

SOUTH AFRICA / JUDGMENT

Suleiman v S (A45/2023) [2023] ZAWCHC 216 (15 August 2023)

[2023] ZAWCHC 216

COURT

Western Cape High Court, Cape Town

BEFORE

Mangcu-Lockwood, M I Samela

CASE / FILE NUMBER

A45/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No.:A45/2023

In

the matter between:

MOEGAMAT

FAIZEL SULEIMAN

Appellant

and

THE

STATE

Respondent

JUDGMENT

DELIVERED ELECTRONICALLY ON 15 AUGUST 2023

MANGCU-LOCKWOOD, J

A.

INTRODUCTION

- [1] This is an appeal in terms of section 309 (1)(a) of the Criminal Procedure Act 51 of 1977 (“CPA”) against both conviction and sentence of life imprisonment meted out by the Wynberg Regional Court against the appellant in respect of the rape of a 14 year-old minor boy (count 3). In fact, the appellant was also convicted and sentenced for three other counts, being two counts of sexual assault in respect of the same 14 year-old minor boy (counts 1 and 2), and attempt to commit a sexual offence in respect of another minor male of 12 years (count 4). The appellant was sentenced to direct imprisonment on all four counts as follows: 12 months in respect of count 1; five years in respect of count 2; life imprisonment in respect of count 3; and seven years in respect of count 4. All the sentences were to run concurrently in terms of Section 280(2) of the CPA. The appellant was automatically rendered unfit to possess a firearm, and his name was added to Part B of the National Child Protection Register and in the National Register for Sex Offenders.
- [2] As already mentioned, this appeal only concerns the conviction and sentence in respect of count 3 since no leave to appeal was lodged in respect of the other convictions and sentences. The appeal was lodged out of time, and the appellant brought an application for condonation, which was not opposed. After considering the application for condonation, this Court granted it.
- [3] The charge in respect of count 3 was that on 5 January 2020 in Seawinds, which is in the District of Wynberg, the appellant unlawfully and intentionally committed an act of sexual penetration with the 14 year-old complainant by inserting his genital organ into the anus of the complainant without the consent of the complainant and thus raped him. The appellant was charged for contravening section 3 read with sections 1, 56(1), 56A, 50(2)(a), 50(2)(b), 57, 58, 59, 60, 61, and 68 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“the Sexual Offences Act”); read with the provisions of sections 94, 256, 261 and 281 of the CPA; further read with the provisions of sections 51(1) of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”); and further read with sections 1, 2 and 120 of the Children’s Act 38 of 2005.

B. THE FACTS

- [4] The appellant is a learned scholar and teacher at the Islamic school attached to the Seawinds Mosque, as well as the leader of a youth group consisting of some 17 boys, of which the complainant became a member in 2019. The events in this matter took place between December 2019 and January 2020, when the youth group was having ten nightly sleepovers at the mosque, in anticipation of Eid.
- [5] The complainant’s case against the appellant concerned three incidents, which formed counts 1 to 3. He testified that, during the sleepovers, the appellant insisted that he (the complainant) should always sleep next to him. His evidence was that in December 2019, while he was sleeping next to the appellant, he woke up with his pants off, while the appellant was busy pulling and playing with his penis. He testified that he saw the hands of

the appellant as well as the appellant's face while he was performing this act. He pushed the appellant away, and got up to go to the door, which he tried to open, but it was locked. When the complainant got up the appellant followed him, and once both could see that the door was locked, the appellant instructed the complainant to go back to sleep, which the latter obeyed, although he did not go back to sleep next to the appellant but went and lay on his own, some distance from the appellant. He did not tell anyone about the first incident for fear of shame, and remained at the mosque for the remainder of the sleepovers.

