REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: A36/2021
REPORTABLE: ~~YES~~/NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED
DATE: 20/07/23

In the matter between:

SIPHO ERIC TSOAI **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGEMENT

KGANYAGOJ

[1] The appellant was arraigned in the regional court Lebowakgomo before regional court magistrate Modipane PW on one count of rape read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA), read further with the provisions of the Older Persons Act 13 of 2006 in that it alleged that the complainant was a 62 years old woman at the time of the alleged rape. The appellant has pleaded not guilty to the charge. The appellant was found guilty as charged and sentenced to life imprisonment. The appellant has exercised his automatic right of appeal in terms of section

309(1)(a) of the Criminal Procedure Act 51 of 1977 as amended, since he has been sentenced to life imprisonment by a regional court. The appellant is appealing against both conviction and sentence.

[2] In the court *a quo* the State has led the evidence of the complainant as its first witness. She testified that on 11th November 2017 in the early hours of the morning around 3h00, she was sleeping alone in her house. As she was sleeping, she heard somebody knocking at the window of her bedroom and introducing himself as uncle Tsoai. She recognised the voice of that person been that of the appellant. The appellant is her nephew. The appellant was staying in one of the houses in the same yard as the complainant. There were five different structures in the yard including a shack which the appellant used to occupy before he moved into the house which was occupied by his grandmother before she passed away. The complainant's children also stay in that yard when they are back home during school holidays.

[3] On recognising the voice of the appellant, the complainant peeped through the window and saw that it was indeed the appellant. The appellant told the complainant that there was a thief at the kraal. The complainant was having a kraal of goats and sheep. On hearing the report, the complainant took off her pyjamas and put on her clothes with the intention of going to the kraal to check her livestock. When the complainant opened the door, she found the appellant at the door wearing only a T-shirt and did not put on his trouser. The complainant told the appellant to go and put on his trouser. The appellant was wearing his underwear as the complainant could not see his buttocks. The appellant asked the complainant to borrow him her cell phone and use its torch to go and check the thief at the kraal. The complainant gave the appellant her cell phone and the appellant went to the kraal.

[4] When the appellant came back from the kraal, he gave back the complainant her cell phone through the window as the complainant was inside the house and the door was closed. The complainant put her cell phone down and went out of the house to confirm if indeed there was a thief at her kraal. The

complainant and the appellant started walking towards the kraal. As they were in the lapa, the appellant jumped in front of the complainant and grabbed the complainant by her throat. After she was grabbed, the appellant told the complainant that it has been long since he had been desiring her buttocks. The appellant further told the complainant that he was going to rape her and thereafter kill her. They started struggling as she wanted to remove the appellant's hand from her throat. The appellant strangled the complainant to the extend that she could not utter a word, and she fell to the ground.

(5] After falling she lost her consciousness. She regained her consciousness in the morning at about 6h30 and found herself in the appellant's room. By then the appellant was on top of the complainant and had inserted his penis into her vagina and doing up and down movements. She and the appellant were both naked, and the complainant was feeling pains when the appellant was doing the up and down movements. The appellant told her that he was surprised why he was not ejaculating as ejaculation takes about 30 minutes. The complainant told the appellant that he will not ejaculate because he was having sex with her grandmother. After that the appellant took out his penis from the complainant's vagina and put it into the complainant's mouth. After putting it into her mouth, the appellant told the complainant to suck his penis. The complainant told the appellant that her mouth was dry and that she did not have saliva.

[6] The appellant went to fetch water so that the complainant can drink and have saliva. She told the appellant that she was hungry and that he must go and fetch porridge in her house which was far from the appellant's house. After the appellant left to go and fetch the porridge, the complainant managed to escape. The complainant ran to a friend's house which was across the road whilst being naked. When she crossed the road, she saw people who were going to the funeral which was not far from her homestead. When the people saw her been naked, they ran away. A child who lives opposite her friend's homestead came and put on a cloth on her.

