

SOUTH AFRICA / JUDGMENT

Khoza v S (A77/2022) [2023]

ZAMPMBHC 41 (21 July 2023)

[2023] ZAMPMBHC 41

COURT

Mbombela High Court, Mpumalanga

BEFORE

Greyling-Coetzer, Ratshibvumo

CASE / FILE NUMBER

A77/2022

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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

DATE 21/ 7/2023

SIGNATURE

CASE NUMBER: A77/2022

In the matter between:-

WILLIE KHOZA

Appellant

and

THE STATE

Respondent

JUDGMENT

GREYLING-COETZER AJ (RATSHIBVUMO J CONCURRING)

- [1] On 27 September 2018 the appellant, a 41-year-old male person, was convicted in the Mpumalanga Regional Court, held at Thulamahashe (court a quo), on a charge of Contravention of the provisions of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of Section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, for raping a minor female person aged 8 years (complainant) at the time.
- [2] In line with Section 51(1) of the Criminal Law Amendment Act 105 of 1997 the appellant was sentenced to life imprisonment. The appeal comes before this court in terms of Section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (“CPA”).
- [3] The appellant was legally represented throughout the proceedings and pleaded not guilty, exercising his right to remain silent in respect of the disclosure of the basis for his plea.
- [4] Per the notice of appeal and in summation, it is contended on behalf of the appellant that the State failed to prove its case beyond reasonable doubt in light of the following improbabilities in the State’s case: -
- (a) it being highly improbable that the appellant would drag the complainant from the street in daylight at the risk of members of the public seeing it;
 - (b) that the appellant would rape the complainant, knowing that his sister is a few meters away;
 - (c) that the appellant would rape the complainant at his parental home when his own home is situated across the street;
 - (d) that it is highly improbable that it took the complainant’s grandmother 3 (three) days to discover that something was wrong with the complainant;
 - (e) that considering the injuries sustained by the sexual assault, the complainant walked home without difficulty;
 - (f) that the court a quo erred in concluding that the fever suffered by the complainant was as a result of infection in light of no evidence presented that the fever was linked to the sexual assault;
 - (g) that it was improbable that the grandmother of the complainant ordered the complainant to bath before taking her to hospital, therefore running a risk of tampering with DNA evidence;
 - (h) that there was no evidence of DNA found in the complainant’s private parts, linking the appellant, notwithstanding visible discharge in the complainant’s private parts;
 - (i) that there was no evidence that a radio was removed from the bedroom, thereby diminishing the reliability and credibility of the complainant’s evidence;
 - (j) that there was no evidence that the appellant threatened the complainant with death should she tell anyone; and

- (k) that obvious and clear contradictions of the complainant's evidence were ignored by the court a quo, and although the court a quo correctly invoked the cautionary rule, it failed to properly apply the principle relating to a single witness.
- [5] In respect of sentence, it is contended in the notice of appeal that: -
- (a) the sentence of life imprisonment is shockingly inappropriate;
 - (b) the court a quo erred in not finding that there are substantial and compelling circumstances justifying a departure from the prescribed minimum sentence, moreover in circumstances where the appellant was a first offender and gainfully employed; and
 - (c) the court a quo misdirected itself in over-emphasizing the seriousness of the offence and the interest of society at the expense of the personal circumstances of the appellant.

Factual background

- [6] On Friday the 7th day of February 2014, the complainant was walking home from school with a friend named T[...]. After the complainant parted ways with Thanks, the appellant called the complainant over by name, he took her hand and led her into a homestead where he raped her.
- [7] On Monday the 10th day of February 2014, being three days after the incident, the complainant was examined by a forensic nurse. It was found that the complainant's hymen was not intact, her labia minora was bruised on both sides and red in colour. A white discharge was also detected during the examination. The standardised rape kit swaps were collected.
- [8] The complainant, in her evidence which was received by the court a quo through an intermediary, gave a detailed description of the sexual assault. She stated that on the day in question she was walking home with her friend Thanks, whereafter they parted ways as T[...], entered her home. The appellant called her name twice and took her by the hand taking her to a homestead. She did not know who's homestead it was as she has never been there but assumed it was the appellants. He unlocked a door and on entering the door was closed behind them. He took her to a room close to the door where a radio was switched on, playing loud music. The complainant recalled the song playing on the radio.
- [9] The appellant undressed himself and the complainant, whereafter he inserted his penis into her vagina whilst she was lying on the bed facing upwards. The complainant testified that she was crying a lot and that the appellant closed her mouth with the palm of his hand. She described the actions made by the appellant to be that of jumping up and down until such time as he was finished and climbed off of her.
- [10] The appellant then told her not to tell anyone and sent her home. She dressed herself and proceeded to walk home. On arrival at home, she found her grandmother resting although it was not yet dark. She went to sleep.