- [6] The second incident also occurred during December 2019. On that occasion, the complainant was again sleeping next to the appellant, when the appellant squeezed his (complainant's) bum and again played with his penis and kissed him. This was during the night, while everyone else was sleeping in the mosque. Again, he did not report this incident.
- [7] The third incident is the subject of the third charge against the appellant, and it occurred in the early hours of 5 January 2020. On this occasion, the complainant woke up with his pants and underwear pulled down, while the appellant's hands were on his bum. The appellant spit in his hand, put the saliva on his (appellant's) penis and inserted his penis into the anus of the complainant. The complainant pushed him away, got up and went to sit in the corner crying. Although the complainant did not tell anyone about the incident at the mosque, he testified that he could not take it anymore on this occasion, and decided to go home to report the incident to his grandfather, who had long ago invited the children in the family to report to him any incident of that nature.
- [8] Upon arrival at home, the complainant immediately reported to his grandfather that the appellant had touched him in the wrong places, but did not give details of the various incidents or how it was perpetrated. When the complainant's mother joined the complainant and grandfather, the complainant reported to his mother that the appellant had touched and raped him, and gave her details of the three different incidents and of the penetration on the third incident.
- [9] The complainant's grandfather immediately went to the mosque to confront the appellant. It was approximately 2pm in the afternoon of 5 January 2020. At the mosque the complainant's grandfather asked the appellant: "How could you do things like this to the kids?" The appellant's response was that the kids always play like that, and he did not do anything to the complainant. The

appellant's version, which was put to the grandfather, was that at this point he thought the grandfather had come to confront him about a fight that the complainant had been involved in on the previous night, involving another boy in the youth group. The grandfather disputed this, stating that he knew nothing of the alleged fight. However, he confirmed that he had only confronted the appellant about "what he was doing to the kids" and had not mentioned any sexual conduct.

- [10] After the confrontation, the complainant's grandfather contacted the complainant's mother to take things further because he could not stomach the detail and left that to his daughter.
- [11] The next important event was on 6 January 2020, when the complainant's mother added the appellant to her WhatsApp and started a conversation with him. Her evidence was that she wanted to "gather evidence" and to hear his side of the story. A copy of the WhatsApp conversation between her and the appellant was admitted into evidence, and it included voice notes between the two. I return to the contents of the WhatsApp later.

C. THE APPEAL

- [12] In the heads of argument the appellant raised numerous alleged contradictions in the evidence presented on behalf of the complainant, in the following:

12.1 The complainant displayed uncertainty about the exact months when the three incidents allegedly took place.

12.2 The complainant's version of the alleged rape incident relayed in the J88 medical form (J88) materially contradicts his evidence in chief.

12.3 It is highly improbable for the alleged incidents to have taken place during the fasting period of Ramadan, in the early hours of the morning, when many Muslims were sleeping in close proximity to each other in the mosque.

12.4 Leading questions by the prosecutor on material evidence were not objected to by the defence and were permitted by the presiding officer.

12.5 It is highly improbable that the complainant was prevented from reporting the first alleged incident, when his home was very close to the mosque.

12.6 It is highly improbable that the complainant did not know what to do during the time of the alleged incidents, when he was given instruction by his grandfather to report to him should anyone touch him inappropriately.

12.7 The complainant's report to his mother was not consistent with the complainant's evidence.

12.8 As regards the J88, no injuries were noted on the genital organs of the complainant; the findings of the forensic nurse did not include or exclude rectal penetration; and the assessment of the forensic nurse, does not confirm any penetration.

- [13] It is well to remember the basis on which this Court may interfere with the decision of the Magistrate's Court. That is only in circumstances where it is established that there was a material misdirection in respect of facts and/or law.[1] In the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

