

SOUTH AFRICA / JUDGMENT

K.S v S (Appeal) (CA60/2018) [2025] ZANWHC 89 (27 May 2025)

[2025] ZANWHC 89

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Masike

CASE / FILE NUMBER

CA60/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST

DIVISION, MAHIKENG

CASE

NO.: CA60/2018

COURT

A QUO CASE NO.: RC101/2016

Reportable: YES / NO

Circulate to Judges: YES

/ NO

Circulate to Magistrates:

YES / NO

Circulate to Regional

Magistrates: YES / NO

In the matter between: K[...] S[...]
APPELLANT
And
THE STATE
RESPONDENT
CORAM: HENDRICKS JP &
MASIKE AJ
ORDER
(i)
Condonation for the late filing of the
notice of appeal is granted.
(ii)
The appeal against conviction and sentence
is dismissed.

JUDGMENT

MASIKE AJ

INTRODUCTION

[1] What serves before this Court is an application for condonation for the late filing of the notice of appeal and appeal against conviction and sentence. Mr K[...] S[...] (the appellant), was arraigned on 12 April 2017 in the Regional Court for the Regional Division of North West held at Mogwase (the court a quo) before Regional Magistrate Pako (the learned Regional Magistrate) on charges of having committed the offence of rape. Throughout the trial in the court a quo, the appellant was represented by Ms Pheeha from Legal Aid South Africa.

[2] It is apposite to quote from the record the charge as put to the appellant by the state:

“PROSECUTOR: The charge preferred against the accused person before the honourable court your worship is one of rape section 3 read with section 1, 55, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007 and also read with the provisions of section 256 and 261 of the Criminal Procedure Act 51 of 1977 (the CPA) also further read with the provisions of section 51 and schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended, in that on 17 April 2015 and at or near Disake in the Regional Division of North West the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit G..... P..... a six year old minor by inserting his penis into her vagina, had sexual intercourse with her without the consent of the said minor complainant.”

[3] On 4 August 2017, the learned Regional Magistrate found the appellant guilty and sentenced him to life imprisonment. It is once more apposite to quote from the record what the learned Regional Magistrate said when finding the appellant guilty. The following was said:

“I find the accused committed the offence of rape which is an offence referred to in Part 1 of Schedule 2 of Act 105 of 1997. In the result the accused is FOUND GUILTY OF RAPE which is an offence referred to in Part 1 of Schedule 2 of Act 105 of 1997.”

GROUND OF APPEAL

[4] The appellant assails the conviction and sentence on the following grounds:

“A. AD CONVICTION

1. In convicting the appellant, it will be argued that the Trial Court misdirected itself by finding that the appellant is guilty as charged on charge of rape when considering the trite that the appellant bears no onus to prove his case but for the State to prove its case beyond reasonable doubt.

1.1 That the Trial Court misdirected itself by failure to take into account the letter from the Forensic Science Laboratory marked Exhibit exonerated the appellant since there was no semen detected on the complainant’s underwear hence the laboratory could no proceed with DNA analysis

1.2 That the Trial Court misdirected itself by failure to apply cautionary rule when evaluating the evidence of the complainant since she was a child witness at the age of eight years and a single witness to the rape itself.

1.3 That the Trial Court misdirected itself by finding that the complainant on was honest, credible and to be relied upon and her evidence sufficient to return conviction on a charge of rape. It is the appellant submission that the sexual intercourse did not take place and therefore the complainant was not raped.

B. AD SENTENCE

2. In sentencing the appellant, it will be argued that the Trial Court misdirected itself by sentencing the appellant to a term of life imprisonment when it did not warn or appraise the appellant with the imposition of life imprisonment upon the conviction of rape (read with the provisions of section 51(1) Part I of Schedule II of the Criminal Law Amendment Act 105 of 1997).

2.1 That the charge sheet did not refer to the relevant subsection of section 51 of the Criminal Law Amendment Act to find life imprisonment applicable.

2.2 That the Trial Court misdirected itself by failure to find that the appellant’s cumulative personal circumstances are substantial and compelling circumstances justifying a departure from imposing the prescribed minimum sentence in terms of section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997.