[7] When the complainant was with this child, she saw the appellant coming towards where she was standing, and this child's sister told her to ran into the friend's homestead. The appellant followed the complainant to the friend's house and entered the house. When the complainant saw that the appellant had entered the friend's house, she asked the friend to borrow her the phone so that she could phone the police. She did phone the police but the police took some time to respond. The friend sent her sister-in-law's child to go and call the appellant's mother. The appellant's mother came and phoned the police, but the police told her that they did not have cars. The appellant's mother then phoned the complainant's children and told them that the appellant had raped the complainant.

[8] The complainant and the appellant's mother went to the complainant's homestead to look for the complainant's clothes. On arrival at her homestead, the complainant remained outside whilst the appellant's mother entered her homestead. Later the appellant's mother came back with very same clothes she was wearing before she was raped. She does not know where the appellant's mother found those clothes as she remained outside, and further that the appellant had taken her to where he sleeps.

[9] The complainant's children live in the Reef, and they requested the complainant's niece to transport her to the police station. Her niece came and transported her to the police station. They were in the company of the appellant when they went to the police station. At the police station the complainant opened a rape case against the appellant. The police took her statement and wrote it down, but did not read back her the written statement. She was injured behind her right ear and on her forehead. Her vagina and throat were also painful. The way her throat was painful, she could not swallow food for two weeks but was only drinking mageu. The appellant was arrested and the complainant was taken to the hospital.

[10] The complainant was cross examined and she stated that she did not scream for help as she trusted the appellant and had thought that the appellant

was her child and would assist her. It was put to the complainant that on the J88 the doctor had recorded that the condition of her clothing was clean, and the complainant responded by stating that her clothes were dirty and had bloodstained as she had never washed them. The complainant was asked why she did not scream for help when she found the appellant on top of her when she regained her consciousness, and her answer was that her throat was painful, she did not have strength to shout and her voice could not come out. When asked why she did not bite his penis when he inserted it into her mouth, her answer was that she did not have the strength. The complainant stated that she did not know whether the appellant's mother found her clothes in her house or in the house in which the appellant had raped her.

[11] She stated that when she woke up, she found herself been naked and did not know where the appellant had undressed her. The complainant denied that on the date in question she had forced the appellant to have sexual intercourse with her, and also denied that she started abusing the appellant sexually since 2016. The complainant further stated that she could not give birth to a child and after that tell the child to sleep with her. She also stated that she could not sleep with a child whilst having white hair. The complainant denied that the appellant had bitten her on her forehead at the time she was preventing the appellant to leave her house after the sexual intercourse, but that he had bitten her when he wanted to rape her.

[12] The State called Daphney Mokgohlwe Tlokwane as its second witness. She testified that she knows the complainant and that the complainant is her neighbour. She stated that on 11th November 2017 she was asleep when she heard somebody outside shouting for help. When she went outside to go and check, she found that it was the complainant. The complainant was screaming that she had been raped by the appellant. The complainant was naked, and she took a towel and gave it to the complainant so that she could wrap herself with it. They asked the witness's brother to borrow them his phone so that they can be able to phone the police.

[13] They phoned the police but the police did not come. That day there was a funeral that the witness was supposed to attend. Whilst they were at the cemetery the police phoned the witness's brother and told them to come to the police station and that the complainant should not bath. The complainant's niece came and they took the complainant to the police station.

[14] The witness was cross examined and she stated that when she saw the complainant for first time after hearing her crying for help, the complainant was naked and was bleeding on her forehead.

[15] The State called Math Dikeledi Tswai as its third witness. She testified that she is appellant's mother, and that the complainant is her sister-in-law. She stated that on 17th November 2017 at about 6h30 in the morning she was asleep when a child came to woke her up and told her that the complainant was calling her. She left her homestead and found the complainant at her neighbour's house. The complainant was seated on a chair been naked, and she had wrapped herself with a cloth or doek. The complainant was crying and one could see that she was feeling pains.

[16] The witness took the complainant to her home (complainant) so that she could dress up. The witness found the complainant's clothes in her room and she took them and gave them to the complainant. After that the witness went to the house which the appellant was occupying. That house was in the same yard with that of the complainant. From there they called the police and the police did not come to the scene. The witness then phoned the complainant's son, who told the witness to phone her aunt to come and fetch the complainant. The aunt's son arrived, and the witness, complainant, the appellant and the child who called the witness drove to the police station. They left the appellant at the police station when they went to the hospital.