- [14] At the appeal hearing the appellant's counsel conceded that the alleged contradictions raised in the heads of argument are not material. Nevertheless, this judgment proceeds to consider them.
- [15] It is significant that the evidence led on behalf of the complainant was not disputed in any material respect. The complainant was 16 years old when he gave evidence. His evidence was clear that the incidents occurred in December 2019 and January 2022. There is no demonstrated basis on which it can be concluded that his evidence lacked clarity or was not satisfactory in any material aspect. The detail he gave regarding how the sexual incidents were perpetrated was not seriously challenged.
- [16] The complainant's evidence was also not disputed that, under the care of the appellant, the youth were required to obey his instructions, whom the complainant referred to as his amir. That is one of the important considerations when regard is had to the unchallenged evidence that the appellant insisted that the complainant should sleep next to him every night during the sleepover period, resulting in the complainant sleeping next to the appellant on the second and third incidents. It was also in the context of that power dynamic that the appellant instructed the complainant to come back to bed when the complainant was trying to see if the door was unlocked so that he could exit the mosque and go home. This is the context in which the complainant's evidence must be construed that he did not go home to report the first and second incidents. In any event, as the Magistrate correctly pointed out, section 59 of the Sexual Offences Act provides that a court may not draw any inference only from the length of delay between the alleged commission of a sexual offence and the reporting thereof.
- [17] As for the contradiction between the version of the complainant in court and the version that he apparently relayed to the medical officer and which was subsequently recorded in the J88 form, the contents of the J88 were not put to the complainant or to any of his witnesses.
- [18] It was also argued that the medical report did not assist the case of the State because no injuries were noted on the genital organs of the complainant and that the forensic finding did not include or exclude rectal penetration. However, the evidence of medical officer, Sister Ntwana, was that the lack of injuries was not uncommon in instances of anal penetration, and that more often than not there were no such injuries recorded. In any event, Sister Ntwana testified that the use of saliva as a lubricant would be consistent with the lack of injuries. I find no misdirection in this regard committed by the Magistrate.
- [19] In Court, it was argued that there was no clear evidence of penetration on the part of the complainant, his grandfather and his mother. There is no merit to this criticism. The complainant gave clear evidence regarding the third incident, and testified as follows[2]:
- "[COMPLAINANT]: ... And then the third time he did not play with my penis. The third time he ... so with his spit and he put it in between my bum and he put his private part in. And, and as he was doing it I, I could not believe it and I, and I turn and I did not ...[indistinct] and I was sitting on the, on the*

mosque corner that morning crying the whole time. PROSECUTOR: ... what did he put in? What did Faizel put in? [COMPLAINANT]: His private part. His private part. PROSECUTOR: Where did he put it? [COMPLAINANT]: In, in my anal. PROSECUTOR: And how many times did he do this? [COMPLAINANT]: Once. PROSECUTOR: And where was he laying when he did this? [COMPLAINANT]: Next to me. PROSECUTOR: Was he in front of you or behind you? [COMPLAINANT]: Behind me at the back. PROSECUTOR: And how close was he? [COMPLAINANT]: Close as we sitting. He was like literally, his private was nearby my bum. So close was he. PROSECUTOR: And where was his hands? [COMPLAINANT]: His hands was on my bum as he was putting it in. PROSECUTOR: Were you awake? [COMPLAINANT]: I was not awake I was sleeping, but I felt. I felt he is putting his private part in and I saw it with my eyes. PROSECUTOR: Did you look at him? [COMPLAINANT]: I did, I did first push him away. I did first look, so I push him away, but I did not look at him. PROSECUTOR: Now how do you know it was him? [COMPLAINANT]: Because, because I was next to him. He was laying next to me and he told me: "Come sleep next to me." "

- [20] The complainant's detailed evidence above was not disputed, save to put to him that the appellant had no knowledge of the allegations. As for the complainant's report to his grandfather, both the complainant and the grandfather stated that the complainant did not give details of the sexual conduct of the appellant, save to report that the appellant had touched him in places that he did not like. In this regard, the grandfather's unchallenged evidence was that he did not want to hear the detail of what had been done to his grandson as he could not 'stomach it', and it was enough for him to hear that the complainant had been touched inappropriately. This is the reason he gave for not mentioning details of sexual conduct when he confronted the appellant at the mosque, and chose to leave the rest to his daughter.
- [21] Regarding the report to his mother, the complainant's evidence was that he told her that he was touched and raped by the appellant. This was corroborated by the complainant's mother who stated that the complainant told her that the appellant touched him "by my private and by my bum, something about penetration or something like that". She said she had asked him where exactly he was touched, and he confirmed that it was on his penis. She also confirmed that the complainant told him about the three different incidents. Regarding the rape incident, she testified as follows:

"PROSECUTOR: And you said he mentioned something about penetration. What exactly did [complainant] tell you about penetration? [THE MOTHER]: I asked him because [complainant] said he hurt him at the back. PROSECUTOR: Sorry? [THE MOTHER]: He hurt him at the back. ... PROSECUTOR: Did [complainant] tell you who hurt him at the back? [THE MOTHER]: Yes, Madam. He was specific, Cheikh Faizel hurt him. I made sure I asked him three times "Are you sure?". He said, "Yes mummy, I'm 14". He was 14 at the time. PROSECUTOR: Okay. Did he say where did he hurt him? [THE MOTHER]: He explained to me he touched his private part. He kissed him on his lips also and he wanted to penetrate him, because he said it was sore. And that really made me angry."