2.3 That the Trial Court misdirected itself by sentencing the appellant to a term of life imprisonment, the sentence is shockingly inappropriate severe when considering the appellant’s cumulative facts in mitigation.”

SUMMARY OF THE

FACTS

- [5] The State relied on the evidence of three witnesses. G... P... (the complainant), S... M... P... (the mother of the complainant) and Dr. August Mutayonga Kahasha (Dr. Kahasha). The learned Regional Magistrate called Detective Warrant Officer Ronny Elias Kgabosile (Detective Kgabosile) as a witness of the court. The appellant testified in his defence.
- [6] Before the evidence of the complainant was led, the State applied for her evidence to be led by way of an intermediary, because the complainant was 8 years old at the time the trial was heard. The State further applied for the evidence of the complainant be led by way of closed – circuit television (CCTV). The appellant, through his legal representative, did not object to the application by the State.
- [7] The learned Regional Magistrate swore in the intermediary, Mr. Omolemo Japhta Mafoko. The learned Regional Magistrate further conducted an examination of the complainant to satisfy himself that she appreciates the difference between right and wrong and between lies and truth. Having satisfied himself that the complainant is competent to testify, she can distinguish between right and wrong and between lies and truth, the learned Regional Magistrate proceeded to admonish the complainant.
- [8] The complainant testified that she knows the appellant. The appellant resides at Disake. On 17 April 2015, the appellant came to the homestead of the complainant to consume sorghum beer. The appellant was consuming sorghum beer with Abraham, Babiki, Motseng and the father of the complainant.
- [10] When the appellant was consuming sorghum beer, the complainant was playing with her friends. It is the evidence of the complainant that the appellant at some point lifted up the complainant and carried her from her homestead to his homestead. At the homestead of the appellant, the appellant undressed the complainant of her trouser and panty. The appellant then proceeded to undress himself of his boxer shorts, and he then proceeded to penetrate the vagina of the complainant with his penis.
- [11] The complainant was crying because the appellant injured her and there was blood coming from her vagina. The appellant then gave the complainant cakes and took the complainant to her home. The appellant promised to give the complainant two R2.00's and one R1.00 the following day. On arrival at her home, the complainant reported the incident to her mother and Businana. The complainant was taken to the hospital and the matter was reported to the South African Police Services. The complainant was examined by the doctor.
- [12] The mother of the complainant testified that on 17 April 2015, the complainant arrived home at around 19H00, after she had been looking for her from the neighboring houses because during the day the complainant was playing with the neighbour's children. As the mother of the complainant was about to go out to search for the complainant, she heard the voice of the complainant outside asking "where are you now going". The mother of the complainant called her into the house and when the complainant entered the house, the mother of the

complainant asked her where she was coming from at that time of the night. The complainant told her that the appellant took her to his homestead. On their arrival at the homestead of the

appellant, the appellant placed the complainant on top of the bed, undressed her of her trousers as well as her panty. The appellant

also undressed himself of his trouser and boxer shorts. He then mounted the complainant and penetrated her with his penis. At the

time the complainant was crying, and the appellant gave her cakes.

[13] The mother of the complainant testified that after the complainant made the report to her, she proceeded to check the panties of the complainant. The panties were blood stained, and her vagina was full of blood. She then dressed the complainant and left with her.

[14] The mother of the complainant further confirmed that the complainant was examined by a doctor and that the incident was reported to the South African Police Services. The mother of the complainant confirmed the complainant was born on 10 March 2009. The birth certificate of the complainant was handed in as an exhibit. The appellant, through his attorney, did not object to the handing in of the birth certificate of the complainant to prove her age. The mother of the complainant testified further that the appellant is the son of her paternal uncle.

[15] Under cross examination, the mother of the complainant was asked how she checked the vagina of the complainant after she made the report. The mother of the complainant explained that she opened the legs of the complainant and saw that her vagina was bleeding. The mother of the complainant told the court that she opened the vagina of the complainant but did not open it completely because she was scared to touch the blood that was coming out of the vagina of the complainant.

