

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: AR22/21

In the matter between:

MDUDUZI TSHAZI

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Umzimkhulu Regional Court (sitting as court of first instance):

The appeal against the convictions and related sentences imposed on count 1 (kidnapping) and count 2 (rape) are dismissed.

JUDGMENT

Khallil AJ (Henriques J concurring)

Introduction

[1] The appellant was arraigned in the regional court, Umzimkhulu, on one count each of kidnapping (count 1) and rape (count 2) of the complainant, and of housebreaking with intent to commit an offence unknown to the State (count 3) and sexual assault (count 4).

[2] In counts 1 and 2, it is not disputed that the complainant was under the age of 16 years at the time of the commission of the offences. It is also alleged that the rape was committed in circumstances where the complainant was raped more than once. For these reasons, the rape charge, falling within the ambit of Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (CLAA), was substantively framed to be read with section 51(1) of the CLAA, which prescribes, upon conviction, a sentence of imprisonment for life.¹

[3] The appellant having pleaded not guilty to all four charges, was convicted on counts 1 and 2, and found not guilty and acquitted on counts 3 and 4. He was sentenced on 20 November 2020 to 5 years' imprisonment for kidnapping (count 1), and the learned magistrate having found no substantial and compelling circumstances that justified the imposition of a lesser sentence in respect of the rape conviction in count 2, imposed the ordained sentence of imprisonment for life. The sentence on count 1 was ordered to run concurrently with the sentence imposed on count 2.

[4] The matter serves before us with leave of the court *a quo* on both counts against both the conviction and sentence, without the necessity of having to apply for leave to CPA).²

¹ Rape falling within the ambit of Part I of Schedule 2 of Criminal Law Amendment Act 105 of 1997 (CLAA), where, amongst others, 'the victim is under the age of 16 years' or where the rape was committed in circumstances 'where the victim was raped more than once' whether by the accused or by any co-perpetrator or accomplice. Section 51(1) of CLAA provides that 'Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life'.

² Section 309(1)(a) of Criminal Procedure Act 51 of 1977 provides that

[5] The main contention of the appellant is that the complainant, being a minor when she testified, was not admonished by the learned magistrate to speak the truth, and further that there was no competency enquiry conducted to determine whether she had the capacity to distinguish between truth and falsehood.

[6] The appellant contends that the trial magistrate also failed to determine whether the complainant understood the nature and import of the oath and consequently, the court ought not to have placed any reliance on her evidence.³ The sole basis for this proposition is that the complainant was still a minor at the time of testifying.

[7] It is common cause that the complainant was a single child witness to the kidnapping and rape. It is contended that her evidence stood uncorroborated and that the trial court, in evaluating her evidence, did not have proper regard to the cautionary rules applicable to the evidence of a single witness and the evidence of a child witness.

[8] There was a delay of around five months before the complainant made the first report of the rape to one S[...], who allegedly saw the complainant being chased by the appellant on the day in question. The appellant contends, that this evidence ought not to have been accepted by the trial court for the following reasons:

- (a) S[...], who lived in the area, was not called to testify nor was any statement taken from him; and
- (b) The complainant only reported the matter to her mother at the insistence of S[...] some five months after the alleged incidents. The allegations of kidnapping and rape, it is contended, were accordingly not made freely and voluntarily by the complainant to her mother.

‘ . . . if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B . . . ’.

³ Paras 3 – 10 of appellant’s head of argument.

[9] Regarding the sentences imposed, it is contended that the learned magistrate failed to attach sufficient weight to the personal circumstances of the appellant, and had proper cognizance been taken of these circumstances, the court *a quo* ought to have found that substantial and compelling circumstances did indeed exist justifying a deviation from the prescribed sentence of imprisonment for life imposed in count 2 of rape.

