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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. AR265/2017

In the matter between:

ELLIAS MPISI NXUMALO **APPELLANT**

and

THE STATE **RESPONDENT**

O R D E RS

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1. The application by the State in terms of s 310A of the Criminal Procedure Act 51 of 1977 as well as the application for condonation are hereby granted.

2. The respondent is granted leave to appeal the sentence of 12 years' imprisonment imposed.

3. The appellant's appeal against his conviction is dismissed.

4. In respect of the appeal against sentence, the appellant's appeal against sentence is dismissed. The respondent's cross-appeal to increase the sentence imposed by the court a quo is upheld. The sentence imposed by the court *a quo* is set aside and substituted with a sentence of 20 years' imprisonment.

J U D G M E N T

HENRIQUES J (MASIPA J concurring)

Introduction

[1] On 29 February 2016 the appellant was convicted of the rape of the complainant, seven year old N[….] C[….] and was subsequently sentenced to 12 years' imprisonment. Leave to appeal the conviction and sentence was granted by the court a quo on 31 October 2016. It is common cause that the provisions of the minimum sentencing legislation, the Criminal Law Amendment Act 105 of 1997, applied to his conviction and that the court a quo deviated from imposing the prescribed minimum sentence of life imprisonment. The appellant at the time of conviction and sentence was 57 years old and was known to the complainant and her family.

[2] In 2018, subsequent to the appeal being enrolled for hearing, the respondent filed an application in terms of s 310A of the Criminal Procedure Act 51 of 1977 (the CPA) to increase the sentence of the appellant. As per a directive of the Judge President of this division dated 4 June 2018, such application was to be dealt with at the hearing of the appeal. It is common cause that on 24 April 2018, when the matter served before Gorven J, he found that the provisions of s 310A(3) of the CPA were peremptory and directed the respondent to serve the application personally on the appellant. In consequence thereof, the appeal and the s 310A application were adjourned sine die.

[3] It is common cause that a copy of the s 310A application was served

personally on the appellant, his legal representatives as well as the presiding magistrate in the court a quo. The presiding magistrate confirmed receipt of the application and filed a notice to abide the decision of the appeal court.

[4] When the matter served before court on 8 February 2019, Mr *Mkumbuzi* who appeared for the appellant, had not had an opportunity to consider the respondent's s 310A application. Consequently, he was given an opportunity to do so and at the next hearing date, being 25 February 2019, had filed an answering affidavit seeking to oppose the s 310A application and for condonation.

The application in terms of s 310A of the CPA

[5] It is perhaps useful at this juncture to consider the relevant provisions of s 310A of the CPA to give context to the affidavits filed in the application.

[6] Section 310A of the CPA reads as follows:

'(1) The attorney-general may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the provincial or local division having jurisdiction, provided that an application for leave to appeal has been granted by a judge in chambers.

(2) *(a)* A written notice of such an application shall be lodged with the registrar of the provincial or local division concerned by the attorney-general, within a period of 30 days of the passing of sentence or within such extended period as may on application on good cause be allowed.

(b) The notice shall state briefly the grounds for the application.

(3) The attorney-general shall, at least 14 days before the day appointed for the hearing of the application, cause to be served by the deputy sheriff upon the accused in person a copy of the notice, together with a written statement of the rights of the accused in terms of subsection (4): Provided that if the deputy sheriff is not able to serve a copy of the notice, it may be served in any other manner that may on application be allowed.

(4) An accused may, within a period of 10 days of the serving of such a notice upon him, lodge a written submission with the registrar concerned, and the registrar shall submit it to the judge who is to hear the application, and shall send a copy thereof to the attorney-general.

(5) Subject to the provisions of this section, section 309 shall apply *mutatis mutandis* with reference to an appeal in terms of this section.

(6) Upon an application for leave to appeal referred to in subsection (1) or an appeal in terms of this section, the judge or the court, as the case may be, may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the application or appeal, taxed according to the scale in civil cases of the provincial or local division concerned.'

[7] The section makes provision for the Attorney-General now the Director of Public Prosecutions (the DPP) to make application to a high court to appeal a sentence imposed by a lower court, provided leave to appeal has been granted by a judge in chambers. Notice of such application is to be lodged with the registrar within a period of 30 days from the date of the passing of sentence or within such extended period as may on application on good cause be allowed. After personal service of the application by the deputy sheriff, together with a written statement of the accused's rights, an accused person may within 10 days of service of such notice lodge written submissions with the registrar which shall be considered by the judge who is to hear the application.

