, leaving her to deal with the trauma on her own out of fear for her family's life. Also this trauma will sit with her for the rest of her life, and she will have to find ways to deal with it and find joy in living again. But to find that the appellant has no prospect of rehabilitation is unfounded. And to

[66] 11 of 1998.

use the harsh sentence as a deterrent only, is to reduce the accused to a means to an end.

[70] A substantial sentence of 20 years' imprisonment is a sentence that exacts proper retribution, provides adequate protection for society, and brings home to the appellant the gravity of what he did[67] but also leaves room for rehabilitation.

ORDER

[71] In the circumstances, I propose the following order:

[1] The appeal against the appellant's conviction is dismissed.

[2] The appeal against the sentence is upheld and replaced with a sentence of 25 years imprisonment, of which 5 years is suspended on the condition that:

[2.1] The appellant goes for the necessary treatment and rehabilitation programs during incarceration.

[3] The sentences are antedated to 23 March 2021.

WJ du Plessis
Acting Judge of the High Court

I agree, and it is so ordered.

A Millar
Judge of the High Court

[67] *Vilakazi v S* [2008] ZASCA 87, *Skoti v S* [2009] JOL 24602 (ECG).

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Instructed by:	The State Attorney
Date of the hearing:	3 May 2022
Date of judgment:	17 June 2022