[17] The witness was cross examined and she stated that when she found the complainant at the neighbour's house, she told the complainant to stand up so that they can go to her homestead to dress up. The witness stated

that prior to the incident of the 11th November 2017 at some stage she was not in good terms with the complainant, but on the date of the incident they were in good terms. She further stated that the complainant and the appellant were having a good relationship.

[18] The State called Meso Masete Lucas as its fourth witness. He testified that he is a medical practitioner. He is the one who had examined the complainant on 11th November 2017 at about 14h00 and thereafter completed her J88 form. On his notes on the J88 he had recorded that on the relevant medical history and medication that there was nothing of note. The condition of the complainant's clothes when she arrived at the hospital was clean, and she was well built of her age. The complainant presented a history of being sexually assaulted by a known perpetrator around 3h00 in the early hours of the morning. The perpetrator had strangulated and assaulted her. The complainant was not sexually active, and her last consensual sex intercourse was 15 years ago.

[19] The complainant was post-menopausal of about 20 years. The complainant did not bath or changed her clothes. The perpetrator did not use a condom. On examination of the complainant he found that there was abrasion on the forehead and 1 centimetre tear at three o'clock, her vaginal was having a discharge mixed with blood. Her mental and emotional status was good. There was no evidence of drug or alcohol. His conclusion was that there was evidence of forceful penetration. The clitoris, frenuleum of the clitoris, urethral orifice, parurethral, labia minora and labia majora were normal. On the posterior fauchette there were no scarring or bleeding. There was also no tear or increased friability.

[20] On the fossa nivicularis it was normal. There was no hymen, no swelling and no bumps. The cleft opening of the hymen was not applicable as there was no hymen. The vagina was submitting to two fingers. There was a bleeding and a tear at three o'clock with a discharge mixed with blood. There was no erosion of the cervix. The cervix was normal with discharge inside,

and there was no bleeding of the cervix. The perineum was intact. There was no sign of anal penetration. That the abrasion on the forehead could have been as a result of the assault during the strangulation, and that the abrasion was still fresh.

[21] The witness was cross examined and when asked whether he found signs of strangulation during his examination, his answer was that he saw signs of fresh abrasions, and that as the complainant was of dark coloured skin, he was unable to ascertain the bruises that were present, but there were no bruises which he could see as signs of strangulation. The witness stated that the tear at three o'clock was unlikely to happen in a consensual intercourse because in the consensual intercourse there will be mutual agreement where there is a foreplay before, and the patient will release discharges which she become wetted down, and that is when it will not cause any laceration under. That concluded the evidence of the State and it closed its case.

[22] The appellant took the witness stand and testified under oath. He denied raping the complainant, knocking at her door and telling her that there was a thief, and also putting his penis into her mouth and telling her to suck it. The appellant conceded engaging into a sexual intercourse with the complainant, and stated that it was consensual. According to the appellant, the complainant is her aunt and they were living in the same yard. On 11th November 2017 he was coming from Hamolapo where there was a funeral with his friends. He left the place where the funeral was supposed to be held to go and change his clothes as they were requested to cook at the funeral, and the clothes he was wearing were not proper for cooking.

[23] On arrival at home, the complainant opened the front door for him. As the appellant was entering the house, the complainant asked him where he was the previous night as she had been waiting for him. The appellant told the complainant that he was out with friends and that they were at Hamolapo. The complainant started insulting the appellant and followed him into his room and stood at the door. The complainant told the appellant that she wanted to

have sexual intercourse with him. The appellant refused and the complainant told him that it will not take long as it will be one round.

[24] That is when the complainant and the appellant went to the complainant's room where they started having consensual sex intercourse. As they were engaging in their sexual encounter, the appellant realised that the one round was taking long and time was not on his side, and he decided to leave without finishing their sexual engagement. The appellant told the complainant that he had to leave as his friends were waiting for him. The complainant refused him leaving and that is when the appellant stood up and left.