[8] It is common cause that the respondent was required to bring the application within 30 days from 29 February 2016 but did not do so, hence Mr *Singh* who appeared for the respondent sought condonation. In the application for condonation, Mr *Singh* who is the deponent to the affidavit explains the reasons for the delay which can be summarised as follows:

(a) on receipt of the record on 1 February 2018 in preparation for the appeal, he ascertained the misdirection in respect of sentence by the court a quo, and, on 5 February 2018 an email was dispatched to Legal Aid South Africa informing them of the intention to cross-appeal the sentence imposed;

(b) on 23 February 2018, an adjournment was granted to enable the respondent to file the s 310A application;

(c) the affidavit acknowledges that the prosecutor in the lower court did not take any further steps to cross-appeal the sentence nor was it brought to the attention of the DPP, KwaZulu-Natal that the matter ought to be assessed to decide whether the sentence ought to be appealed against. It was only in

preparation for the appeal that these steps were taken;

(d) as the respondent has good prospects of success in the cross-appeal, this outweighs the prejudice caused by the non-compliance with the 30 day period prescribed in the section; and

(e) the affidavit also deals at length with the submissions in respect of the alleged misdirections of the court a quo on sentence and the merits of the cross-appeal.

[9] In summary the appellant opposes the application on the following basis:

(a) it has been filed outside of the 30 day time period stipulated in s 310A;

(b) the respondent has not shown good cause as to why condonation ought to be granted;

(c) the explanation proffered and the *ipse dixit* of the State Advocate is an insufficient explanation for the failure to comply with the time limits;

(d) although there may be prospects of success on appeal, this is not sufficient reason to grant condonation;

(e) the written statement of rights was not properly served on the appellant at the time the application was served by the sheriff and the appellant was unable to exercise his right to make written submissions. As a consequence, the appellant's fair trial rights envisaged in s 35(3) of the Constitution of the Republic of South Africa, 1996 have been breached;

(f) there was no misdirection or error on the part of the court a quo in imposing the sentence it did, and this court ought not to interfere with the sentence imposed by the court a quo; and

(g) a further submission made by Mr *Mkumbuzi* was that s 310A made provision for the application to be granted by a single judge in chambers and not in terms of the procedure contained in the Judge President's directive.

[10] Turning now to consider the merits of the condonation application and the explanation provided, firstly, the Judge President of this division has indicated that such applications ought to be dealt with at the hearing of the appeal. In my view there does not appear to be anything wrong with this procedure being followed given the workload of judges in the division and possible delays in placing such application before a single judge in chambers. More importantly, among the considerations

when deciding on condonation are the merits of the appeal and there seems no good reason to burden three judges with deciding this, when two judges can deal with this at the actual appeal hearing. In any event the high court can regulate its own proceedings.

[11] The above practice appears to have been followed in this division on a number of occasions and I was specifically referred to *Sihle Gedleyihlekisa Mfeka v The State* case number AR218/2016, an unreported judgment of this division by Seegobin J (Koen J concurring), delivered on 1 February 2019. There does not appear to be any bar to the procedure as set out in the Judge President's directive being followed, provided the procedural requirements of s 310A of the CPA have been complied with and an appellant is provided an opportunity to file written submissions by the time of the hearing of the application.

[12] Although Mr *Mkumbuzi* in his heads of argument submitted that the written statement of rights had not been properly served on the appellant, this point was in my view correctly not pursued at the hearing of the appeal given the return of service which reflected compliance with the section. In addition, apart from the application being served on the appellant it was also served on his attorneys of record, Legal Aid South Africa.

[13] I have carefully considered the explanation provided by the respondent for the failure to bring the application within the time periods stipulated in s 310A. Among the aspects which this court must consider in granting condonation is whether or not good cause has been shown. Good cause involves the consideration of the prospects of success on appeal as well as whether or not a reasonable explanation has been provided for the delay, convenience of the court, delays in the administration of justice and the interests of the parties in bringing finality to the matter.[1] The respondent concedes that the application was instituted a considerable time after the sentence was imposed by the court a quo. Although the adequacy of the explanation leaves much to be desired, and the delay is a long one, as the respondent has good prospects of success on appeal, the application in terms of s 310A and condonation ought to be granted.

[14] In granting condonation, however, it must be borne in mind that the

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[1] *Gumede v Road Accident Fund* 2007 (4) SA 304 at 307D-G, *Harris v Absa Bank t/a Volkskas* 2006(4) SA 527 (T) at 528 I-J,*Silber v Ozen Wholesalers (Pty) Ltd 1954 (2)* SA 354 *(A)* at 352 H-353 A

application for condonation has been decided based on the particular facts of this matter and that the court was alive to the submissions made by Mr *Mkumbuzi* that the DPP ought not to be given carte blanche to bring an application such as this where there has been a considerable delay and an unsatisfactory explanation tendered. The fact that condonation has been granted in this matter ought not to be viewed as this court countenancing such conduct for future matters. Each matter will be dealt with on its own peculiar set of facts.