[22] Although the complainant's mother used the phrase "wanted to penetrate" as opposed to "penetrated", what is clear from her evidence is firstly that the term "penetration" arose during the complainant's report to her. She explained, even during her cross examination, that she was at pains to ascertain from the complainant whether he understood the terms he was using, including penetration, to which he responded that at 14 years he was old enough to understand it. Secondly, what transpires from her evidence is that the complainant reported that the appellant hurt him with his penis which resulted in the complainant's anus being sore. This can only mean that the complainant reported that the appellant inserted, or attempted to insert, his penis into his anus. Why else would the complainant report being sore from the incident if there was no touching of genital organs and an attempt to penetrate his anus?

[23] In this regard it is relevant that section 3 of the Sexual Offences Act defines the crime of rape as the unlawful and intentional commission of an act of sexual penetration with the complainant without the consent of the complainant. In turn, sexual penetration is defined in section 1 to include –

"any act which causes penetration to any extent whatsoever by –

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person,

and "sexually penetrates" has a corresponding meaning."

[24] In my view, the evidence of the complainant's mother confirms the complainant's version that the penetration was slight and very brief because he (the complainant) pulled away immediately. That conduct was enough to satisfy the definition of sexual penetration contained in section (1) of the Sexual Offences Act which includes "penetration to any extent whatsoever". The extent of penetration does not matter.

[25] In any event, it was not disputed that the third incident stood apart from the first two for the complainant, such that he could not take the conduct of the appellant anymore and ran home to report the matter to his grandfather. Further, his description of the actual incident, in which the appellant used his saliva to lubricate his penis and inserted it inside the complainant's anus, was similarly not disputed. As the Magistrate correctly observed, there was no basis for the complainant to fabricate those details given his own attitude towards anal rape, which he testified about. In this regard the complainant testified that if someone had reported such an incident to him at the time he would have laughed at it. This evidence was also not challenged.

- [26] Besides all of this, was the Whatsapp evidence I have already referred to. According to the complainant's mother, it was because of her disbelief at the events relayed to her by her son that she commenced a WhatsApp conversation with the appellant. It was in the WhatsApp messages that the appellant admitted that "I'll be able to relate to [the complainant]"; "I've seen psychologists... it helped a bit"; "being raped at 11 was not my choice at all but I forgave and moved on"; "I know I touched his bum...when I told him to turn to the other side"; "I just ask mouf [forgiveness] for all the inconvenience and the pain and sorrow I have caused you and your family".
- [27] It is correct that the appellant did not admit to having raped or committed sexual misconduct towards the complainant in the WhatsApp messages. However, when viewed against his version that was to later emerge during his own evidence, the WhatsApp messages became very important.
- [28] The appellant's version was that when he was confronted by the complainant's grandfather on the afternoon of 5 January 2020, it was in relation to a fight that the complainant had had with another boy on the previous night, and which had resulted in a bruise or cut beneath the eye of the complainant. According to him, it was in respect of the injury that the grandfather had first attended at the mosque, with the complainant who remained in the car, to confront him. Then, according to the appellant, the complainant's grandfather had again attended at the mosque later that same afternoon of 5 January 2020 but did not speak to him and instead spoke to the chairman of the mosque as well as his (the grandfather's) friends, all to whom he loudly revealed the sexual allegations against the appellant.
- [29] I have already indicated that the complainant's grandfather had no knowledge of the said fight, and denied that he had gone to the mosque to confront the appellant about a fight. The version was also not put to the complainant who attended at the mosque with his grandfather for the confrontation. As for the remaining allegation regarding a second visit by the grandfather to the mosque on the same day, it was not put to the complainant's grandfather or to the complainant who, according to the appellant, also attended on the second visit to the mosque.
- [30] The appellant also relied on the alleged boys' fight of the previous night as the background context for the WhatsApp conversations between him and the complainant's mother. As the Magistrate correctly pointed out, the question that arises is, if that was the appellant's impression, why did he deem it necessary to mention that he had touched the complainant's bum or that he himself was raped at 11 years old?
- [31] Furthermore, on the appellant's own version, it was later on 5 January 2020, during the second visit of complainant's grandfather to the mosque, that he discovered that the allegations against him involved sexual allegations. It therefore makes no sense that, when he admitted in a text on 6 January 2020 that he touched the bum of the complainant he thought this discussion was regarding an injury on the face of the complainant. That version cannot reasonably possibly be true.