Competency of complainant as child witness

[10] It is well known, if not trite, that before a child witness may give evidence, the presiding officer must be satisfied that he or she is a competent witness. The term 'competent' refers to the ability to give evidence and relates to whether the child has sufficient intelligence, sense and reason in order to understand the difference between truth and falsehood, they recognise that it is wrong to tell a lie, and can understand and answer the questions put to him or her.⁴

[11] There is no specific age at which a child can automatically be assumed to have the requisite competence to testify and even children as young as 3 years old have been found to be competent to testify in court.⁵ In each case the presiding officer must satisfy him or herself that the child has the necessary competence.⁶

[12] Section 192 of the CPA provides that '[every] person not expressly excluded by this Act from giving evidence shall . . . be competent and compellable to give evidence in criminal proceedings'. Young child witnesses appear to be one of the exceptions to this provision.

[13] The authors Schwikkard and Van der Merwe state as follows:⁷

⁴ DT Zeffert *et al Essential Evidence* 2 ed (2020) at 278 and 337 – 338.

⁵ *R v Bell* 1929 CPD 478; *R v Manda* 1951 (3) SA 158 (A); *R v J* 1958 (3) SA 699 (SR).

⁶ *S v L* 1973 (1) SA 344 (C); *S v T* 1973 (3) SA 794 (A).

⁷ PJ Schwikkard and SE van der Merwe (eds) *Principles of Evidence* 4 ed (2016) at 451.

‘Even very young children may testify provided that they (a) appreciate the duty of speaking the truth; (b) have sufficient intelligence; and (c) can communicate effectively’.
(footnote omitted)

[14] In terms of section 193 of the CPA, it is incumbent on the court in which criminal proceedings are conducted to decide on the competency of any witness to give evidence. [15] The material question that the trial court should ask itself is whether the young witness’s evidence is trustworthy. Trustworthiness depends on factors such as the child’s power of observation, their power of recollection and their power of narration.⁸

[16] The complainant was 15 years old at the time of the alleged offences, in grade 8, and was 17 years and 10 months old when she testified at trial.⁹ Her evidence was given under oath without the use of an intermediary, as envisaged in section 170A(1) of the CPA. The appointment of an intermediary by the court is however discretionary and is to be invoked only where ‘it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings’. The trial court accepted that no undue mental stress or suffering would befall the complainant if an intermediary was not used. It bears mentioning and is unfortunate that the trial magistrate failed, at the very least, to enquire into the various statutory provisions which provide special measures for children to testify, such as testifying *in camera*, the prohibition of the publication of information that might reveal the identity of the child and the use of an intermediary. In providing these measures, the legislature clearly intended to ameliorate those aspects of the criminal process that tend to expose a child to secondary psychological trauma or emotional harm.¹⁰

⁸ *Woji v Santam Insurance Company Ltd* 1981(1) SA 1020 (A) at 1021.

⁹ Record, page 91, lines 13-14; page 41 of the Bundle (Exhibit “A”) – birth certificate of complainant.

¹⁰ Sections 153, 154, 158 and 170A of the Criminal Procedure Act 51 of 1977; *S v Mokoena*; *S v Phaswane* 2008 (2) SACR 216 (T), para 50; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* [2009] ZACC 8; 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC); *Centre for Child Law and others v Media 24 Limited and others* [2019] ZACC 46; 2020 (1) SACR 469 (CC); 2020 (3) BCLR 245 (CC)

[17] *In casu*, neither the State, nor the defence, raised any concerns regarding the competency of the complainant or her appreciation of the gravity of taking the oath. The trial magistrate, clearly relying on the age of the complainant (17 years 10 months), the submission of the prosecutor that it was not necessary to enquire into the complainant's competency and that she understood the import of taking the oath, proceeded to administer the oath. The defence raised no qualms on any of these issues. It remains, however, that the learned magistrate failed to ascertain if the complainant understood the nature and import of the oath and may be justifiably criticized for relying on the assertion of the prosecutor that a competency enquiry was not necessary.

[18] The material issue is whether, given the facts of this case, it was necessary for the magistrate to conduct a competency enquiry and to determine if the complainant understood the nature and import of the oath, and if so, whether these omissions rendered the complainant's evidence either inadmissible, alternatively, of so little probative value, that no reliance could be placed thereon.

