IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal number: A40/2022

In the matter between:

KHULU JACOB MAKHUBU Appellant

and

THE STATE Respondent

CORAM: VAN ZYL, J *et* MPAMA, AJ

HEARD ON: 25 JULY 2022

DELIVERED ON: 6 OCTOBER 2022

JUDGMENT BY: MPAMA, AJ

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[1] The appellant was arraigned in the Regional Court sitting in Vrede, on a charge of rape, read with the provisions of section 51(1) of Act 105/1997. He pleaded not guilty, however, he was convicted on 16 March 2010 and sentenced to life imprisonment.

[2] In view of the appellant's life imprisonment , the appeal is before us on the basis of section 10 of the Judicial Matters Amendment Act 42/2013, in terms

of which the appellant has an automatic right to appeal his conviction and sentence.

[3] The appellant's appeal is premised *inter alia,* on the following grounds :

AD CONVICTION

1. That the learned magistrate erred in accepting the evidence tendered by the state witnesses thereby rejecting the appellant's evidence as not being reasonable possible true.

2. That the learned magistrate erred in not correctly applying the cautionary rule on the evidence of a child witness. The child did not sleep at home and did not tell the truth about her whereabouts to her mother.

AD SENTENCE

(i) That an effective term of life imprisonment is strikingly inappropriate in that it is out of proportion to the totality of the accepted facts in mitigation. In effect, it disregards the period of time that the appellant spent in custody awaiting trial.

[4] The facts can be succinctly summarized as follows: On 26 October 2007 the complainant, Ms TN, nine years old at the time, was playing next to the school gate during break time. It was about 11H00. A tall man, clad in a long black jacket approached her. The man requested her to go and buy a cigarette at a tuckshop. I deem it necessary to indicate at this stage already, that during cross-examination of the complainant, when she was questioned about the colours "black" and "brown" by being referred to certain items in court she corrected herself by testifying that the jacket which the man was wearing, was actually brown.

[5] The complainant has often seen the man before that day. He had also on a previous occasion made a similar request to her and during that occasion, she acceded to his request. She consequently again acceded to his request this time. On her return, she found the man still standing next to the school gate and gave him the cigarette. The man grabbed and dragged her to a certain backroom not far from the school, where he lived. Whilst he was dragging her, she cried loudly, but nobody saw them, since the other school children played

behind the school. When they got inside, he locked the door. He took out a cigarette and started smoking. The complainant continued crying.

[6] When done smoking he threw her on the bed, undressed her and himself and sexually penetrated her vaginally with his penis. He took a white cloth and wiped her vagina when done penetrating her. He gave her R1 and told her not to tell anyone about what had just happened or else he will kill her. He instructed her to leave and she proceeded home. It was about 13H00 when she proceeded home.

[7] When she arrived at home, she found her mother who enquired from her about why she returned late from school. She was scared to report to her mother what happened to her. Instead, she lied and reported that she was coming from her grandmother's place. Her mother gave her a hiding and told her to tell the truth. She made a report to her mother about what happened. The complainant and her mother went to the police. At a later stage, the complainant drove with the investigating officer and pointed the place where she was raped out to him. After the appellant was arrested, the complainant identified him at the police station as the man who raped her. The police also took the complainant to the hospital in Frankfort for a medical examination.

[8] The complainant's mother testified that the complainant did not sleep at home the night of 25 October 2007. On 26 October, she made enquiries at her grandmother's place and they informed her that she was not there. She went to look for her at school and found her clad in a filthy school uniform. She asked her where did she sleep and her response was that she slept at her grandmother's place. She left the complainant at school and proceeded home.

[9] The complainant came back from school at about 14H00. Once again, she asked her where she slept. The complainant said at her granny's place. She told her that she went to her granny's place, but that she was not there. She scared her by saying she will call the police if she is not telling the truth. The complainant reported that a man called Khulu previously called her during the

school break to go and buy cigarettes. On the day of the incident it happened again and when she returned from the shop after she bought the cigarettes, he took her into his place and closed the door. He put her on the bed, undressed her and himself and climbed on top of her. When he was finished, he gave her R1.00 and told her not to report this to anyone.

[10] Inspector Sethunya January Tsotetsi is a member of SAPS. He is the investigating officer. He handled the rape complaint and interviewed the complainant. The complainant informed him about a tall man, with a slim body and wearing a long brown jacket. She reported that the man lives close to the school, that he had on previous occasions called her during school break and sent her to go and buy cigarettes for him. On the day of the incident, he again requested her to do so and when she returned from the shop, he took her to where he lives. She explained that there was a blue house with backrooms. The man took her to a two-roomed backroom. She explained further that they entered the first room via a door and that there were three-legged pots inside the room next to the door. The said room was partitioned with a curtain, which led to a bedroom where she was raped. There was a bed and a washing basin. The complainant further reported that when he was done raping her he took a white cloth and wiped her female private part. Inspector Tsotetsi drove to this house. The complainant pointed the house out to the witness. He called another police vehicle and they took the complainant to the police station. He went inside the main house, but did not find the appellant. He found the appellant's cousin who called the appellant on his phone.