The appellant's grounds of appeal against conviction

[15] Turning now to the appeal against the conviction, there are several grounds on which the appellant challenged the conviction, namely:

(a) the court a quo erred in administering the oath in relation to the complainant and the second State witness, both of whom were child witnesses;

(b) the evidence of the complainant, a single witness, was not satisfactory in all material respects and was unreliable;

(c) the court a quo erred in dealing with the medical evidence presented and committed a misdirection in that no evidence was tendered by the doctor that there was any interference with the 'hymenal diameter'; and

(d) the court a quo committed a misdirection in finding there was no bias or malice by the complainant and her family against the appellant and that they had a motive to lie and falsely implicate him.

[16] At the commencement of the proceedings in the court a quo, both the appellant and his legal representative confirmed that the provisions of the minimum sentencing legislation had been explained to him and that the prescribed minimum sentence of life imprisonment was applicable. He pleaded not guilty and his alibi defence was that he was at his place of employment at Z[....] Construction on 13 January 2015. In addition, the appellant submitted that the complainant was influenced by her parents to fabricate these false allegations against him.

[17] The State led the evidence of the complainant as well as her two sisters, T[….] and N[….] C[….], her mother N[….] C[….] and the investigating officer Constable Ngobese. It must be borne in mind that at the commencement of the trial, the prosecutor sought to use the services of an intermediary in order for the evidence of the complainant and that of her one sister to be led given their age and

the nature of the proceedings.

[18] Mr *Mkumbuzi* submitted and is quite correct that the provisions of inter alia, ss 162, 163 and 164 of the CPA apply when evidence of child witnesses is to be led. In summary he indicates that the witnesses, specifically the complainant were not properly admonished to tell the truth before giving evidence. Consequently, this court has to consider the transcript of the proceedings in relation to how the complainant was admonished prior to her testifying.

[19] Section 164 of the CPA enjoins a court to hold an enquiry in circumstances where it is apparent the witness does not understand the nature and import of the oath or the affirmation as a consequence of ignorance arising from youth, poor education or any other cause.[2] The enquiry which the court conducts is not a rigid one and a court resorts to admonishing a child witness when it appears the witness does not understand the nature of the oath.[3] A presiding officer is required to form an opinion that a witness does not understand the nature and import of the oath in order to admonish a child witness.

[20] The transcript of the proceedings indicates that initially the court for some inexplicable reason required the prosecutor to hold the competency enquiry. However, what is also evident from the transcript is that the court then conducted the enquiry as it was enjoined to do and performed the competency enquiry. It is clear from the answers to the questions that the complainant who was eight years old at the time she testified, did not understand the nature and import of the oath due to her youthfulness. Consequently, the court made a conscious decision that the complainant be admonished.

[21] In relation to the form that such admonishment must take, the Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, & others*[4] stated that all that is required is for a witness to be able to understand what it means to relate what occurred and that a child witness understands what it means to tell the truth.

[22] The questioning by the court in relation to whether or not the complainant understood what it meant to tell the truth was elementary but seemed to be appropriate for a child of such youthfulness. In addition, the court a quo was best

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[2] *S v B* 2003 (1) SACR 52 (SCA) para 15.
[3] *S v Swartz* 2009 (1) SACR 452 (C) paras 7-14.
[4] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, & others* 2009 (4) SA 222 (CC) para 165.

suited to observe the complainant's demeanour when she answered the questions. The admonishment was properly administered in my view and consequently the challenge to the admissibility of the complainant's evidence namely, that she was not correctly admonished to tell the truth on the facts of this matter are without merit and must be dismissed.

[23] Similarly with the complainant's sister, T[….] (who wanted to be called by her second name N[….] when she testified), the court after conducting a competency test admonished her as it was apparent she did not understand the nature and import of the oath on questioning her. In relation to N[….], the elder of the sisters who was 15 years old at the time she testified, the court did not admonish her but established that she understood the nature and import of the oath and consequently the witness took the oath and was sworn in.

[24] I agree with the submission of Mr *Singh* that one cannot be an armchair critic in these matters and often there is no textbook approach to follow in each matter. It often depends on the presiding officer's view of the demeanour of the witness. Of further note is that after the court had engaged in the process of the competency test as well as admonishing the complainant, the appellant's legal representative was pertinently asked whether there was anything his wished to add or raise a complaint about the nature of the competency test and the admonishment. The record indicates at page 46 line 6 that no complaint was ever raised at the trial that the complainant was not correctly admonished nor that the competency test had not been properly performed. Similarly no complaints were raised by the appellant's legal representative in relation to the manner in which the competence of these witnesses was established nor the manner in which they were admonished and took the oath. Consequently, the evidence of these witnesses has been properly received.

[25] Turning now to the merits of the conviction and the evidence presented at the trial, the complainant testified that on the day in question, she was en route to M[….]'s home to return a towel which her mother had previously borrowed to wrap her baby brother in. As she approached the appellant's home which is on the way to M[….]'s home, the appellant chased her, grabbed her and threw her over his shoulder. He then carried her to his home and pushed her inside through a window. The appellant entered the home through the front door alone and closed the door.