- [32] Furthermore, when the appellant was confronted about his comments on WhatsApp that he had touched the complainant's bum, and that he had been raped at the age of 11 and was seeing a psychologist, the appellant stated that he had been confused when he wrote those things. The appellant never explained what brought about this apparent confusion. What may be stated immediately is that none of these Whatsapp comments bear any relevance to an alleged fight between two boys, or to an injury to the complainant's face. The appellant could not provide a satisfactory explanation for the afore-mentioned WhatsApp comments, save that he was confused. The Magistrate committed no misdirection when he rejected the appellant's version in this regard, which was an afterthought.
- [33] One of the appellant's belated defences – also not put to the complainant's witnesses - is that the complainant fabricated these allegations against him because firstly the complainant is an attention-seeker, and secondly, he was influenced by his mother to bring the allegations against him. In respect of the attention-seeking allegations, the appellant claimed in his evidence that it was when the complainant did not receive all the attention that he wanted from the appellant that he trumped up these allegations against him. In an effort to distance himself from the complainant, the appellant stated that he had closer relationships with other boys with whom he came into contact during the week at madrasa, as opposed to the youth group attended by the complainant which only met on weekends. And so, the version of the appellant was that he only came into contact with the complainant on weekends. Further, the appellant claimed that the complainant "grew attached to me without me knowing".
- [34] Not only was the attention-seeking defence not put to the complainant or his mother and grandfather, but it was in contrast to the evidence of the complainant and his mother, that it was the appellant who bought the complainant luxuries. This was not a one-sided relationship as the appellant tried to belatedly suggest.
- [35] As regards the appellant's allegation that the complainant's mother propagated these allegations against him, this version was also not put to the complainant or his mother. In any event, the version was senseless. According to the appellant, he had previously raised questions - presumably to the complainant's mother - regarding the fact that the complainant's parents were not married despite being in a long-term relationship. Furthermore, he stated that the complainant's mother was a 'party person' and the father was an alcoholic. There was no detail regarding when the appellant allegedly made these inquiries from the complainant's mother or how they were related to the allegations against him. This version also does not explain why it was the complainant's grandfather who approached the appellant to confront him at the mosque regarding sexual allegations on the day of the incident, and not the mother.

[36] Furthermore, as I have already indicated, the evidence led on behalf of the complainant that he went home and reported the incident, first to his grandfather and next to his mother was not disputed. In other words, the sequence of events was not disputed. That sequence excludes the allegations from emanating from the mother.

[37] Moreover, the evidence of both the complainant's mother and grandfather, which was not challenged, was that, before this incident, they had a good relationship with the appellant. The grandfather stated that "I had all the trust in the world on him to help those kids...". The complainant's mother stated that she "had a wonderful relationship" with the appellant, and she "trusted" and "felt comfortable" with him. None of that evidence was challenged during cross-examination. The evidence further indicated that this trust in the appellant included allowing the complainant to sleep over at the mosque for a number of days under the appellant's

care. Clearly, the appellant's evidence was an afterthought.

D. THE SENTENCE

[38] As regards the sentence, it was argued before us that the sentence is so shockingly inappropriate that it calls for this Court's intervention.

[39] It is trite that the power of an appellate court to interfere with a sentence imposed by a lower court is limited. In *S v Bogaards*[3], the Constitutional Court stated an appellate court 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.

[40] It was explained as follows in *S v Malgas*[4]:

"The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the

former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.”

[41] Count 3 against the appellant is included in the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“CLAA”), which provides as follows:

“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 1 of Schedule 2 to imprisonment for life”.

[42] In turn, the following offence is included as part of Part 1, Schedule 2:

“Rape as contemplated in section 3 of the Sexual Offences Act where the victim is a person under the age of 16 years”.