[16] Dr Kahasha told the court that he has been a doctor since the year

2003. On or about 18 April 2015 he examined a patient and filled in a medical report, the patient was the complainant. Dr Kahasha recorded in the medical report what he observed. He observed linear abrasions on the external aspect of the labia minora, small laceration on the fossa navicularis, redness on the vestibule and fresh blood and abrasions on the perineum. The conclusion of Dr Kahasha was that of sexual assault. The observations were compatible with recent trauma, vaginal penetration of the penis could not be excluded. The medical

report, called J88, was accepted as an exhibit. The appellant through his legal representative did not object to the handing in of the J88.

[17] Under cross examination it was put to Dr Kahasha that the mother of the complainant testified that she had opened the legs of the complainant and touched the upper part of her vagina. Dr Kahasha was asked if this could not have been the cause of the redness and fresh

blood that was observed by Dr Kahasha. Dr Kahasha explained that the traumatic lesions he saw were caused by a blunt object. He insisted that the blunt object which could not be excluded, is a penis. He conceded fingers could cause traumatic lesions but insisted that he does not believe the mother of the complainant would have caused the numerous lesions on the vagina of the complainant. The State closed its case.

- [18] The appellant was called to testify. The appellant denied having sexual intercourse with the complainant. The appellant admitted that he was at the homestead of the complainant on the day in question and that he was drinking sorghum beers with the aunt of the complainant and other people. He had two cakes in his possession and he gave Bange the two cakes. Thereafter the complainant came to him and asked for cakes. He told the complainant he does not have any more cakes and that he would bring her some cakes the following day.
- [19] Between 18H00 and 19H00 the appellant left the homestead of the complainant to go to his homestead. Whilst on the way to his homestead, he heard footsteps of a child coming from behind him. It was the complainant following him. The complainant told the appellant she was going with him to get the cakes the appellant promised to give to her. At the homestead of the appellant, he told the complainant to wait on the stoep. He went inside the house, he put some cakes in a plastic and he gave them to the complainant. He then took his clothes off the washing line, put them on the bed and walked the complainant back to her homestead. The appellant testified that the complainant entered her homestead and he went to the butcher to enjoy himself.
- [20] The appellant testified that the brother of the complainant found him at the butcher and asked him to come back to the homestead of the complainant with him. The appellant refused. A friend of the brother of the complainant and the brother of the complainant then manhandled the appellant. The appellant was taken to the homestead of the complainant. At the homestead of the complainant, the father of the complainant confronted the appellant. He accused the appellant of raping the complainant. The appellant denied raping the complainant. The appellant was arrested on that day. Swabs were taken from the appellant.
- [21] The appellant denied having carried the complainant from her homestead to his homestead. The appellant denied having promised the complainant R2,00's and R1,00. The appellant testified that the complainant was falsely implicating him because the appellant had assaulted the uncle of the complainant and he had also burned him with fire.
- [22] Under cross examination, the appellant elaborated on the fight between himself and the uncle of the complainant. It was put to the appellant that according to his testimony, the fight with the uncle of the complainant took place the day prior the alleged rape incident. However, on the day of the alleged rape, the family of the complainant welcomed him to their homestead and no issue were made of the fight between the appellant and the uncle of the complainant the previous day. It was put to the appellant that the complainant had no

reason to falsely implicate the appellant in having raped her.

- [23] The learned Regional Magistrate called Detective Kgabosile. Detective Kgabosile informed the court that he is a member of the South African Police Services for a period of 30 years. He is the police official who took the specimen that was taken from the complainant to the forensic science laboratory in Pretoria for analysis. The results read there was no semen found from the complainant to be compared to that of the appellant. No DNA was analysed.

THE LAW

- [24] Section 35(3)(a) of the Constitution of the Republic of South Africa reads as follows:

“Every accused person has a right to a fair trial, which includes the right—

- (a) to be informed of the charge with sufficient detail to answer it;”

- [25] Section 84(1) of the CPA reads as follows:

“84. Essentials of charge

- (1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.”

- [26] Section 51(1) of the Criminal Law Amendment Act (CLAA) reads as follows:

“51 Discretionary minimum sentences for certain serious offences

- (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.”