[19] The record reflects that the approach by the court *a quo* was to first confirm the age of the complainant as 17 years 10 months before she testified. The prosecutor on enquiry from the magistrate was of the view that it was not necessary to enquire into the competency of the complainant and that she understood the import of taking the oath, nor was it necessary for the complainant to give her evidence through an intermediary as envisaged in section 170A of the CPA.¹¹

[20] On page 91, the record reflects that immediately after the complainant was sworn in, the following questions were first put to her by the prosecutor in examination in chief:

‘Prosecutor: Thank you, your worship. (s) *Do you go to school*----- yes I do.

What school do you attend? Secondary school.

You know you are at court today, correct? ----- Yes.

Why are you at court today? ---- I laid a charge for being sexually assaulted.

¹¹ Record at 91, line 14. *Chili v The State* (AR754/14) [2016] ZAKZPHC 12 (12 February 2016) paras 57 – 58

Do you remember when that happened? ---- yes.

When was it? ---- It was 24 April 2018.' (My emphasis)

[21] The above extract and earlier enquiries by the learned magistrate directed to the prosecutor, reflects that the magistrate was aware of the complainant's age (two months short of being an adult). There was nothing to suggest that the complainant could not distinguish between truth and falsehood or that she was of such a young age that she did not understand the nature and import of taking the oath or that there were any concerns regarding her competency. This appears to be the rationale, gleaned from the record, of why the learned magistrate simply administered the oath to the complainant.

[22] Save for the two exceptions in section 163 (affirmation in lieu of oath) and section 164 (admonishment) of the CPA, section 162, as a starting point, requires that all witnesses be sworn in before testifying. This is exactly what the learned magistrate did.

[23] Had there been any indication to the contrary regarding the complainant taking the prescribed oath, only then would it have been necessary for the provisions of section 164(1) of the CPA to have been invoked. This section provides:

'Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: provided that such person shall in view of the oath or affirmation, be admonished by the presiding Judge or Judicial Officer to speak the truth.'

[24] The appellant's reliance on the complainant not being admonished by the trial magistrate is accordingly without merit as there was no indication at all that the complainant, who was almost an adult at the time when she testified, did not understand the sanctity of the oath. Surely if there were any concerns, it was open to the legal representatives themselves, in fact a duty on them, to have raised such concerns with the trial magistrate, which they did not do. There was also nothing to suggest that the

complainant could not distinguish between truth and falsehood. This perhaps explains why no such concerns were raised before the trial court.

[25] The Supreme Court of Appeal, in *S v B*,¹² held that the presiding officer did not have to hold an explicit enquiry to determine that a child witness did not comprehend the oath or affirmation before proceeding to admonish the witness to tell the truth. All that is required is that there be some rational basis to justify the presiding officer reaching the conclusion that the witness did not understand the oath or affirmation. The court held that in some cases the mere age of the child would be sufficient to justify a presumption that the child did not understand the oath. The court however did not specify at what age this could be assumed. In my view, by similar reasoning, the converse is equally true that a child by mere age (17 years 10 months), and in the absence of any indication to the contrary, is sufficient to justify the presumption that the child did indeed understand the import of the oath and is a competent witness without the need for any explicit enquiry. This acceptance by the learned magistrate was reaffirmed by the manner in which the complainant testified in court. There was simply nothing that could be gleaned from the record, even remotely, to suggest otherwise.

[26] In *S v Chalale*,¹³ the child witnesses were 15 and 17 years of age and the magistrate assumed on the basis of their ages that they lacked the capacity to comprehend the oath, and proceeded to admonish them to tell the truth. The high court disagreed with the approach taken by the magistrate, holding that children of 15 and 17 years of age usually do understand the nature and sanctity of the oath, and cannot therefore be presumed not to understand it. In *S v SD*¹⁴, the court followed a similar approach in accepting a 13-year old complainant's evidence as reliable.