- [11] The following morning the complainant ate her food, but went back to sleep. On Sunday she went to church with her grandmother but instead of singing along with her grandmother, she was sleeping in church. The complainant testified that she was sleeping on the Saturday and Sunday after the incident, because she was feeling pain in her vagina.
- [12] Upon arrival back home her grandmother touched her body and discovered that she had a fever. On the Monday morning her grandmother woke her up and touched her body again to check for the fever, which still persisted. It was at this point that her grandmother removed the blankets and started to check her body. She removed the complainant's panties and discovered that the complainant was injured, as there was an opening in her vagina as described by the complainant, and noticed her vagina was red.
- [13] Her grandmother questioned her about what could have caused the injury, in response the complainant reported that on the Friday, while on her way home from school, she met the appellant who she called 'Uncle Willie'. He took her inside a homestead, put her on the bed and climbed on top of her, putting his penis into her vagina, and jumping up and down.
- [14] According to the complainant, her grandmother gave her water to bath, after which they attended to Hospital where she was examined. After the examination the police arrived and she was asked to explain what happened, which she did. She was also asked to show the police where this homestead was, which she did and photographs was taken whilst she was there with the police.
- [15] Before the court a quo the photographs which depict the complainant pointing out the house and the room where the incident allegedly occurred was received into evidence by agreement between the parties. The photographs depicted the appellants parental home, proximity to his home, his sister's home and the room where the rape was alleged to have taken place.
- [16] During the proceedings in the court a quo, the complainant, identified the appellant after he was moved from the accused dock and seated amongst 8 (eight) other male persons also dressed in civilian clothes in the gallery.
- [17] It was common cause that the complainant did not report the rape to anyone on the day in question, and that she only did so 3 (three) days later, pursuant to her grandmother's observations and enquiry.
- [18] To support the complainant's evidence the State led the evidence of Mrs. N[...], the complainant's grandmother, as well as the forensic nurse who examined the complainant 3 (three) days after the incident.

- [19] The complaints grandmother corroborated the sequence of events and report of the rape. According to her the complainant told her that the appellant met her next to the Nazarene Church. According the grandmother the complainant was emotional, angry and crying while she was making the report to her. She said the complainant told her that she was afraid to report the incident, as the appellant told her that he would kill her if she told anyone.
- [20] The further State witness a forensic nurse, Ms. Chauke, testified that on 10 February 2014, and as recorded in the J88 medical report, she examined the complainant. She found that the hymen was not intact and that the labia minora was bruised on both sides as well as red in colour.
- [21] She further observed a white discharge during the complainant's vaginal examination. She could not confirm whether the discharge had a foul smell or not. She concluded that the presence of the injuries on both sides of the labia minora were bruises which are consistent with forceful penetration. She confirmed that a vaginal swab was taken for purposes of DNA evidence. According to Ms. Chauke the complainant informed her that she was sexually assaulted by a known person.
- [22] In his evidence in chief the appellant stated that on 7 February 2014 he took his father to hospital in the company of his mother. He left his mother and father at the hospital and returned home. His homestead is situated across from his sisters and parental homestead. He was not in possession of the keys to his parental house, which was left with his sister. On the day his sister was busy in the yard in front of her and his parental home. From the evidence it crystalised that the rape took place at the appellant's parental home, thought the help of the photographic evidence.
- [23] According to the appellant, after his arrival at home from the hospital, he went to the tuck shop to buy water, which tuck shop is situated approximately 500m from his home. On his way to the tuck shop he met the complainant and her friend, Thanks. They greeted him and he responded by telling the complainant that she must send greetings to those at home. According to the appellant he last saw the complainant when she was in infant.
- [24] According to the appellant, before he went to the tuck shop, he went to one Aubrey Mahlangu's home, and after buying water from the tuckshop he proceeded to his homestead. He found that his sister still busy outside. He proceeded into his homestead and drank the water. He then received a call from a teacher named Victoria Mnisi, who brought her car to the appellant for a service.
- [25] The appellant denied grabbing the complainant and taking her to his parental home, and raping her. He testified that he could not have done so as alleged by the complainant as he was not in possession of his parents' house keys, which was with his sister. He also denied that there was a radio inside the room in question.