[11] The appellant arrived and together they proceeded to the backroom. He found that the inside of the backroom fitted the description given by the complainant; inside it had the three-legged pots next to the door, the curtain to the backroom partitioning the bedroom, the bed and the washing basin. With the appellant's permission, he searched the house and under the bed he found a long brown jacket in a box and a white cloth. He sealed the cloth in a bag, stored it until it was sent away for forensic tests.

[12] The J88- Medico Legal Report pertaining to the complainant was handed in as Exhibit "A" and the contents were formally admitted in terms of section 220 of Act 51/1977. The examination was performed at Mafube Hospital, Frankfort, on 26 October 2007 at 18h30. With regard to the gynaecological examination, it was recorded that the hymen was "*broken and fresh*". The doctor was unable to do a full internal vaginal examination because it was too painful for the complainant. The doctor concluded as follows in the said report:

"...the fact that hymen is broken and fresh suggestive that penetration did take place."

[13] An affidavit in terms of section 212 of Act 51/1977 pertaining to DNA analysis was handed in as Exhibit "B" and a letter in addition thereto was handed in as Exhibit "C". The contents and correctness thereof were formally admitted in terms of section 220 of Act 51/1977. The following is evident from the said documents:

(i) The DNA of the appellant was found on the white cloth that was found in the bedroom of the appellant.

(ii) Only a male DNA profile was obtained from the said cloth.

[14] During the cross-examination of Inspector Tsotetsi it was put to him that what was found on the white cloth during the DNA analysis was the appellant's saliva and not his semen. Inspector Tsotetsi responded that since he is not an expert in the relevant field, he is not in a position to respond thereto. The State consequently requested a further report regarding the DNA analysis, which was subsequently obtained in the form of an affidavit in terms of section 212 of Act 51/1977. It was handed in as Exhibit "E". The said exhibit contains an explanation of the chemical process that is followed to test for the presence of semen. From Exhibit "E" it is further evident that the previously mentioned test was carried out on the white cloth and in conjunction with the fact that a DNA profile was in fact obtained from the white cloth, it was concluded that it was most probably the appellant's semen that was on the cloth.

[15] This concluded the State's case.

[16] The appellant's version as put to the witnesses and testified on by him is as follows: He did not meet the complainant on that day and never raped her. He admitted that he was staying in the backroom visited by the police. The night before his arrest he was at work where he was employed as a security guard. He returned in the morning. When at home he started vomiting, took a white cloth and wiped his mouth. After a while, he took some money and went to buy electricity. His cousin Popi was there with him but in the main house. However, as he was leaving to buy electricity he reported to her that he was leaving.

[17] He went to his friend's place, Simphiwe Mahlaba and together they proceeded to town, Cornelia. They ran his errands and at about 12h00 they went back to his place. He loaded electricity and proceeded with his friend to his place. He remained there until very late when he received a call from his cousin informing him that the police was looking for him. He proceeded to his place. He found the police waiting in the main house and on arrival he proceeded to the backroom with the police. Inspector Tsotetsi searched his place and found his long brown jacket and a cloth. Inspector Tsotetsi took the items and he was arrested. He does not know the complainant and she was not present at the time of his arrest. He denied that his semen was found on the cloth.

[18] It is trite that a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court. See **R v DHLUMAYO AND ANO 1948 (2) SA 677 (A)** at 705.

[19] The appeal court is not at liberty to depart from the trial court's findings of fact and credibility. It will only interfere with the court a quo's findings if there are material misdirections and erroneous findings. See **S v FRANCIS 1991 (1) SACR 198 (A)** at 204 C - E. See also **MAKATE v VODACOM LTD 2016 (4) SA 121 (CC)** at paras [37] - [41].

[20] The issue to be decided is whether the trial court was correct in accepting the version of the State and rejecting that of the appellant. The question is whether the appellant's version is reasonably possible true.

[21] The trial court dealt with the evidence of a single child witness. It is the appellant's contention that the court *a quo* failed to apply the cautionary rules that apply to the evidence of a single child witness as the complainant was not a satisfactory witness and she lied about her whereabouts on the night of the 26th October 2007.

[22] Section 208 of the Criminal Procedure Act 51/1977 provides that a court can convict an accused on the evidence of a single witness.