[25] The complainant followed the appellant and she was in possession of a slasher. The complainant tried to hit the appellant with that slasher, and the appellant was able to hold the complainant with her hands. The complainant started biting the appellant on his arms and shoulder. When the complainant realised that the appellant was not going to let her go, she pushed the appellant backwards. As the complainant was pushing the appellant, they arrived at a stoop which was a bit higher and the appellant fell to the ground. The complainant also fell landing on top of the appellant.

[26] After the complainant had fell on top of the appellant, she pressed the appellant's chest with her knee and grabbed him by his genitals. That is when the appellant grabbed the complainant from the back of her neck, pulled her closer to him and bit her on the forehead. They both let each other go after the appellant had bitten the complainant on the forehead. The appellant stated that he never saw the complainant going to the neighbour's house, as he went into his house, slept and did not go to the funeral anymore. The appellant stated that he heard that the complainant was naked, but he did not see her been naked. The appellant further stated that he never forced the complainant to have sexual intercourse with him, but that it was the complainant who had forced him to have sex with her.

[27] The appellant was cross examined and he stated that he was 24 years of age, and had been staying with the complainant since his childhood. He also stated that the complainant and his mother were the one who were supporting him. The appellant stated that he started having sex with the complainant during 2016 when he was doing matric, and that it was the complainant who had asked him that they have sexual intercourse. The appellant stated that on the date of the incident, they both went to the complainant's room, where they both undressed, got on the bed and started kissing each other and had sex. The appellant further stated that on the date in question he did not want to have sex with the complainant, but because he was tired of the complainant bothering him by telling him that he was making her a fool, telling lies about her and also that the complainant was troubling the appellant's girlfriend, he just wanted to satisfy the complainant so that she can leave him and his girlfriend alone.

[28] The appellant stated that the one round took long because he did not want to have sexual intercourse with the complainant. The appellant further stated that when he left the room after the sexual encounter, the complainant was following him wearing clothes. The appellant stated that the complainant did not want him to leave before he could ejaculate. The appellant stated that he had bitten the complainant on her forehead as she had grabbed him by his private parts. That concluded the evidence of the appellant and he closed his case.

[29] The appellant's appeal is directed against both conviction and sentence. What this court must determine is whether in the light of the evidence adduced at trial, the guilt of the appellant has been established beyond reasonable doubt. If it is found that the appellant was properly convicted, this court must determine whether the sentence meted to the appellant was appropriate.

[30] It is trite that the prosecution must prove its case beyond reasonable doubt.Equally trite is the observation that in view of this standard of prove in a

criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. An accused is not compelled to testify, but once he/she elects to testify, what the court must determine is whether the version presented by the accused is reasonably possibly true.

[31] The approach to the evaluation of evidence in a criminal case was formulated in S *v Chabalala*[1] where Heher AJA said:

> "The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused 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 so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one {apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear".

[32] The appellant's defence is that of consensual sex intercourse with the complainant and further that he and the complainant have been engaging in consensual sex intercourse since 2016 whilst the appellant was still in matric. By pleading consensual sex intercourse, entails that the issue of penetration by

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[1] 2003 (1) SACR 134 (SCA) at para 15

the appellant into the complainant's vagina on the date in question is not in dispute.

[33] In terms of section 3 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* [2], any person who unlawfully and intentionally commits an act of sexual penetration with a complainant without the consent of the complainant is guilty of rape. In *Otto v The State* [3] Plasket AJA said:

> "In terms of s 1(2), consent for purposes, inter alia, of the offence created by section 3 means 'voluntary or uncoerced agreement'. Section 1(3) provides that the circumstances in respect of which a complainant 'does not voluntarily or without coercion agree to an act of sexual penetration include, but are not limited to 'situation' where there are abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to sexual act, or unwillingness to participate in such a sexual act".

[34] The evidence of the complainant in relation to the alleged rape is that of single witness. It is trite that a court must apply the cautionary rule on the evidence of a single witness. Further the evidence of the single witness must be clear and satisfactory. (See *S v Sauls* & *Others* [4]).