[26] At the time the complainant was dressed in a skirt, underwear and t-shirt. She

tried to run away but the appellant pulled her by her skirt and she fell down and hurt the back of her head. He then undressed her and made her lie on his bed on her back with her knees pulled up and legs apart. The appellant removed his pants and inserted his penis into her vagina. At the time she informed him that she did not like what he was doing. It was painful and he had his penis in her vagina for a long time. After a while when she was leaving he said to her 'go away, I was not even interested anyway'. Whilst on her way to M[….]'s home, her sister T[….] who had come to look for her, asked her where she was coming from. T[….] told her that it was late in the afternoon and that they should return home.

[27] When her sister questioned her as to where she was coming from, the complainant, who was crying, told her that she was coming from uncle M[….]'s (being the appellant) home and informed her that he had grabbed her and put her in the house through the window. She told her sister that she attempted to run away but he had pulled her and she had hurt the back of her head.

[28] The two sisters then returned home to N[….] and T[….] reported to her what had transpired. On the day in question they were home alone as both their parents were out. On her mother's return that afternoon, the complainant and her two sisters reported what had happened. Because their parents did not have money they only travelled to the hospital some time later.

[29] The complainant recalled attending at the Montebello Hospital and the doctor on examining her told her parents that she had been raped. The police were called and took them to Ndwedwe Police Station where her mother made her statement. She also recalled her mother advising the police person that she had gone to collect her pension and when she observed her taking a bath she noticed that she was passing urine very slowly and having difficulty. On their return from the police station she confirmed that they were involved in an accident and the car collided with a bus. They were transported to the hospital for treatment of their injuries and the following day they travelled with the investigating officer Constable Ngobese to Ndwedwe to arrest the appellant. The complainant pointed the appellant out to the police.

[30] She denied that she would make up any stories to falsely implicate the appellant and confirmed that he had raped her in his bedroom. She testified that at the time the appellant resided with M[….] and his son P[….], but they were not there on the day of the incident. Although she tried to scream when they were in the house together and he was raping her, the appellant threatened her with a knife and a doll.

[31] She also confirmed that her mother had examined her and informed her that she had been raped. She confirmed that she had forgotten to inform the police that the appellant had threatened her with a knife but she did inform her mother and sisters of this and it appears that they had forgotten about this too. She disputed the appellant's version that on the day in question, his girlfriend and P[….] were at home. She denied this and indicated that her sisters had also gone to M[….]'s house to confront him about why he had raped her and on their arrival at his home found him at the doorway with his penis hanging outside of his trousers.

[32] N[….] C[….] testified she recalls the incident very clearly as it was her sister, the complainant's birthday. That morning their mother had instructed the complainant to return the towel to M[….]'s house. At approximately midday, N[….] left. When it started getting late and the complainant had not returned, she went looking for her. She found the complainant walking on the road and she was crying. She asked the complainant where she was coming from and the complainant informed her that she was coming from M[….]'s home as when she was walking to M[….]'s house, he had chased her and grabbed her and put her in his house through the window and closed the window. He then came into the house and when she tried to run away he closed the door. He removed her skirt and underwear and inserted his penis into her vagina. Thereafter he gave her a doll which makes a noise saying 'I love you'. He also showed her a knife and threatened that if she ever told anyone at home what had happened he would stab her.

[33] This conversation took place on the road whilst they were going home and on their arrival at home they informed their sister N[….] what had happened. N[….] confirmed that all three of them went to the appellant's home to confront him about what he had done to the complainant and that they found him there naked. He kept quiet even though they questioned him a number of times. They then left the appellant's home and returned home. M[….] informed their mother what had transpired and their mother then informed their father.

[34] During cross-examination N[….] confirmed that she had proceeded to M[….]'s house and found her and the grandfather there and asked her about the complainant's whereabouts. M[….] informed her that the complainant had not arrived there. N[….] confirmed that her family and the appellant's were no longer getting along but this was as a consequence of the incident and denied that her father had assaulted the appellant or that they had an issue concerning cats and chickens.

[35] N[….] confirmed that she made a statement to the police and that the incident was reported to the police a few days after the incident as their parents had no money at the time. In relation to the difference between her evidence in court and in her statement, she confirmed that the reason why she did not inform the police at the time of making the statement that they had gone to the appellant's house to confront him was because the police had never asked her that question. She denied that she was falsely implicating the appellant because her family had told her to do so. She was further adamant that it was the appellant who had raped her sister.

[36] She confirmed that the appellant worked at C[….]'s but did not know about him working at Z[....] Construction Company. She disputed that the appellant's son and wife were always at home as they were unemployed. She indicated that they were not always at home because they would go away with the appellant to C[….]'s home.