¹² *S v B* 2003 (1) SACR 52 (SCA); *Haarhoff and another v Director of Public Prosecutions, Eastern Cape* [2018] ZASCA 184, 2019 (1) SACR 371 (SCA), [2019] 1 All SA 585 (SCA) from para 27.

¹³ *S v Chalale* 2004 (2) SACR 264 (W) para 3. *S v Sikhipha* 2006 (2) SACR 439 (SCA) paras 13 – 14, here the court emphasized the point that there was nothing in the evidence presented in court that showed that the children (aged 14 and the other child was not known) did not understand the import of the oath. (*Sikhipha* para 13 was followed in *S v Mali* 2017 (2) SACR 378 (ECG) para 12.)

¹⁴ *S v SD* 2020(1) SACR 78 (KZP), at paragraphs 22-26,

[27] Given the above circumstances, I am of the view that it was not necessary for the magistrate to hold any explicit competency enquiry and that the trial court was justified in assuming that the complainant knew and understood the import of taking the prescribed oath, a finding reinforced by the manner in which the complainant testified in examination in chief and throughout the extensive cross-examination.

Merits

[28] Turning to the merits of the appeal, counsel for the appellant rightly emphasised that there were two reasons for the complainant's evidence to be evaluated with caution, namely, she was a child witness, albeit almost an adult when she testified, and also a single witness.

[29] According to the complainant, who was 15 years old at the time of the incidents, she and two other children, were returning home on foot from a cultural event close to the area where she lived, when she was accosted by the appellant who initially greeted them and proceeded to grab her. She tried to resist but was overpowered. The appellant carried sticks in one hand. He dragged the complainant until they reached a homestead and when she attempted to escape, he managed to catch her close to a church. He forced the complainant into the church, asked her to undress and raped her by inserting his penis into her vagina. The appellant also had a knife in his possession.

[30] He then forced the complainant into his homestead and compelled her to spend the night with him. During this time, he raped the complainant three times whilst she cried. In the early hours of the following morning at around 2h00, he escorted the complainant close to her grandmother's house. He threatened her that if she told anyone about what happened, he knows where she lived with her two minor siblings and harm would befall them. It is not in dispute that the complainant's mother, because of employment, lived elsewhere and returned home only at month-end.

[31] She was a virgin before the rape and after this incident she felt pain inside her vagina for days, bled a little and could not walk properly.¹⁵ She could also see some blood on her panty at the time she was being raped in the appellant's room.

[32] Before this incident, on occasion, she saw the appellant in the area, and the appellant would greet her and want to talk to her. He appeared to be romantically interested in her.¹⁶ This was reinforced by the appellant when he testified that he 'proposed' love to her before this incident.

[33] The complainant did not report the kidnapping and rape to anyone until some five months later when she met S[...], who had seen her being chased by the appellant on the day in question, and who also briefly spoke to the appellant at the time. As S[...] informed the complainant that the appellant was no longer in the area, she related to him what had transpired, this being the first report she made of the kidnapping and rape to anyone. S[...] also begged her to tell her mother what had happened. Although not known to her, S[...] was from the same area where she lived.¹⁷ At the trial, S[...] was however not called to testify.

[34] In cross-examination the focus largely fell on the delay in reporting the alleged kidnapping and rape, and to whom the complainant had reported this incident. It was put to her that S[...] had influenced her to lay false charges against the appellant as S[...] and the appellant had problems between them. The complainant denied being unduly influenced by S[...] and was adamant that all he advised her to do, was simply 'to speak the truth while there is still time'.¹⁸

[35] The version of the appellant put to the complainant was that she willingly accompanied him to his room on the day in question. When they got there, they watched a movie on his laptop and spoke. Strangely, part of the conversation according

¹⁵ Record at 109, lines 21 – 25.

¹⁶ Record at 107, lines 5 – 10.

¹⁷ Record at 102, lines 18 – 19 and at 103, lines 4 – 5.