- [27] Part I of Schedule 2 of the CLAA as it relates to this matter reads as follows:

“Rape –

- (a) when committed—
- (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice:
- (ii) by more than one person. where such persons acted in the execution or furtherance of a common purpose or conspiracy>:
- (iii) by a person who has been convicted of two or more offences of rape. but has not yet been sentenced in respect of such convictions: or

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

(b) where the victim—

(i) is a girl under the age of 16 years;

(ii) is a physically disabled woman who, due to her physical disability is rendered particularly vulnerable: or

(iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act, 1973 (Act No. 18 of 1973): or involving the infliction of grievous bodily harm.” (my emphasis)

ANALYSIS

[28] The appellant was convicted and sentenced on 4 August 2017. The notice of appeal was served in the court a quo on 12 June

2018. The notice of appeal was filed in this Court on 7 October 2024. The appellant has brought an application for condonation of the late filing of the notice of appeal. The application is not opposed by the State. The explanation tendered by the appellant is acceptable. I am of the view that this aspect of the appeal need not detain this Court any further and condonation for the late filing of the appeal should be granted.

[29] This Court must determine on the strength of the evidence as a whole, if the State proved the guilt of the appellant beyond reasonable doubt. The approach to be adopted is to weigh up all the elements which point towards the guilt of the appellant against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs heavily in favour of the State as to exclude any reasonable doubt about the guilt of the appellant. (See: *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 15).

[30] In the absence of an irregularity or misdirection, a court of appeal is bound by the credibility findings of the trial court, unless it is convinced that the findings are clearly incorrect. (See: *S v Jackson* (35/97) [1998] ZASCA 13; 1998 (4) BCLR 424 (SCA); [1998] 2 All SA 267 (A) (20 March 1998) at para 10).

[31] Counsel for the appellant submits that the court a quo misdirected itself by failing to consider the letter from the forensic science laboratory, as it exonerated the appellant from the offence since there was no semen detected on the complainant’s underwear, hence the FSL could not proceed with the DNA analysis.

[32] In my view, counsel for the appellant is conflating issues. The evidence of the complainant is that the appellant raped her. Identity was not in issue. The letter does not contradict the evidence of Dr Kahasha that he saw traumatic lesions which were caused by a blunt object and that the blunt object which could not be excluded, is a penis. The letter does not read a semen sample was found on the underwear of the complainant and a DNA sample obtained

from the appellant was compared to the semen sample found on the underwear of the complainant and there is no match. It simply reads as follows at paragraph 2:

“No semen could be detected on the exhibit (PAD000490950). Therefore no DNA comparison could be carried out.”

- [33] On the issue of the court a quo having failed to apply the cautionary rule when evaluating the evidence of the complainant, since she is a child witness at the age of eight years and a single witness to the rape itself. I have considered the judgment of the learned Regional Magistrate. It did indicate that the evidence of the complainant should be approached with caution as she is a child of a tender age. The learned Regional Magistrate stated the caution which is to be exercised is because of the inherent danger of relying on the evidence of children. The learned Regional Magistrate further indicated that the evidence of the complainant must receive special scrutiny because she is a single witness regarding the sexual intercourse.
- [34] The learned Regional Magistrate relying on *S v S* 1995 (1) SACR 50 (ZS) (*S v S*) C – I, examined the evidence of the complainant against the six main objections to rely on the evidence of children set out in *S v S*. The learned Regional Magistrate found there were no material contradictions in the evidence of the complainant. The evidence was not contradicted in material respects by other state witnesses and further there were also no improbabilities in the evidence of the complainant which affected her credibility. Having considered the record of the proceedings in the court a quo, I am of the view, that the contradictions highlighted by counsel for the appellant, are slight peripheral and not material. Contradictions must always be judged within context.
- [35] In any matter in which contradictions and inconsistencies arise, the aim is not to establish which of the versions is not correct, but rather to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. (See: *S v Mafaladiso and Others* 2003 (1) SACR 583 (SCA) at page 593 – 594 (*Mafaladiso*)).
- [36] In *Mafaladiso* the court went further and stated that the mere fact that it is evident that there are contradictions must be approached with caution by a court. Firstly, it must be carefully

determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory

versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven

reasons

for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up.

[37] Not all contradictions affect credibility. In *S v Mkohle* 1990

(1) SACR 95 (A) at 98E – G Nestadt JA held at follows:

“Contradictions per se do not lead to the rejection of a witness's evidence. As NICHOLAS J, as he then was, observed in S vs Oosthuizen 1982(3) S A 571(T) at 576 B - C, they may simply be indicative of an error. And (at 576 G - H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence.”