- [26] In support of the appellant's case, the appellant's sister, Ms. Khoza testified that on 7 February 2017 her mother left their house keys with her, and the appellant took their mother and father to hospital. After he arrived back home, he did not ask for the keys to their parents' house. According to her she was busy outside her homestead for the whole day, and that the appellant left home after his arrival back from the hospital. He thereafter returned and went straight to his homestead.
- [27] She confirmed that she saw the complainant and her friend, T[...], who resides next door, passing by at the stage when the appellant was going to the tuck shop.
- [28] She testified that the door to her parents' house, through which access was gained according to the complainant, was always locked from the inside and was only used when they fetched water. This door was situated at the back of the house.
- [29] From the totality of the evidence there was no allegation of acrimony between the complainant, her grandmother, the appellant or the appellant's family. The evidence led confirmed that the appellant was a friend of the complainant's family in general and her grandmother, and that he would often visit the grandmother's homestead.
- [30] The court a quo found that identification was not in dispute, as the appellant admitted that he indeed met with the complainant on the date in question. But what remained in dispute was whether or not the appellant was the person who raped the complainant.

Ad conviction

- [31] The evidence of the rape was based on the evidence of a single witness, being the complainant. Other than being a single witness to the act of rape, the complainant was a female child aged 8 years at the time of the incident. Thus, the complainant is both a child witness and a single witness. In such instances the courts have in the past applied what is commonly referred to as a double cautionary rule. Applying the cautionary rule applicable to single witnesses and approaching a child witnesses' evidence with caution. This as explained by Mocumie JA (as she then was) in the recent matter of *Maila v The State*[1] was because cases, prior to the advent of the Constitution which provides in section 9 that all is equal before the law, held that

inter alia child witnesses could be manipulated to falsely implicate a particular person as a perpetrator.

- [32] This double cautionary rule should be employed with due caginess and mindful that evidence ought to be considering as a whole. As held in *S v Hadebe* [2]:

... "The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in G a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other

available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.” [3]

[33] In the matter of *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A)[4] it was held that a court must be satisfied when it seeks to rely on a child witness’s testimony, as provided for in Section 208 of the CPA,[5] that it is trustworthy. In doing so the court would consider various factors, without creating a closed list of factors, such as the child’s power of observation, recollection, narration and communicate.

[34] In *Maila v The State*[6] it was held as follows: -

“[18] This court has, since Wojji, cautioned against what is now commonly known as the double cautionary rule.[7] It has stated that the double cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single witness’s evidence, tested through (in most cases, rigorously) cross-examination, should be ‘trustworthy’. This is dependent on whether the child witnesses could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers. Furthermore, the child witness’s evidence must not have changed dramatically, the essence of the allegation should still stand. Once this is the case, a court is bound to accept the evidence as satisfactory in all respects; having considered it against that of an accused person. ‘Satisfactory in all respects’ should not mean the evidence line by line. But, in the overall scheme of things, accepting the discrepancies that may have crept in, the evidence can be relied upon to decide upon the guilt of an accused person.”

[35] Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 also finds application in the consideration, which provides that:

“(n)otwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.”

[36] The appellant pleaded not guilty and did not provide a plea explanation at the outset of the trial. From the cross-examination preferred and the evidence of the appellant, it appears that the appellant’s case was that he did not rape the complainant, as he was not in possession of the key to the house where it is alleged that the rape took place, his sister was in possession of said house keys. The aforesaid version cannot be squarely fitted into the box of an alibi, but is of a similar nature and has some elements of an alibi to the extent that the impossibility to have entered the house was supported by the evidence of the appellant’s ‘alibi witness’, being his sister who was in possession of the said keys.

[37] An accused person who raises a defence such as an alibi is under no duty to prove such a defence. If the defence is reasonably possibly true, the accused is entitled to be discharged and to be found not guilty. As held in *Maila* matter (supra), [8] the only responsibility such an accused would have is to raise the defence at the earliest opportunity. The Court proceeds to explain

the reason being simple: to give the police and the prosecution the opportunity to investigate the defence and bring it to the attention of the court.

[38] The question that must be determined is whether the evidence of a single witness in respect of a rape, in this case an 8-year-old female child, was satisfactory in all material respects, and at the same time whether or not the appellant's version was reasonably possibly true.