[35] According to the appellant's version, he and the complainant has been engaging in consensual sex intercourse with each since 2016. The alleged rape took place on 11th November 2017. Doctor Meso who examined the complainant after the alleged rape and thereafter completed the J88, has testified that at the time of the alleged rape the complainant was not sexually active, and that the complainant has last had consensual intercourse with her late husband 15 years ago. This piece of evidence was not challenged by the

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[2] 32 of 2007

[3] (2017) ZASCA 114 (21 September 2017) at para 15

[4] 1981(3) SA 172 (A)

appellant. If indeed at the time of the alleged rape the complainant was not sexually active, it is improbable that she and the appellant have been engaging in sexual intercourse with each other since 2016.

[36] The complainant has testified that the appellant had assaulted and strangled her to the extend that she lost her consciousness when she regained it, she found herself naked with the appellant on top of her and raping her. The appellant told the complainant that he was unable to ejaculate, and the complainant told the appellant that he will not ejaculate since he was having sex with his grandmother. The appellant has also corroborated the complainant on this issue that he did not ejaculate and it was taking long for him to ejaculate, hence he took out his penis out of the complainant's vagina.

[37] According to the complainant she was able to escape from the appellant after she had sent the appellant to go and fetch food for her. This might seem strange and tempt one to ask whether in a rape situation, will the victim have time to ask the perpetrator to go and fetch food for her. In this case both the victim and the perpetrator are known to each other, are closely related and were the only two living in the same yard, but in different houses. The complainant knew that if she could send the appellant to fetch food for her, he will know where the food was stored. It is clear that the complainant wanted to use the issue of food as a decoy so that she can be able to escape. As per the complainant's version, she did not wait for the appellant to come back with food, but ran out of the house being naked to a friend's house next door immediately after the appellant has left.

[38] The second and third state witnesses corroborated the complainant's version that she went next door being naked and reported to them that she had been raped by the appellant. The third State witness is the appellant's mother and has not tried to protect the appellant. The second State witness has testified that she was asleep when she heard a person shouting for help. When she woke up to go and check, she found that it was the complainant who

was naked, and that the complainant told her that the appellant had raped her. It is also common cause that on the date in question there was a funeral on the same street as that of the complainant. At the time which the complainant ran to the neighbour's homestead, there were other people on the street who came to attend the funeral. If indeed nothing serious had happened to the complainant, it is highly improbable that the complainant would have decided to humiliate herself by running on the street being naked. In my view, it is improbable that a woman of her age, more especially in village can decide to run on the street been naked and risked being seen as a witch.

[39] The fourth State witness doctor Mesa, under cross examination has testified that the complainant had a tear in her vagina at three o'clock, and that it was unlikely that a tear of that nature will happen in a consensual sex intercourse. Counsel for the appellant could not take that issue any further when cross examining the doctor. The conclusion of the doctor was that there was forced penetration. The appellant's version was that the complainant did want him to leave before he had ejaculated. When he wanted to leave the complainant came to him whilst being in possession of slasher and wanted to attack him. The version that the complainant was in possession of a slasher was never put to the complainant. The appellant further testified that as he was struggling with the complainant, and she pulled him by his private parts and he had to bite the complainant on her forehead in order to ward her off. The issue of the complainant pulling the appellant by the private parts was never put to the complainant.

[40] It is not clear from the appellant's version whether he was able to disarm the complainant of the slasher. According to the appellant, as they were struggling with each other, the complainant fell on top of him and pressed his chest with her knee and grabbed him by his private parts. If the complainant was able to grab the appellant by his private parts, it means the appellant was no longer holding the complainant by both of her hands. That was the opportune moment for the complainant to have used the alleged slasher if indeed she was in possession of it. However, the appellant did not explain as

to what had happened to the slasher, and it is therefore doubtful whether indeed the complainant was in possession of the slasher.

[41] The evidence of the complainant is also not that perfect, like how the clothes were recovered with the help of the third state witness. However, the complainant has testified that she did not enter the room with the third state witness who recovered the complainant's clothes. If the complainant did not enter the room, she will not be expected to know the exact spot where the clothes were found. The evidence of the complainant is to the effect that she lost consciousness whilst she was still wearing her clothes, and when she regained her consciousness she was naked and the appellant was on top her and they were now in the appellant's room. There is no evidence presented as to the distance from the appellant's room to that of the complainant. Since the complainant was unconscious, she will not know where she was undressed, and how she ended up been in the room since the struggle took place in the lapa.