[37] N[….] C[….] testified that the appellant was their neighbour and that she knew about the rape as the complainant had relayed the story as to how she was raped to their sister T[….], and, that T[….] had in turn reported this to her when they arrived home. She confirmed that after T[….] had relayed to her what the complainant had told her, she confirmed this with the complainant. The three of them then went to the appellant's home to confront him about what had transpired. They were standing a distance from his home and he was standing by the door, naked on his upper body but dressed on his lower body. His penis was showing outside of his pants. They confronted him about what he had done to the complainant and initially he kept quiet and did not respond. He then chased them away and insulted them using vulgarity. He informed them that they should leave his home or he would catch them and do the same thing to them that he had done to the complainant.

[38] They then returned home and when their mother arrived later that evening they made a report to her about what had transpired. N[….] confirmed that the appellant resided with his wife and child but they did not see them on the day in question, specifically when they went to the appellant's home to confront him about what had transpired earlier on that day with the complainant.

[39] She also confirmed that they had made a report to their aunt earlier that day as their aunt had heard the complainant crying. Their aunt examined the complainant and confirmed that she had been raped and said they should tell their mother when she returned home that day. N[….] confirmed that she did not tell her mother when

she returned that the complainant had been examined by her aunt, but she confirmed that she did inform their mother that they had confronted the appellant earlier on.

[40] She further confirmed that although her statement to the police does not record that they had gone to confront the appellant, she did mention it and possibly the police officers did not take it down. She also testified that she had forgotten to inform the court that the complainant had mentioned to her that the appellant had threatened her with the knife and promised her a doll. She confirmed that she had mentioned to the police the aspect relating to the doll and the knife but they had forgotten to mention it when they were taking down her statement.

[41] N[….] further confirmed that the appellant and her family were no longer on good terms with each other given this incident and also that she knew that the appellant's wife was not at home on the day in question. The previous day she had overheard the appellant's wife speaking with her mother informing her mother that she was going to her parental house at Umdloti and thereafter to C[….]'s place as they were working with the municipality on the roads. She also testified that she observed the appellant on the morning of the incident as he had greeted her father before her father had gone to the pension office.

[42] N[….] confirmed that initially her father did not believe that the complainant had been raped. She indicated that on the day of the incident they were informed that her parents had gone to fetch their pension money but they did not have any money left as on the same day they purchased groceries. They went to the police and to the hospital after her mother had borrowed money at M[….]'s homestead to enable them to do so. She further disputed the appellant's version that the windows are too high for him to put a person inside the house through the window. She testified that this was not correct as the windows of the RDP houses are not high and there are approximately four rows of bricks before the window. One can climb or jump into the home through the window and the appellant's bed is next to the window. She confirmed that on the day in question the appellant's son was not at home as he had left with his mother.

[43] Although their father did not initially believe that the complainant had been raped by the appellant, he subsequently changed his mind and indicated that they should take the complainant to hospital to be examined as he was afraid that she had contracted HIV and needed to be treated for this. The reason why her father did

not believe the complainant had been raped was because he was on very good terms with and was very good friends with the appellant. They would often borrow items and exchange items between their families when they did not have and her father and the appellant would give each other tobacco.

[44] The complainant's mother, N[….] M[….] C[….] confirmed the appellant is a neighbour and does not live a far distance away from their home. She indicated that on the day in question she had gone to purchase groceries which was the day of the complainant's birthday. She confirmed that she had sent the complainant to M[….]'s home to return a towel which she had previously borrowed to carry her child. The children reported to her on their return that the appellant had raped the complainant when she was passing by his home to go to M[….]'s. The appellant had chased her, carried her and thrown her through the open window into his home because the bed is next to the window.

[45] She confirmed that she was informed that earlier on that day the children had gone to fetch firewood and that when T[….] returned, she realised that the complainant was not back yet and went to look for her. She found the complainant crying and they confronted the appellant who was at the door of his home with his penis hanging outside of his pants. She confirmed that the children made a report to her that the appellant indicated if they made a report to their parents he would slit their throats with a knife.

[46] She confirmed having examined the complainant and because they did not have money and the father of the children was not working, she borrowed money and took the complainant to the Montebello Hospital to be examined. This was the reason why there was an initial delay in the complainant being examined. They were then fetched by the police to attend at the Ndwedwe Police Station to lay a complaint against the appellant. On their way home, the bakkie they were travelling in was involved in an accident with a taxi and they were injured. It was due to the accident and the injuries sustained that there was a further delay in the investigating officer fetching them to take the complainant to be examined at the Mahatma Gandhi Hospital.

[47] This witness confirmed that she had made two statements to the police and the police did not read the statements back to her. This was the explanation for the differences in her evidence and what was recorded in the statements. She confirmed that the appellant's wife and child had left some time prior to the incident and no

longer resided with him on the day of the incident.