[39] It is trite that a court of appeal will be reluctant to interfere with the trial court's evaluation of oral evidence, unless there is a misdirection by the trial court. The reasons here for is simply. A trial court has the advantage of seeing and hearing witnesses, which is not the case in an appeal court. A trial court is thus better suited to make credibility findings. An appeal court will be hesitant to interfere unless there is a misdirection in applying the law to the facts, in which case the appeal court will interfere. This court thus needs to consider whether there is such a misdirection.[9]

[40] From the judgment of the court a quo it was acutely aware of the cautionary rule applicable to the evidence of the complainant. The evidence was evaluated thoroughly, taking in consideration and particularly dealing with discrepancies and contradictions which came to the fore. The court a quo can on this basis not be faulted.

[41] Notwithstanding the complainant's age at the date of the offence, as well as at the date of giving evidence, the complainant's evidence was consistent and clear. She responded to statements put to her, albeit with noticeable emotion. The complainant was cross-examined extensively, and although she broke down during this process, I am in agreement with the court a quo's finding that same cannot be said to be demonstrated incidents of untruthfulness. The fact that the complainant was raped was consistent with the evidence produced by the forensic nurse and set out in the J88 form – the hymen was no intact, the labia minora was bruised on both sides and red in colour, and a white discharge was observed during the vaginal examination.

[42] According to the medical examination, the complainant was developed at a Tanner Stage 1 and not sexually active. She was therefore not fully developed like an adult female, and when penetrated, the semen will not go deep into the vagina. Although DNA swabs were taken, the absence of male DNA does not render her evidence unreliable as suggested in the grounds of appeal.

[43] The remaining grounds of appeal in respect of the conviction has no merits for the following reasons:-

43.1 the evidence of the complainant was not that she was dragged by the appellant but that he took her by the hand and she walked freely with him;

43.2 the appellants parental home was entered via the back door, which is not the door to which his sister Ms. Khoza had the key. She also testified that the key for said back door was always in the door, this door was not within her view from where she was at the front. What was in full view was the homestead of the appellant;

43.3 the undisputed medical evidence was that the complainant's injuries were to her labia minora and that same was bruised and her hymen was not intact. There is no basis to conclude that the complainant would not have been able to walk having sustained such injury or would have walked with difficulty. It further escapes me how it can be contended that the complainant's grandmother had to discover "something was wrong with the complainant" earlier. As set out in Milton and referenced in Maila (supra), there is a reluctance on the part of rape survivors, or some of them, to report the rape at the first opportunity, and this is a firmly recognized fact. It is also generally accepted that with young children their reluctance is compounded.[10] A failure by a complainant to report an alleged rape as soon as possible cannot be the benchmark for determining whether or not a complainant has been raped.[11]

43.4 the Court a quo did not find that the fever was linked to the sexual assault. The Court a quo stated that fever is almost always an indication of an infection of some sort;

43.5 the Court a quo made not finding that the radio was removed, but stated that in light of the lapse of time it could be that it had been moved;

43.6 the Court a quo made not finding that the appellant threatened the complainant with death should she tell anyone, that was the testimony of the Mrs. N[...].

[44] The complainant's evidence, notwithstanding full cross-examination, remained constant, duly allowing for some immaterial inconsistencies which rather prove true as opposed to rigorously stick to a made-up story.

[45] The complainant's evidence was satisfactory in all material respects. The discrepancies in her evidence is not material. Whether the appellant undressed the complainant and the complainant dressed herself again, whereafter the appellant removed her panties and raped her; or whether the appellant undressed first whereafter he undressed the complainant; or whether the appellant undressed the complainant first whereafter he undressed himself are irrelevant and immaterial to whether the complainant was indeed raped, when and by whom.