[23] In **S v SAULS 1981 (3) SA172 (A)** at 180 D-F the following was held with reference to section 208:

> "The absence of the word 'credible' is of no significance; the single witness must still be credible, but there are, as *Wigmore* points out 'indefinite degrees in this character we call credibility'. (Wigmore on Evidence vol III para 2034 at 262.) There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPFF JA in S *v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence; will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings, contradictions and defects in the testimony, he is satisfied that the truth has been told."

[24] The Supreme Court of Appeal further determined in **S v MAHLANGU 2011 (2) SACR 164 (SCA)** at para [21] that a finding can be based on the evidence of a single as long as such evidence is "*substantially satisfactory in every material respect, or if there is corroboration".*

[25] A cautionary approach is also to be followed when evaluating the evidence of a child witness. See **WOJI v SANTAM INSURANCE CO LTD 1981 (1) SA 1020 (A)** at 1028 B- D. In **S v V 2000 (1) SA SACR 453 (SCA)** at para [2] the Supreme Court of Appeal stated as follows in this regard:

> "...it is well to remind oneself at the outset that, whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution..."

[26] The trial court was alive to the aforesaid cautionary rules and it found the evidence of the complainant reliable and trustworthy. The record shows that the complainant's testimony, her being a child and a single witness, was considered with the caution required by the magistrate.

[27] The complainant's evidence is corroborated by a host of other evidence: Inspector Tsotetsi found the appellant's backroom in the same condition as described by the complainant. Her evidence was that the rapist was wearing a long brown coat and the police found such coat at the appellant's place. A white cloth as indicated by the complainant was recovered at the appellant's place. This is not the end as this cloth was sent away for forensic tests and the results show that the appellant's sperm was recovered from this cloth.

[28] It was argued before us that if the complainant's version that she was wiped with the cloth was true, her DNA would have been deposited on this cloth. There are a number of reasons that can be suggested for the absence of the complainant's DNA on this cloth, however I choose not to speculate. The fact remains that the discovery of this cloth with the appellant's sperm corroborates the complainant's version that after the rape a white cloth was used to wipe her vagina. The forensic results are at odds with the appellant's version that what was contained on this cloth was saliva as he used this cloth to wipe his mouth when he vomited on the day in question.

[29] In addition to the aforementioned, and very importantly, the presence of the appellant's sperm corroborates the version of the complainant regarding the identity of the appellant as the man who raped her. Furthermore, the complainant could not have known about the appellant's brown jacket, the interior appearance of the appellant's backroom and the existence of the white cloth if she had not been in contact with the appellant and in his backroom on that day.

[30] The contents of the J88 and the conclusion recorded therein by the doctor serve as further corroboration of the complainant's version that she had been raped.

[31] It is correct that the complainant contradicted her mother's evidence regarding her whereabouts on the night of 25 October 2007. She admitted that she lied to her mother when she was asked about her whereabouts because she feared that her mother would give her a hiding if she were to tell the truth. I need to mention that the evidence of the complainant and her mother appears to be a bit confusing pertaining to whether the sleeping-over at the house of the grandmother occurred on the night of 25 October 2007 or 26 October 2007. However, it could not have been the night of 26 October 2007, since the rape had already occurred by that time considering that the medical examination of the complainant was performed on 26 October 2007 at 18h30.

[32] However, the aforementioned contradictions were not of such a material nature to have made a negative finding regarding the complainant's credibility and to have her evidence rejected as being false. See **S v MKHOHLE 1990 (1) SACR 95 (A)** at 98 F-G. See also **HAL obo MEC FOR HEALTH, FREE STATE 2022 (3) SA 571 (SCA)** at para [92]. Therefore, I cannot find any misdirection on the part of the trial court in this regard. It was correct to find that despite any shortcomings in the complainant's evidence the truth has been told.

[33] The appellant denied that he had any contact with the complainant on the day of the incident and consequently denied that he raped her. In fact, according to him he did not know the complainant at all and saw her for the first time in court. The court a *quo* rejected this version as not being reasonably possible true.

[34] The appellant contradicted his own version on material issues. It was put to the witnesses that the appellant does not have a brown jacket; however, he admitted in his testimony that he has such jacket and the police found it at his place. He testified that on the white cloth there was saliva as he used it to wipe his mouth after vomiting. Such explanation flies against the findings in the forensic report showing that his semen was found on this cloth.

[35] His version is that Inspector Tsotetsi gave the complainant the description of his backroom. This cannot be true. Inspector Tsotetsi testified that the complainant gave this description before he visited appellant's place and the complainant was not present when they entered the backroom. The appellant's evidence, therefore does not explain how the complainant knew about the interior appearance of the backroom, the cloth and the jacket. The only reasonable explanation is that the complainant was at the appellant's place, where she was raped.