¹⁸ Record at 111, lines 8 – 12.

to the appellant himself, revolved around the virginity of the complainant (which the complainant denied), and it was put to her that the appellant would testify that he told the complainant that as she was a virgin, he did not 'want to deflower' her because he would be 'forced to pay damages'.¹⁹ The appellant, it was further put, would deny having sexual intercourse with the complainant.

[36] The appellant's evidence was largely in accordance with the case put to the complainant by his counsel. He contradicted himself on some issues and save for denying that she forcibly accompanied him on the day in question and that he had sexual intercourse with her as alleged or at all, he took no issue with much of the version of the complainant relating to the surrounding circumstances.

[37] The following facts, relating to the incident, are common cause:

- (a) The date and place of the incident;
- (b) Identity of the complainant and the appellant;
- (c) The appellant met the complainant on the day in question whilst she was in the company of two other children;
- (d) Complainant spent a night with the appellant in his room; and
- (e) The complainant left the appellant's residence in the early hours of the following morning.

[38] The medico-legal examination report by the doctor was handed in by consent and the doctor was not called to give evidence. The Supreme Court of Appeal²⁰ has cautioned that such practice is generally speaking to be discouraged because there is no opportunity for the doctor to explain the 'frequently subtle complexities and nuances of the report; to clarify points of uncertainty and to amplify upon its implications and the reasons for any opinions expressed in the report'. The importance of the doctor testifying is that it may make the difference between a conviction and an acquittal or perhaps a conviction on a lesser charge.

¹⁹ Record at 115, lines 21 – 25, at 116, lines 1 – 2; at 141, lines 22 – 23 and at 150, lines 10 – 12.

²⁰ *MM v S* [2011] ZASCA 5, 2012 (2) SACR 18 (SCA), [2012] 2 All SA 401 (SCA) para 15.

[39] The medical examination was however conducted some five months after the incident and the report revealed in paragraph 11, a ‘tear over the right lateral aspect’ of the hymen. The conclusion in paragraph ‘K’ (on page 46) of the said report reads ‘Torn hymen on right lateral aspect’. These findings and conclusions were not in dispute and in the absence of any suggestion to the contrary, must serve as independent corroboration of the complainant’s version of the sexual intercourse.²¹ The lack of clarity in the doctor’s report is overcome by the complainant’s evidence, namely, that the appellant inserted his penis into her vagina, she was raped more than once, that she bled, her vagina was painful and she could not walk properly thereafter.

[40] The common cause facts relating to the appellant meeting the complainant on the day in question and that that she spent the entire night with the appellant clearly reduces the risk of any suggestibility of the appellant being falsely accused. The appellant was clearly, by his own admission attracted to the complainant, having proposed love to her even before this incident during 2018. By his own admission it was discussed whether or not she was a virgin. He must accordingly have contemplated having sexual intercourse with her and according to him was only dissuaded by having to pay ‘damages’ if he were to do so as she was still a virgin.²²

[41] It is trite that the appellant’s conviction can only be sustained if on a consideration of all the evidence, his version of events is so highly improbable that it cannot reasonably possibly be true, or where his version can be rejected as false beyond a reasonable doubt on the basis of credible evidence.²³

[42] The objective and undisputed evidence shows that the complainant was subjected to sexual intercourse. She was in the appellant’s room alone in his company for an entire night. By his own version, he contemplated having sexual intercourse with her but was dissuaded by having to pay ‘damages’ as she was a virgin. This is further fortified

²¹ *R v Manda* 1951 (3) SA 158 (A); Exhibit ‘B’ of the bundle of documents at 42 – 47.

²² Record at 111, lines 8 – 12.

²³ *S v V* 2000 (1) SACR 453 (SCA) at 455B para 3.

by the appellant's behaviour when seeing the complainant in the area before this incident, as he showed a romantic interest in her. His suggestion that S[....] put the complainant up to telling a dishonest story as he and S[....] did not see 'eye to eye', without elaboration, is far-fetched and highly improbable, particularly given the facts that are common cause and not in dispute.