[48] In relation to the medical evidence, the J88 marked exhibit “D” was handed in by consent and no evidence was presented by the doctor who conducted the examination at Mahatma Gandhi Hospital on 20 January 2015. It was further recorded that the complainant had been involved in a motor vehicle collision and had been treated for such injuries at the Montebello Hospital. A further note was handed in from Montebello Hospital indicating that on the day the complainant and her family attended there, they were instructed to proceed to the crisis care clinic at Mahatma Gandhi Hospital for the J88 to be completed and no examination was conducted at the Montebello Hospital in relation to the allegation of rape. Such note was signed by Dr N Gordon.

[49] The J88 completed by Dr Raksha Ramjiawan on 20 January 2015 incorrectly reflects the complainant’s age as being four years old and records a report was made by the complainant that a known male, her neighbour, pushed her into his home and inserted his penis into her vagina. The report reflects the hymen as being annular in shape. The complainant was examined on the evening of the alleged rape by her mother who noticed that she had been interfered with. Her aunt also examined her on the same day. Dr Ramjiawan concluded that the complainant had been raped as is evident from exhibit “D” and that the complainant made a report to her that she was raped by a neighbour, it being undisputed that the appellant is the complainant’s neighbour. In addition, the J88 records the injuries that the complainant sustained at the hands of her alleged rapist.

[50] The appellant testified in his defence and called his son, L[….] M[….]as a witness. This witness unfortunately did not corroborate his alibi that he was at work at the time of the alleged incident or that they were living with the appellant at his home. In fact, his son testified that at the time of the commission of the rape the appellant was staying alone at home as he and his mother had gone visiting during that period. In addition, the appellant did not call any witness from his employer to confirm that he was at work at the time the offence occurred even though he testified about this. The fact that the appellant was residing with his family could also not be confirmed by the investigating officer.

[51] The appellant testified that on the day of the incident he was not at home. His wife and son were living with him at the time and he was employed at Z[....] Construction four days a week from Monday to Thursday, and on Friday and

weekends he was employed at C[….]'s home where he worked in the yard and tavern.

[52] He confirmed that the complainant's home was very close to his and that he knows the complainant and her family. He did not have a good relationship with the children's parents, but there were no problems between him and the children prior to this criminal case. During cross-examination of the State witnesses his legal representative put to the witnesses that the reason for the bad relationship between the complainant's parents and himself arose as a consequence of them deliberately letting their chickens into his yard to eat his crops. An altercation had arisen as his cat had then killed some of their chickens.

[53] This version changed when he was cross-examined by the prosecutor. He mentioned for the first time that the complainant's mother had put her up to falsely implicating him in the offences. The reason given for this by the appellant was as the complainant's father had accused him of having a relationship with the complainant's mother. The appellant indicated was the source of the animosity between the two families and resulted in them not being on good terms at the time of the incident. He denied the allegation of rape and testified that he first heard of the allegation on the day of his arrest when the complainant and her mother pointed him out to the police in a police van. He knew all the children and was told of the alleged incident but was never told at the time of his arrest when the incident is alleged to have occurred.

[54] The appellant's son confirmed that for a period of five days before his arrest they were not at home and the appellant was residing at home alone. He also indicated that he was aware that his father worked at C[….]'s but did not know anything about his father being employed at Z[....] Construction.

Analysis

[55] Having regard to the totality of the evidence, the court a quo in my view correctly rejected the appellant's version and most notably even his own alibi witness did not corroborate his version. Although the complainant was a single witness in relation to the actual incident, in my view, she testified in a satisfactory fashion in material respects. The differences in her evidence in court and what was recorded in her statement and / or not recorded was adequately explained by her. Although there are differences between her evidence and that of her sisters, these are not material to her identification of the appellant and what transpired when he raped her. It is also

consistent with the court a quo's view that the evidence of these witnesses was not 'rehearsed'.

[56] In addition, the complainant made a report to her sister shortly after the incident occurred. When they confronted the appellant later that day at his home, his wife and son were not there and he threatened them using vulgarities.

[57] The medical evidence presented corroborates the complainant's version that she was raped. The delay in reporting the incident and in the complainant being examined by a doctor was also explained. Significantly, despite the delay, the medical examination of the complainant showed signs consistent with rape. This finding was not challenged. In addition, it was never disputed that the complainant was examined by her mother on the day of the alleged incident and that her mother found 'some interference'.

[58] As regards the complaint that the complainant and her family lied and fabricated the evidence to falsely implicate the appellant, this too must be rejected. It is common cause and not disputed that the appellant was known to the complainant and her family, and apart from being their neighbour, enjoyed a close relationship with the family and had a good relationship with the complainant's parents. He would often attend at their home for traditional beer and they would do likewise. In addition, as with all good neighbours they often borrowed items they needed from each other.

[59] The appellant's home was a few doors away from the complainant's family home and he knew the complainant's family. Although it was common cause that there was an argument in relation to the chickens, the complainant's mother testified that they were on good terms as when the appellant spoke to her family about this, he spoke to her in what she termed 'a good manner'. In addition, the appellant was seen and heard greeting the complainant's father on the morning of the incident. This is inconsistent with the appellant's version that there was bad blood between them.