[38] I am satisfied that the State proved its case against the appellant beyond reasonable doubt and that the version of the appellant is false. I cannot find fault with the conclusions reached by the learned Regional Magistrate. In my view, the appellant was properly and correctly convicted.

SENTENCE

[39] The appellant assails the imposition of the life sentence on him by the learned Regional Magistrate on the grounds that he was not warned of the imposition of the life sentence upon conviction of rape read with provision of section 51(1) Part I of Schedule 2 of the CLAA. That when the State read the charge sheet, it did not refer to the relevant subsection of section 51 of the CLAA to find life imprisonment applicable.

[40] I have quoted the charge as it was put to the appellant in paragraph 2 above. A reading of the record of the proceedings in the court a quo confirms at no stage did the learned Regional Magistrate make an order nor was there an application brought by the State in terms of section 86(1) of the CPA. I have observed that the learned Regional Magistrate referred to section 51(1) for the first time when he was handing down judgment on conviction.

[41] Section 86(4) of the CPA reads as follows:

“(4) The fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder.”

[42] A formal application to amend a charge sheet is not always required. (See: S v Kolea 2013 (1) SACR 409 (SCA) (Kolea) at para 18). In Kolea, the court went further and found that the fact that the charge sheet was never rectified in terms of section 81(1) of the CPA did not on its own render the proceedings invalid. The test is always whether or not the accused suffered any prejudice.

[43] In a recent decision of Mochware v S (CAF8/22) [2024] ZANWHC 307; [2025] 1 All SA 718 (NWM) (12 December 2024), a matter that served before the full court in this division of the High Court. The appellant therein appealed the imposition of a life sentence on the basis he had not been forewarned by the trial court that the minimum sentence was applicable to the charge proffered against him at the commencement of the trial. Reddy J writing for the court stated as follows at paragraph 14 of the judgment:

“The principles in this regard are commonplace in our law. The nub of the matter is simply whether on a vigilant examination of the

proceedings, can it be found that the appellant was subjected to an unfair trial.”

[44] In M T v The State; A S B v The State; Johannes September v The State 2018 ZACC 27 at para 40, the court held as follows:

“It is indeed desirable that the charge sheet refers to the relevant penal provision of the Minimum Sentences Act. This should not,

however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the

applicability of the Minimum Sentences Act in the charge sheet or in the record of the proceedings, a diligent examination of the

circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in trial. This is so because even though there may be no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused’s section 35(3) right to a fair trial was not in fact infringed.”

[45] In S v Kekana 2019 (1) SACR 1 (SCA) Makgoka JA writing for the court stated the following at paragraph 24 of the judgment:

“...the purpose of reading a particular charge with the provisions of the CLAA is essentially two-fold. First, to alert the accused of the applicability of the prescribed minimum sentence. Second, to afford the accused an opportunity to place facts before the court on which a deviation from the prescribed sentence would be justified, nothing more.”

[46] In light of the fact that the appellant was legally represented in the court a quo. It would be apposite to refer to the matter of Director of Public Prosecutions, KwaZulu-Natal v Pillay (706/2022) [2023] ZASCA 105; 2023 (2) SACR 254 (SCA); [2023] 3 All SA 613 (SCA) (23 June 2023) at para 32 to 38 Goosen JA writing for the court stated the following:

“[32] Where an accused person is legally represented, the obligation which rests upon a presiding officer is of a different character. The presiding officer remains under an obligation to ensure that the trial is fair and that an accused person’s constitutional rights are protected. But that general obligation is to be carried out in the light of the accused having exercised the right to legal representation. Section 25(3) (f) of the Constitution confers upon an accused person the right to choose and be represented by a legal practitioner. In S v Mpongoshe this Court held that section 73(2) of the CPA confers upon an accused the wider right to be represented. In that case it was held that the right to legal representation encompassed the right to have a plea tendered vicariously by the legal representative.

[33] In *Beyers v Director of Public Prosecutions, Western Cape*, it was held that:

‘The idea of being represented by a legal adviser cannot simply mean having somebody next to you to speak on your behalf. Representation

entails that the legal adviser will act in your best interests, will represent you, will say everything that need be said in your favour, and will call such evidence as is justified by the circumstances in order to put the best case possible before the court in your defence.’