[43] In *MM v S*,²⁴ the Supreme Court of Appeal in paragraph 18 stated:

'Whilst in many cases the fact that an accused person gives a false version of events is not decisive of the merits of a conviction, in this case, where the falsity relates to events on a particular day at a particular place involving him and the complainant, if his version cannot reasonably possibly be true, its falsity lends strong support to the truth of the complainant's evidence.'

[44] The only direct evidence implicating the appellant was that of the complainant. For such evidence to be accepted, it is trite that it must be clear and satisfactory in all material respects.²⁵ The trial magistrate in the evaluation of the complainant's evidence, was mindful of the need to treat her evidence with caution because she was 17 years and 10 months old at the time of testifying and was a single witness.²⁶ The courts have said it often enough that the exercise of caution in assessing evidence, should however not be allowed to displace the exercise of common sense.²⁷

[45] The complainant was a good witness who testified in a clear, coherent and satisfactory manner on all material aspects. She had a good recollection of the events on the day in question and much of the surrounding facts she related in her evidence is common cause, alternatively, has not been disputed by the appellant. She withstood cross-examination well and did not contradict herself. An assessment from the record suggests that the complainant is a trustworthy, mature and intelligent witness. I have little hesitation in endorsing the findings of the trial magistrate that the complainant

²⁴ *MM v S* [2011] ZASCA 5, 2012 (2) SACR 18 (SCA), [2012] 2 All SA 401 (SCA) para 18.

²⁵ *Y v S* [2020] ZASCA 42, at paragraphs 48-51

²⁶ Record at 178, lines 6 – 10; *S v Sauls* 1981 (3) SA 172 (A), [1981] 4 All SA 182 (A).

²⁷ *S v Artman and another* 1968 (3) SA 339 (A) at 341.

made a good impression on the trial court.²⁸ A conviction on the basis of the evidence of a single witness is competent in terms of section 208 of the CPA. In *R v Mokoena*²⁹ De Villiers JP stated of the equivalent provision in the 1917 Act that ‘uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction . . . but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect.’

[46] It is so that the ‘first report’ witness S[....] was not called to testify and nor were the two children who were in the company of the complainant on the day in question when she was accosted by the appellant, called to testify. The relevance of the first report, it is trite is admissible to show consistency in the version of the complainant.³⁰ Nothing more. However, given the facts which are common cause and those not in dispute, coupled with the satisfactory evidence of the complainant in all material respects, the failure of S[....]’s testimony does not detract from the strength of the State’s case. Corroboration is a useful aid in overcoming the cautionary rule but there is also no rule of law, that the evidence of a child must be corroborated before acceptance.³¹

[47] When the evidence is weighed in its totality, it amply supports the trial court’s finding that the appellant’s version could not reasonably possibly be true and that the evidence of the complainant, when viewed with the appropriate caution because she was a minor (two months short of being an adult) and the fact that she was a single witness, could be accepted.

[48] There was a delay of five months in the complainant reporting the rape. The complainant gave a satisfactory explanation regarding this delay. She was threatened

²⁸ Record at 178, lines 21 – 25, and at 179, lines 1 – 18.

²⁹ *R v Mokoena* 1932 OPD 79 at 80; *Modiga v The State* [2015] ZASCA 94, [2015] 4 All SA 13 (SCA) para 32

³⁰ *S v Ganga* 2016 (1) SACR 600 (WCC) paras 27-30, *S v Heroldt* 2018 (2) SACR 69 (KZP) from para 11, *Kaibe v S* [2019] ZAFSHC 179 paras 11 – 12, and *Director of Public Prosecutions Western Cape v Regional Magistrate Wynberg and others* [2022] 1 All SA 154 (WCC) para 63.