[36] The trial court was therefore correct to reject the appellant's version as being inherently improbable and not reasonably possibly true. Its finding that the State proved the guilt of the accused beyond reasonable doubt is correct and cannot be faulted.

[37] The appellant also appeals against his sentence of life imprisonment. He was convicted of rape read with the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997. The prescribed minimum sentence is one of life imprisonment.

[38] It is so that the court is allowed to deviate from this sentence if it is satisfied that there are substantial and compelling circumstances warranting deviation. It has been said in **S V MALGAS 2001 (1) SACR 469 (SCA)** that the specified sentences are not to be departed from lightly and for flimsy reasons. The test for deviation is whether on consideration of the circumstances of the particular case the court is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime,the criminal and the needs of the society, so that an injustice would be done by imposing that sentence.

[39] An appeal court can interfere with sentence only where the sentence is affected by an irregularity or misdirection and the sentence imposed is so inappropriate that it induces a sense of shock.

[40] In **S V RABIE 1975 (4) SA 855 (A)** at 857 D- E it was stated that punishment is pre-eminently a matter for the discretion of the trial court, the sentence

should be altered only if the trial court's discretion has not been judicially and properly exercised. The test is whether the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate.

[41] The record indicates that the appellant's personal circumstances were taken into consideration by the court a quo. The following personal circumstances of the appellant were considered; that he was 44 years old at the time of sentencing, a first time offender and a father to a 23-year old child. The appellant though granted bail spent some time in custody before the finalisation of the matter.

[42] The victim was a nine-year-old child at the time of the offence. The appellant dragged a uniformed child from school to his place. Having done all that, he displayed flagrant disregard for the complainant's emotions; he stood there smoking a cigarette before raping her. I cannot imagine what went through the complainant's mind whilst he was still smoking.

[43] It was argued on behalf of the appellant that he spent some period in custody awaiting trial. The record shows that the appellant was arrested on 26 October 2007 and released on bail on 11 February 2008. His bail was cancelled on 16 March 2010, the day of his conviction. The appellant was sentenced on 9 July 2010. Therefore, the time spent in custody awaiting trial is relatively short. Even if this was not the case, such time period cannot in isolation constitute substantial and compelling circumstances warranting deviation from the prescribed sentence.

[44] It is also evident from the record that the seriousness of the offence as well as the interests of the community were considered by the trial court. The offence of rape is described in **S v CHAPMAN 1997 (3) SA 341 (SCA)** at 344 J as a 'humiliating, degrading, and brutal invasion of the privacy, the dignity and the person of the victim'.

[45] In **DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE v PRINS AND OTHERS 2012 (2) SACR 183 (SCA)** the following was said at para [1]:

"No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity, and in the case of children, the right to be children."

[46] A social worker, employed as a probation officer by the Department of Social Welfare, testified in aggravation of sentence on how the incident affected the complainant. From the social worker's evidence and the victim impact report that she prepared it is evident that the complainant has become aggressive and stubborn since the incident. According to the parents of the complainant they feel as though "*they have lost their child*"; she does not discuss issues with them anymore and she does not listen to them. She is constantly crying for no apparent reason and when her parents ask her about it, she leaves their home, goes and sleeps at one of her friend's place. The complainant's performance and progress at school has also deteriorated since the incident. She is often absent from school in order to visit friends in town who are older than she is and who do not attend school. The complainant did receive counselling, but the social worker recommended further and continued counselling. She was interviewed almost three years after the incident by the social worker; however, she was crying and very emotional throughout the interview. This is a reflection of the long- lasting devastating effects and the emotional trauma the incident has had on the complainant's wellbeing.

[47] The aggravating circumstances in this matter far outweigh the appellant's personal circumstances. I am therefore unable to find that the trial court erred in finding that there were no substantial and compelling circumstances that warrant any other punishment than life imprisonment. The sentence imposed by the court *a quo* is not shockingly inappropriate. The sentence that was imposed by the trial court fits the appellant, the crime and serves the legitimate interests of the society.

[48] In my view the appeal against sentence must consequently fail.

[49] In the premises, I would make the following order:

1. The appeal against the conviction and sentence is dismissed.

L. MPAMA, AJ

I agree and it is so ordered:

C. VAN ZYL, J

On behalf of the appellant:	Mrs L. Smith
Instructed by:	Legal Aid South Africa
	Bloemfontein
On behalf of the respondent:	Adv. B.G. Claassens
Instructed by:	Office of the DPP
	Bloemfontein