[60] All the State's witnesses testified that it was this incident which soured the relationship. Most notably, the version which arose during cross-examination of the appellant, was never put to the witnesses nor did he inform his legal representative that the reason for the relationship souring was as the complainant's father had assaulted him as he accused him of having an affair with the complainant's mother.

[61] On a conspectus of all the evidence the appellant was correctly convicted of raping the complainant by the court a quo.

The appeal against sentence and the State's cross-appeal to increase the sentence

[62] The appellant submits that there is a disparity between the sentence imposed and his personal circumstances, although the court a quo properly considered the existence of substantial and compelling factors and applied the proportionality test. Mr *Mkumbuzi* in his heads of argument submitted that lesser sentences have been 'meted out by the courts' to persons like the appellant who have been convicted of raping minor children. In this regard he relied on the decisions in *S v Abrahams*;[5] *Monageng v S*[6] and *Cele v S.*[7]

[63] Whilst there are decisions in which lesser sentences have been imposed for the rape of a minor, each case is decided on its own particular set of facts. Decisions in other cases are not meant to be 'straight jackets' for a sentencing court. Ultimately each matter must be decided on its own peculiar set of facts.

[64] The grounds on which the State appeals the sentence and submits the court *a quo* committed misdirections of law are the following:-

'25. . .

a. The trial court did not pronounce expressly or tacitly on the existence of substantial and compelling circumstances, in order to justify a deviation from the prescribed minimum sentence of life imprisonment.
b. The rape of the complainant fell squarely within the realm of Part 1 of Act 105 of 1997. The applicable sentence was life imprisonment.
c. The court made, with respect a shocking and insensitive statement that since there was no hymenal penetration but vulval penetration instead, that it counts in favour of the appellant as a mitigating factor.
d. The court found as a mitigating factor that the appellant stood trial and did not abscond.
e. The *court a quo* ignored completely the gravity of the offence, thus not taking into account all factors relevant for sentencing. The triad of factors was ignored completely.'[8] (Footnotes omitted)

[65] Mr *Singh* submitted that the court failed to consider the aggravating

[5] *S v Abrahams* 2002 (1) SACR 116 (SCA).
[6] *Monageng v S* [2009] 1 All SA 237 (SCA).
[7] *Cele v S* [2012] 4 All SA 182 (KZP).
[8] Respondent's Heads of Argument para 25.

circumstances of the offence being the fact that the complainant was raped and humiliated on her birthday, the trauma of the incident and the resultant effect of the rape. The appellant also pleaded not guilty and put the complainant and her family through further trauma by forcing them to testify and relive details of the rape. The appellant did not display any remorse.

[66] In respect of the appellant, Mr *Singh* submitted that his personal circumstances namely that he was 57 years old at the time of sentencing, had three children, was gainfully employed earning R500 per fortnight and was a first offender were neutral factors given the aggravating factors. He submitted further that the appellant never expressed any remorse and was therefore not a candidate for rehabilitation. Given the serious nature of this offence, being rape, two of the four pillars of sentencing must come to the fore being retribution and deterrence. In matters of this nature he submitted that the emphasis is placed on deterrence and retribution and rehabilitation plays a smaller role.[9]

[67] Given the aggravating features referred to above, the appellant's circumstances and any mitigating factors which the court may find do not on their own or cumulatively constitute substantial and compelling circumstances justifying the court from deviating from a prescribed minimum sentence of life imprisonment.[10] In light of these misdirections this court is at liberty to consider sentencing afresh and to also consider the application to increase sentence.

[68] If one considers the proceedings in the court a quo, the charge sheet made specific reference to the provisions of the minimum sentencing legislation. These provisions were explained to the appellant prior to the proceedings commencing in the court a quo, and the appellant who was legally represented at the time was fully aware that if convicted, he faced a possible sentence of life imprisonment.

[69] The only substantial and compelling factor which the court a quo alluded to was the fact that there was 'vulval penetration and not hymenal penetration'. It is trite that 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;. . .'

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[9] See *Director of Public Prosecutions, Pretoria v Mtshali* 2016 (2) SACR 463 (GP) para 11.
[10] See *S v AM* 2014 (1) SACR 48 (SCA) para 17; *S v PB* 2013 (2) SACR 533 (SCA) para 20.

[70] This was not a factor which on the facts of this matter constituted a substantial and compelling factor. Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act defines this as rape and the absence of hymenal penetration was a clear misdirection of the court *a quo*.

[71] This finding of the court a quo and the comments made on record does not detract from the fact that the complainant, a seven year old girl was raped. If the court a quo was unclear regarding the medical evidence presented, then the doctor who examined the complainant could have been called to testify.