³¹ Record, page 91, lines 13-14; page 41 of the Bundle (Exhibit “A”) – birth certificate of complainant. See also *R v Manda* 1951 (3) SA 158 (A); *R v Bell* 1929 CPD 478; *R v J* 1958 (3) SA 699 (SR).

by the appellant that if she reported the incident, harm would befall her and her family. The complainant lived with her young siblings and her mother only returned home at month-end. She felt safe to report the incident to S[...] some five months later when she met him as he pleaded with her to inform him or her mother of what had transpired on the day in question. The complainant seems to have been eventually persuaded to relate the events to S[...] when he informed her that that appellant was no longer in the area. In such circumstances, the delay in reporting is understandable.

[49] Section 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SOA) pertaining to delays in reporting of sexual offences provides that: 'In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.'

[50] Section 58 of the SOA relating to previous consistent statements regarding sexual offences provides that:

'Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: provided that the court may not draw any interference only from the absence of such previous consistent statements.'

[51] In the light of the above, I am satisfied that there is no basis to interfere with the court *a quo*'s finding that the version of the appellant is so highly improbable that it could not reasonably possibly be true justifying its rejection, and that the State had proved beyond a reasonable doubt that the appellant is guilty of the crimes of kidnapping and multiple rape of the complainant.

Sentence

[52] It is trite that an appeal court can only interfere with a sentence imposed by the court *a quo* if there is a material misdirection by the trial court or if there is such a grave

disparity between the sentence imposed by the court *a quo* and the sentence the appeal court would have imposed if it were the trial court. It is also trite that the disparity should be shocking or disturbingly inappropriate, or vitiated by irregularity, to justify interference.³²

[53] The rape of particularly women and children has reached alarming levels in South Africa. It constitutes a vile, humiliating, degrading and a brutal invasion of their privacy, dignity and self-worth as a person. Children look up to adults in society to guide, care for and protect them. When this trust is breached, it leaves children in a helpless situation and society looks towards the court to act decisively against persons convicted of such shameless acts. The severe ordained sentence that the legislature has prescribed for rape of the type in this matter is imprisonment for life.

[54] The fact that the complainant was held against her will overnight at the complainant's residence aggravates the commission of the rape. So too the fact that she was raped several times during her period of captivity and threatened with a knife and sticks. The appellant simply took advantage of a defenceless young girl who was just five years older than his own son.

[55] The appellant was 32 years of age, single and has a 10-year-old child. He has a standard 9 or grade 11 level of education. He has a previous conviction in 2013 for being in possession of a dangerous weapon for which an admission of guilt fine of R100 was paid. In 2015 he was convicted of assault and *crimen injuria* and paid an admission of guilt fine of R300. In 2016 he was convicted of kidnapping and sentenced to 2 years' imprisonment. The appellant spent almost 2 years in custody awaiting finalisation of his case in the court *a quo*. There is nothing we could glean from the record evidencing any remorse on the part of the appellant.

³² *S v Malgas* 2001 (2) SA 1222 (SCA), [2001] 3 All SA 220 (A) para 12, *S v Bogaards* [2012] ZACC 23, 2013 (1) SACR 1 (CC) para 41.

[56] The trial court, in sentencing the appellant balanced the seriousness of the offences, the appellant's personal circumstances as well as the interests of society.³³

[57] It is also trite by now that courts should not deviate from the prescribed sentences ordained by the legislature lightly or for the flimsy reasons.

[58] I am satisfied that the court *a quo* correctly found that the circumstances which warranted a departure from the prescribed sentence of imprisonment for life on the rape conviction were non-existent. Nor were the sentences imposed, disproportionate or unjust in the light of the triad referred in *Zinn's* case.

[59] In the result, the following order is proposed:

The appeal against the convictions and related sentences imposed in count 1 (kidnapping) and count 2 (rape) are dismissed.

The convictions and sentences of the court *a quo* are confirmed.

KHALLIL AJ

I agree

HENRIQUES J

Appearances:

For Appellant: V E Ngwenga

³³ *S v Zinn* 1969 (2) SA 537 (A).

Instructed by: Justice Centre
PIETERMARITZBURG

For Respondent: T Shabalala
Instructed by: Director of Public Prosecutions
PIETERMARITZBURG

Date of Appeal: 13 May 2022
Date of Judgment: 20 June 2022