[46] It is trite that the proper approach for a trial court in assessing the evidence is to look at the evidence holistically, and through such a holistic view determine whether the guilt of the accused had been proved beyond a reasonable doubt. In doing so, the trial court ought to weigh up all the elements that point towards the guilt of the accused against all that which is indicative of the innocence of the accused, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides, and having done so, to decide

whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.[12]

- [47] There are improbabilities in the appellant's version in general, and in particular in respect of his ability to access the house where it was alleged by the complainant the rape occurred. The version put to the complainant was that it was impossible for the appellant to enter his parental house, as the key to the house was in his sister's possession. It was also so confirmed by the evidence of the appellant's sister, Ms. Khoza. However, her evidence revealed that the key to the door in question was not the key in her possession, as the key to said door was always kept inside the specific door. For this reason, the appellant had access to the house without having to obtain the key from her, as professed by the appellant.
- [48] Ms. Khoza could and did not testify that the appellant did not access their parental homestead from the backdoor by utilizing the key which is always left in said door. Ms. Khoza corroborated the evidence of the complainant to the extent that she saw the complainant walking with her friend, Thanks, from school. She further could only confirm that after the appellant returned from dropping their parents at hospital, he left towards the tuck shop and later returned, whereafter he went directly into his homestead.
- [49] I therefore find that the court a quo was correct to accept the evidence of the complainant as satisfactory in all material respects, and thus the appellant was properly convicted on the evidence of a single witness. The evidence viewed in totality, proves the appellant's guilt beyond reasonable doubt, and accordingly the court a quo rightly convicted the appellant as charged.
- [50] Consequentially, the appeal against the conviction must fail.

Ad sentence

- [51] The Court a quo imposed the prescribed minimum sentence of life imprisonment. It is common cause that the provisions of Section 51 of the Criminal Law Amendment Act 105 of 1997 are applicable, and that it provides that subject to sub-sections (3) and (6), a regional court or a high court shall sentence a person it has convicted of an offence referred to in paragraph 1 of Schedule 2 to life imprisonment. Sub-section (3) deals with the power of such a court that when it is satisfied that substantial and compelling circumstances exist, it would be justified in imposing a lesser sentence than that prescribed, and having found substantial and compelling circumstances existing, it must impose a lesser sentence.
- [52] In the present matter the rape falls into Part 1 of Schedule 2 in that the complainant was a person under the age of 18 years.
- [53] It is trite that a court, which exercises appeal jurisdiction, cannot in the absence of a material misdirection by the trial court approach the question of sentence as if it was the trial court, and then substitute the sentence arrived at by the trial court simply because it prefers it. However, even in the absence of a material misdirection, an appeal court may be justified in interfering with the sentence imposed by the trial court if the disparity between

the sentence of the trial court and the sentence which the appeal court would have imposed, had it been a trial court, is so marked that it can be described as shocking, startling or disturbingly

inappropriate.[13]

[54] With reference to the grounds of appeal in respect of sentence, it was submitted that the court a quo erred in not finding that there are substantial and compelling circumstances justifying a departure from the prescribed minimum sentence, moreover in circumstances where the appellant was a first offender and gainfully employed. Therefore, the court a quo misdirected itself in over-emphasizing the seriousness of the offence and the interest of society at the expense of the personal

circumstances of the appellant.

[55] In *S v M* 2007 (2) SACR 60 (W) the court, in line with other cases dealing with a departure of the prescribed minimum sentence, 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 factors.[14]

[56] There is thus no authority to sustain an argument that because an offender has no previous conviction or no previous conviction in respect of an offence contained in Part 1 of Schedule 2, it by itself would constitute a substantial and compelling circumstance to deviate. Similarly, no authority exists

that purely because an offender was gainfully employed, same would found a circumstance which is substantial and compelling. All of the aforementioned together with the personal circumstances of an offender, like the appellant, ought to be considered when assessing the existence or not of substantial and compelling circumstances.

[57] The Court a quo considered all the circumstances, placed before it, comparing and weighing the one against the other.

[58] During the trial proceedings it was submitted on behalf of the appellant that it was a mitigating factor that the complainant did not suffer very serious injuries which would have permanently impacted her health. The court a quo correctly, with reference to Section 51(3) (aA) of Criminal Amendment Act, 105 of 1997 rejected this argument.

[59] In its judgment on sentence, the court a quo took into account the victim impact statement in respect of the complainant in order to reflect her voice in proceedings that affect her directly, as well as the mitigating factors as placed before court by the appellant's legal representative. The court a quo, having regard to the basic triad of sentencing as well as the purpose of sentencing, found that all these factors were not compelling and substantial enough to justify a lesser sentence.