[43] In terms of section 51(3)(a) of the CLAA a lesser sentence may be imposed if the Court is satisfied that substantial and compelling

circumstances justify a departure from the prescribed minimum sentence. The Supreme Court of Appeal[5] has cautioned that the “specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded”. With this background in mind, I turn to consider the appeal against the sentence meted out to the appellant.

[44] It was common cause that the complainant was 14 years old at the time offences involved against him, and therefore the CLAA provisions referred to above were applicable. The evidence placed before the Magistrate’s Court for purposes of sentencing included a probation officer’s report, victim impact reports relating to the two complainants in the case, and the oral evidence of the appellant’s father.

[45] The appellant continues to rely on the factors he relied upon in the Magistrate’s Court as substantial and compelling circumstances, which he says, justify a departure from the prescribed minimum sentence of life imprisonment, and they are now examined.

[46] The first is the age and youthfulness of the appellant at the time of committing the offence, which was 24 years. It has been held[6] that there are degrees of maturity, and that the degree of maturity must always be carefully investigated in assessing a young person’s moral culpability for the purposes of sentencing. But the provisions of the CLAA mean that youthfulness is not per se regarded as a mitigating factor or a substantial and compelling factor justifying a departure from the prescribed sentence.[7] What is required is clear evidence about the appellant’s background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral

blameworthiness.[8]

- [47] As the Magistrate correctly observed, although the appellant was young at the time of committing the offences, there was no reason to believe that his conduct was influenced by youthfulness. The contrary was indicated by the evidence – that the appellant was the opposite of a callow youth. There was ample evidence that he was a leader in his community, who impacted, not only young people but also adults. He was involved in marriage counseling, youth counseling, lectures and leading prayers as well as conducting various workshops and outreach programs. There was no evidence of youthfulness or impetuosity as a consequence of the appellant's age at all in the offences related to this matter, and specifically the rape.
- [48] As regards the appellant's involvement in community as a spiritual leader, another factor relied upon as a substantial and compelling factor, there is no denying that he has had a positive influence in his community, especially in his work involving the youth. It was not in dispute that the complainant's lifestyle was significantly impacted by the appellant's involvement in his life and by the youth group, and that the complainant admired the appellant and even imitated the way he dressed.
- [49] However, in the circumstances of this case, the appellant's community involvement and influence amount to an aggravating factor, and this much was admitted by the appellant's counsel in the Magistrate's Court. The offences involved in this case indicate that the appellant used his position of influence to inflict the harm and danger that he did upon the complainants. It was that influence and impact on the community which gave him access to the minor boys, and which put parents at ease enough to send their children to a sleepover at the mosque under his care.
- [50] I have already referred to the power dynamics between the appellant and, specifically, the complainant in count 3, which he exerted throughout the time of inflicting the first to third incidents of sexual offences. This dynamic must also be borne in mind when assessing the argument raised on the appellant's behalf that he did not indulge in any 'extraneous violence or threat'. That argument misses the significance of the power-relationship, which included a subtle form of bullying. In this regard, I am mindful of the complainant's evidence that, when he tried to leave the mosque after the first incident, the appellant instructed him to come to bed, which the complainant felt obliged to obey. This is but one example of the manner in which the appellant abused the position of power that he exercised over the complainant.
- [51] One aggravating feature of the appellant's involvement in the community is that it had not been for long, and had only commenced some nine months before the incidents which are the subject of counts 1 to 3. His evidence was that his employment at Seawinds Mosque was his first permanent job, because the previous two placements were as an assistant Imam, and were in any event for three months each. He thereafter started working at the Seawinds Mosque in about April 2019. Considering that he had only started working at this mosque in

about April 2019, having been a student barely a year earlier, it is deeply disturbing that by end of 2019 he had sexually assaulted a minor boy. It justifies why it was appropriate for the appellant's name to be entered into the National Child Protection Register and in the National Register for Sex Offenders.

[52] To make matters worse, the evidence indicates that the appellant continued with his conduct unabated. Barely three months after he was granted bail in respect of this matter, he was again charged with an offence of a sexual nature in respect of the second complainant in this matter with regards to count 4. The express written bail condition that was issued in respect of count 3 was read out during his evidence, and included the following: "...that the accused refrain from going to the Mosque, situated in St Ralph, Seawinds ... with immediate effect". Despite this bail condition, the appellant was back at the mosque in May 2020, sleeping over once again with minor boys, and committed an attempted sexual assault upon the second minor on 20 May

2020. In my view, this issue is also relevant when considering

another factor relied upon by the appellant as a substantial and compelling factor, namely that he is a first-time offender. Although

it is correct that the appellant was a first-time offender when he was arrested for this incident, it was not long before he was

arrested for a similar offence.