[34] ‘Representation’ in this sense is not confined to the conduct of the trial. A legal representative, who is engaged to represent an accused, is obliged to act in the best interests of their client. That means, inter alia, to act according to the highest standards of professional ethics; to advise the client of their rights fully and properly; and to guide and advise the client in exercising of those rights. The legal representative must prepare thoroughly and properly on all aspects of the case. This includes advising the client about s 93ter(1), where it applies, informing the magistrate of the process and whether a request is made to proceed without assessors.

[35] A presiding officer must, in the first instance, respect an accused person's choice of legal representative and must defer to the legal representative’s conduct of the matter. These are general principles which are well established. They inform our adversarial system of trial adjudication. It is against this backdrop that the duties of a trial magistrate must be viewed. Where an accused is represented, it must be established that the representative and the accused were aware of the provisions of the section, and whether the accused, as represented, has made a request as envisaged. It is incumbent upon the presiding officer to ensure that the court is constituted in accordance with s 93ter(1). As indicated in *Gayiya*, the presiding officer must take the lead in doing so at a stage before any evidence is led.

[36] The approach regarding the intended reliance upon prescribed minimum sentences as provided by s 51 of Act 105 of 1997, is instructive. In *S v Legoa*, it was held that the concept of substantive fairness under the Constitution requires that an accused be informed of facts, which the State intends to prove to bring him within the increased sentencing jurisdiction provided by that Act. The court declined to lay down a general rule regarding the form of notice. It held that:

‘Whether the accused’s substantive fair trial right, including his ability to answer the charge, has been impaired will therefore depend upon a vigilant examination of the relevant circumstances.

[37] In *S v Kolea*, this Court reaffirmed the principle in *Legoa*. It also endorsed the approach set out by Ponnann JA in a minority judgment in *S v Mashinini and Another*, where the learned judge stated that the fair trial enquiry is first and foremost a fact-based enquiry. The court in *Kolea* held that the conclusion to which the majority had come was wrong.

[38] Although we are not here dealing with a fair trial enquiry, compliance with s 93ter(1) of the MCA is no less a fact-based enquiry. In light of this, it is equally undesirable to lay down a general rule regarding what must be done to establish compliance with the section. The set of guidelines proffered in *Langalitshoni*, strays into this terrain. The requirements are at odds with the notion of a right to legal representation. They are also premised

upon a misconception of the nature of the right conferred by s 93ter(1) and the application of principles of waiver.” (Foot notes omitted)

[47] Counsel for the appellant in his heads of argument states; “the question is whether the Regional Court had jurisdiction to sentence the appellant to a term of life imprisonment in terms of section 51(1) of the Act when it failed to warn the appellant about the implication of section 51(1) of Part I of Schedule II of the Act 105 of 1997”. The short answer to this question is, yes.

[48] An examination of the record of the proceedings in the court a quo reveals Ms Pheeha for the appellant when addressing the court in mitigation of sentence said the following at page 281, line 15 to 24:

“...Your worship it is, the nature of the offence your worship even from, the nature of the seriousness of the offence your worship even from the beginning of the trial those were explained to the accused your worship and he understands same.” He was further advised of the prevalence your worship in the jurisdiction of the honourable court and the effect such an offence can have on the victim your worship, that was also explained to the accused and he understands.” (my emphasis)

Ms Pheeha made the following further submissions at page 282, line 4 to 13 :

“And the seriousness of the offence of rape your worship of minors its seriousness was also, the defence would like to submit that that also could have contributed to the legislature having enacted the Criminal Law Amendment Act your worship where specific punishments or sentences were provided for your worship to deal with such offences. And the defence is aware that this offence carries a minimum sentence of life imprisonment and accused was advised of that.” (My emphasis)

[49] This demonstrates that Ms Pheeha was completely aware of the prescribed minimum sentence legislature applicable to the proffered charge against the appellant. The appellant pleaded not guilty to the proffered charge as put to him. I have accepted that in the charge put to the appellant, no reference is made to subsection 1 of Section 51 of the CLAA. The appellant did not object to the proffered charge put to him.