[60] The rape of women and children in South Africa is so prevalent that it no longer even create a sense of shock when it's found to have happened. In the Maila matter (supra) the court set out that South Africa has one of the highest rape statistics in the world, even higher than some countries at war, the country's annual police crime statistics confirming this: In 2019/2020 there were 42 289 rapes reported, as well as 7 749 sexual assaults. This translated, the court held, into about 115 rapes per day.[15]

[61] As referenced in the unreported matter of Buso v State[16] the crime statistics for the second quarter of 2021/2022 showed a 7.1% increase in rape-reporting, with 3 951 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 unreported

crime, which means that the true extent of the crime is not known, but it is reported than only 1 in 25 rapes in Gauteng are reported to the police and 1 in 10 cases opened in a guilty verdict.[17]

[62] In the Maila matter (supra) the court held:[18]

"[59] Taking into account Jansen, Malgas, Matyityi, Vilakazi and a plethora of judgments which follow thereafter as well as regional and international protocols which bind South Africa to respond effectively to gender-based violence, courts should not shy away from imposing the ultimate sentence in appropriate circumstances, such as in this case. With the onslaught of rape on children, destroying their lives forever, it cannot be 'business as usual'. Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. Reasons such as lack of physical injury, the inability of the perpetrator to control his sexual urges, the complainant (a child) was spared some of the horrors associated with oral rape, which amount to the acceptance of the real rape myth, the accused was drunk and fell asleep after the rape, the complainant accepted gifts (in this case, sweets) are an affront to what the victims of gender-based violence, in particular rape, endure short and long term. And perpetuate the abuse of women and children by courts. When the Legislature has dealt some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-based violence against women and children and promote what Thomas Stoddard calls 'culture shifting change'.[32]

[60] The message must be clear and consistent that this onslaught will not be countenanced in any democratic society which prides itself with values of respect for the dignity and life of others, especially the most vulnerable in society: children. "

[63] Aforementioned finds application in the present matter. There is accordingly no justifiable ground for this court to replace the sentence that the trial court imposed.

[64] The complainant, without fear, accepted the hand of “Uncle Willie”, who is a person the compliant obviously trusted and knew. To rape her is unconscionable and deserves no other sentence than that imposed by the court a quo: life imprisonment. The sentence is not disproportionate to the seriousness of the offence which the appellant committed on an 8-year-old child, and therefore justified in the circumstances.

[65] As a result, the following order is granted: -

1. The appeal against conviction and sentence is dismissed.

D GREYLING-COETZER

Acting Judge of the High Court

I agree

T V RATSHIBVUMO

Judge of the High Court

FOR THE APPELLANT: Adv WB Ndlovu

Instructed by NM Madunda Attorneys

FOR THE RESPONDENT: Adv AN nkosi

Instructed by Director of Public Prosecution

Mbombela

DATE OF HEARING: 21 April 2023

DATE OF JUDGMENT: 21 July 2023

[1] Maila v The State (429/2022)

[2023] ZASCA 3 (23 January 2023) at para [17]

[2] S v Hadebe and Others 1998 (1) SACR 422 (SCA)

[3]

at 426 F -H

[4]

at 1028 B-D

[5] Section 208 of the CPA provides: “An accused may be convicted of any offence on the single evidence of any competent witness.”

[6] Maila v The State (429/2022)

[2023] ZASCA 3 (23 January 2023)

[7] See *Vilikazi v S* (2016) 2 SACR 365 (SCA)

[8]

at [21]

[9] *R v Dhlumayo* 1948 (2) SA 677 (A)

[10] JR Milton “South African Criminal Law and Procedure” Vol 2, 3rd Ed at 461; Maila (supra) at par [27]

[11] *Monageng v S* 2009 (1) All SA 237 (SCA) at par [24]

[12] *Tshiki v S* [2022] ZASCA 92 (SCA) at par [23]

[13] *S v Malgas* 2002 (1) SACR 469 (SCA) at par [12]

[14] See also *S v Abrahams* 2002 (1) SACR 116 (SCA) and *S v Swartz* 1999 (2) SACR 380 (C)

[15] Maila (supra) at par [57] referring to Amanda Gouws ‘Rape is endemic in South Africa. Why the ANC government keeps missing the mark’ 9 August 2002, Mail & Guardian, <https://mg.co.za/opinion/2022-08-09-rape-is-indemic-in-South-Africa-Why-the-ANC-government-keeps-missing-the-mark/>

[16]

A250/2021[2022] ZAGPPHC 404 (17 June 2022) at [48]

[17] The court referencing Machisa M, Jina R, Labuscagne G, Vetten L, Loots L, Swemmer S, Meyersfeld B & 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

[18]

at [59]

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ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAMPMBHC/2023/41.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/khoza-v-s-unknown-topic-ampmbhc-2023>

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