[53] Of further concern is the appellant's response once he was constrained to admit that the bail conditions did not permit him to be present at all at the mosque on 20 May 2020, where he stated as follows: "As a leader, your worship, I am willing to pay a price. I am willing to pay a price as to that extent that seeing 300, 400 people going hungry where I knew that I could have made a difference. When I knew I could have made a difference. So because of an accusation against me, I should chop off the hands or the feeding for 300 to 400 people per day because of an accusation. So that is how I looked at the matter.." The attitude displayed in this quote displays the appellant's blatant defiance of the rule of law and the administration of justice. This is undoubtedly an aggravating factor in the circumstances of this case.

[54] It also raises the question of whether the appellant is a candidate for rehabilitation, as claimed in the heads of argument submitted on his behalf. The evidence indicates the contrary. Even though the appellant obtained an opportunity in the form of bail, to reflect on his conduct and possibly get help, and to avoid long-term incarceration, he instead continued unabated with the same sexual misconduct and with a recalcitrant attitude towards the bail condition.

- [55] Another indication that the appellant is not a candidate for rehabilitation is his lack of remorse, which is highlighted in the report of the probation officer. As a result of the appellant's lack of remorse, the probation officer was unable to recommend any suitable punishment for the appellant. Instead, even to the probation officer the appellant continued to rely on his version which was belatedly raised and not put to the witnesses of the complainant.
- [56] It was argued that a substantial and compelling factor is the fact that the appellant was sexually abused at age 11, which transpired from the Whatsapp messages and was confirmed by him during cross examination. The difficulty is that no evidence was led by or on behalf of the appellant in this regard. Even at the sentencing stage, it was stated that the appellant considered the matter too personal for it to be delved into further. And it transpired that his parents were unaware of these revelations in any event, and could not confirm them. Although it may be understandable that the appellant considers the alleged sexual assault a personal matter, it cannot assist him because the court was not in a position to evaluate and consider it, especially as a substantial and compelling circumstance to justify departure from the minimum sentence.
- [57] Another factor relied upon as a substantial and compelling circumstance is that the complainant did not suffer any physical injury. It is correct that, apart from the complainant reporting to his mother that his bum was sore on the day of the incident, no physical injury was noted by the medical nurse in the J88 form. As I have already indicated, Sister Ntwana's evidence was that it is more common than not, in cases of anal penetration, not to have identifiable physical injuries. In any event, as the Magistrate correctly observed, section 51(3) (aA) of the CLAA provides that, in the context of a rape, the lack of physical injury to the complainant cannot form substantial and compelling circumstances.
- [58] Furthermore, the absence of physical injuries does not mean that there were no other injuries incurred, including mental or psychological. The complainant's grandfather and mother reported that the complainant's personality and behaviour have significantly changed since the third incident, as was his spiritual walk.
- [59] I have otherwise found no misdirection on the part of the Magistrate in this case. His judgment, in respect of both conviction and sentence, was comprehensive and very well-reasoned.
- [60] In all the circumstances, the appeal against conviction and sentence is dismissed.

N. MANGCU-LOCKWOOD

Judge of the High Court

I agree.

M. I. SAMELA

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- [1] S v Francis 1991
- (1) SACR 198 (A) at 198J-199A.
- [2] The quote that follows excludes questions relayed by the intermediary.
- [3] S v Bogaards [2012] ZACC 23; 2012 BCLR 1261 (CC); 2013
- (1) SACR 1 (CC) para 41.
- [4] S v Malgas
- [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001) para 12.
- [5] In S v Malgas para 25D.
- [6] S v Mabuza and Others (174/01) [2007] ZASCA 110; [2007] SCA 110 (RSA) (20 September 2007) para 22.
- [7] S v Mabuza and Others para 23.
- [8] See S v Matyityi [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) ; [2010] 2 All SA 424 (SCA) (30 September 2010) para 14.
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Prepared on 9 October 2026 · Esheria