- [50] I am of the view that the failure to refer to subsection (1) of section 51 of the CLAA did not vitiate the sentencing proceedings. The appellant had enough information in the charge that was put to him, to answer to the charge. The legal representative of the appellant knew that the charge the appellant was facing was that of rape of a minor under the age of 16 years, which automatically attracts a sentence under section 51(1) of the CLAA. From the submissions made by Ms Pheeha on behalf of the appellant in the court a quo, the appellant was made aware of the seriousness of the offence from the beginning of the trial. The appellant was further advised that the offence carries an automatic minimum sentence of life imprisonment.
- [51] In conclusion, I am of the view that the appellant was not prejudiced by the failure of the State to refer to subsection 1 of section 51 of the CLAA, when putting the charge to the appellant and the Regional Court had jurisdiction to sentence the appellant to a term of life imprisonment in terms of section 51(1) of the CLAA, even though it failed to warn the appellant about the implication of section 51(1) read with Part I of Schedule II of the Act 105 of 1997.

IS THE SENTENCE IMPOSED APPROPRIATE

- [52] It is a trite principle of our criminal jurisprudence that sentencing discretion lies pre-eminently in the sentencing court and must be exercised judiciously. In *S v Boogards* 2013

- (1) SACR 1 (CC) at para 41, the court stated the following:

“Ordinarily, sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another.” (Foot notes omitted)

- [53] In *Bailey v The State* (454/11) [2012] ZASCA 154 (01 October 2012) Bosielo JA writing for the court stated the following at para 19:

“What then is the correct approach by an appellate court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court after exercising its discretion properly simply because it is not the sentence which it would have imposed or that it finds it shocking? The approach to an appeal on sentence imposed in terms of the Act, should in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This in my view is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not.” (My emphasis)

- [54] In *S v Matyiti* (695/09) [2010] ZASCA 127 (30 September 2010), Poonnan JA writing for the court stated the following at para 23:

“Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is ‘no longer business as usual’. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses that appear to fit the sentencing officer’s personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.” (My emphasis)

- [55] The Conviction of the appellant of the rape of a minor under the age of 16 years carries with it an automatic life sentence, unless there are substantial and compelling circumstances which justify the imposition of a lesser sentence.
- [56] The personal circumstances of the appellant were recorded in the court a quo as the following: the appellant was 35 years of age, he has a minor child aged 4 years, the said minor child is staying with her mother. The child’s mother is unemployed, and the child’s mother is receiving a child grant. The parents of the appellant have passed away. His siblings are staying with their stepfather and before his arrest the appellant was staying with his grandmother at Disake. The grandmother of the appellant is receiving a old age grant and she suffers from asthma. His grandmother is staying alone. The older sister of his grandmother having passed on.
- [57] The appellant was employed before his arrest at Levero Constructions receiving a salary of R 6000.00 per month. The appellant was assisting at home with household necessities and maintaining his minor child. The appellant was a member of the Community Policing Forum from 2015 until his arrest. The appellant owns livestock in the form of goats. He was herding the goats in the morning before going to work and his grandmother used to help him but she is no longer help him because she is sick.
- [58] It was submitted by Ms Pheeha in the court a quo that the rape of the complainant cannot be singled out as the worst rape ever reported and no weapon was used in the commission of the offence.

[59] Rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way. (See: S v Mudau (764/12) [2012] ZASCA 56 (9 May 2013) (Mudau) at para 17).

[60] The appellant is related to the complainant. He was in a position of trust over the complainant. The complainant was 6 years old at the time of the rape. These in my view are aggravating factors. I am not persuaded that the learned Regional Magistrate erred in sentencing the appellant to life imprisonment. In my view there are no substantial and compelling circumstances that would warrant this Court deviating from the prescribed minimum sentence of life imprisonment. The appeal against sentence should consequently fail.

[61] Resultantly, the following order is made: -

ORDER:

T MASIKE

ACTING JUDGE OF THE HIGH COURT SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

I agree

R D HENDRICKS JP

JUDGE PRESIDENT OF THE HIGH COURT SOUTH AFRICA,

APPEARANCES

DATE FOR HEARING: 14 FEBRUARY 2025, DATE OF JUDGMENT: 27 MAY 2025 FOR APPELLANT:
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Prepared on 14 October 2026 · Esheria