[72] The aggravating features of this matter cannot be ignored and consequently the starting point when sentencing the appellant would have been the prescribed minimum sentence of life imprisonment. The Supreme Court of Appeal (the SCA) has repeatedly endorsed the views expressed in *S v Malgas*[11] that the starting point is the minimum sentencing legislation and that a court must not depart from such sentence lightly or for 'flimsy reasons'.

[73] The respondent submits that a sentence of 12 years' imprisonment is shockingly and disturbingly inappropriate given the circumstances. The court a quo committed several misdirections which are evident on the judgment on sentence, namely, the finding that this was an isolated offence and the finding that the appellant was not a paedophile. Further, the fact that the appellant attended all his court appearances was a mitigating factor and he was a candidate for rehabilitation and reformation. In addition, the court found that as there was no hymenal penetration but vulval penetration this constituted a substantial and compelling circumstance.

[74] The personal circumstances of the appellant, he being 57 years old, with three adult children and him being employed was not out of the ordinary and did not constitute substantial and compelling circumstances as envisaged in *Malgas*.[12] Having regard to these it is clear that the court a quo committed a misdirection warranting this court to allow the cross-appeal and also allowing the appeal court to apply its mind to sentencing afresh.

[75] Whilst I acknowledge the circumstances of the offence, what I cannot lose sight of is the fact that the appellant was a first offender and was 57 years old at the

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[11] *S v Malgas* 2001 (2) SA 1222 (SCA).
[12] *S v Malgas* 2001 (2) SA 1222 (SCA) para 25.

time of conviction and sentence. I agree with the submission by Mr *Singh* that the appellant did not display any remorse, and the court a quo's findings in relation to his demeanour that this was a display of remorse, I do not agree with. Similarly the SCA has expressed its sentiments that this is not a true sign of remorse. The court a quo speculated and appeared to be sympathetic toward the appellant as it found the appellant's demeanour demonstrated remorse.

[76] I have had regard to a number of decisions in relation to the rape of a minor under these circumstances. In *Director of Public Prosecutions, Grahamstown v Peli*[13] the SCA alluded in its judgment to the fact that if a trial court evaluates neutral factors advanced during mitigation of sentence as constituting substantial and compelling circumstances, this constitutes a misdirection which justifies interference on appeal in respect of sentence. The SCA increased the sentence of the appellant in that matter from six years to life imprisonment.

[77] It must also be borne in mind in terms of Section 28 of the Constitution of the Republic of South Africa Act 108 of 1996 in addition to basic nutrition, shelter and care:

"*Every child has the right to be protected from maltreatment, neglect, abuse or degradation."*

[78] It is regrettable that despite the provisions of Section 28 of the Constitution, children continue to be physically and sexually exploited and there is an increase in such offences. This court as upper guardian of minors has a duty to act in the best interest of minors and impose appropriate sentences to those convicted to sexually abusing minors.

[79] In *S v Chapman*[14] the late Mohamed CJ held as follows:

"*Rape is a very serious offence constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the constitution and to any defensible civilisation*."

[80] However given the personal circumstances of the appellant specifically his age a sentence other than one of life imprisonment is appropriate. The appellant is 58 years old and approaching the twilight years of his life and to impose a term of life

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[13] *Director of Public Prosecutions, Grahamstown v Peli* 2018 (2) SACR 1 (SCA) para 12.
[14] 1997 (3) SA 341 (SCA) at 344 J to 344 A

imprisonment would be unduly, harsh and severe in the circumstances.[15]

[81] In addition, to increase the sentence and impose a sentence of life imprisonment would be disproportionate in the circumstances having regard to the decision of *S v Malgas.* Given the personal circumstances of the appellant, specifically his age, a sentence other than one of life imprisonment is appropriate.[16] Consequently, in my view, taking into consideration all the relevant facts and circumstances when considered holistically, and having regard to the advanced age of the appellant, a sentence of 20 years' imprisonment appears to be appropriate.

[82] In the result the following orders will issue:

1. The application by the State in terms of s 310A of the Criminal Procedure Act 51 of 1977 as well as the application for condonation are hereby granted.
2. The respondent is granted leave to appeal the sentence of 12 years' imprisonment imposed.
3. The appellant's appeal against his conviction is dismissed.
4. In respect of the appeal against sentence, the appellant's appeal against sentence is dismissed. The respondent's cross-appeal to increase the sentence imposed by the court a quo is upheld. The sentence imposed by the court a quo is set aside and substituted with a sentence of 20 years' imprisonment.

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HENRIQUES J

I agree

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MASIPA J

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[15] *S v Hewitt* 2016 JDR 1079 (SCA) at paragraph 15, *S v Seedat* 2017 (1) SACR 141 SCA at paragraph 41

[16] See *S v Hewitt* 2017 (1) SACR 309 (SCA) para 15; *S v Seedat* 2017 (1) SACR 141 (SCA) para 41.

CASE INFORMATION

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Date of Hearing	:	8 February 2019 25 February 2019
Date of Judgment	:	19 July 2019