[42] Under the circumstances, even though the evidence of the complainant was that of a single witness, despite its deficiencies, it was clear and satisfactory and has also been corroborated by the evidence of the other three State witnesses. The same cannot be said with that of the appellant, it had some afterthoughts like the complainant having attacked him with a slasher and also grabbing him by his private parts. The fourth State witness has put this matter beyond reasonable doubt, when the appellant failed to challenge him after he had testified that for that past 15 years the complainant was not sexually active, and also when he testified that the tear at three o'clock which the complainant was having, was unlikely to happen in consensual sex intercourse. The court is satisfied that despite the deficiencies in the complainant's evidence, the truth has been told, whilst the evidence of the appellant is false beyond reasonable doubt. Therefore, the is nothing to fault the court a *quo* in convicting the appellant.

[43] Turning to sentence, it is trite that sentencing is the prerogative of the

trial court, and should not lightly be interfered with. An appeal in which interference with sentence will be justified is when it is found that the trial court has misdirected itself in some respect, or if the sentence imposed was so disturbingly disproportionate that no reasonable court would have imposed it. The test is not whether the trial court was wrong, but whether the trial court has exercised its discretion properly. (See S *v Romer*[5]*).*

[44] The appellant has been convicted of rape of an elderly person who is above the age of 60 years. At the time of the commission of the offence the complainant was aged 62 years. The offence which the appellant has been convicted of falls under the preview of section 51(1) Part I of Schedule 2 (b)(iA) of the CLAA. Ordinarily the trial court is compelled to impose life imprisonment unless it finds substantial and compelling circumstances to exists which justify the deviation from the prescribed minimum sentences.

[45] In *OPP Gauteng v Tsotetsi*[6] Coppin AJA said:

> "As held in Malgas, confirmed in S v Dodo, and explained in S v Vilakazi, even though 'substantial and compelling' factors need not be exceptional they must be truly convincing reasons, or 'weighty justification' for deviating from the prescribed sentence. The minimum sentence is not to be deviated from lightly and should ordinarily be imposed".

[46] In mitigation of sentence the appellant has testified under oath and also called the probation officer. The appellant's mitigating factors were that he was 24 years of age, and born on 3[…] J[…] 1997. At the time of the commission of the offence he was 21 years of age. He is single and has no children. Prior to his arrest he was doing odd jobs selling at a certain shop, and earning R1200.00 per month. Initially he was out on bail, but his bail has been revoked during March 2019, and has been in custody since that date. He is still young and not a bad person in the community. He is able to get along with

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[5] 2011(2) SACR 153 (SCA) at paras 22 and 23

[6] 2017 (2) SACR 233 (SCA) at para 27

every person, and does not choose people.

[47] In aggravation of sentence the State led the evidence of the probation officer who had prepared the victim impact report of the complainant. She testified that the said rape had affected the complainant emotionally and had also strained the relationship with her sister-in-law, as they are no longer communicating or visiting each other. The incident had also traumatised the complainant to the extent that she is suffering from insomnia. After the incident she had some nightmares, and had to go and stay in Gauteng where she was undergoing counselling with a psychologist, and that has improved her sleeping problems. She was unable to stand for a long time as she experiences pains on her waist, which she did not have before the incident. The complainant is very angry to the fact that the person whom she had raised, and who was supposed to be protecting her is the one who is hurting her.

[48] In sentencing the appellant, the court *a quo* took into consideration the appellant's personal circumstances, the gravity of the offence, the interest of society as well as factors that were listed as substantial and compelling circumstances, and came to the conclusion that they were not truly convincing or weighty enough justifying a deviation from the prescribed minimum sentence of life imprisonment.

[49] The appellant has been convicted of a serious offence which is prevalent in the entire country. The appellant has targeted a vulnerable old lady who has raised him. The legislature has seen the need to protect our elderly as they are the most vulnerable, and in most instances lives alone which makes them easy targets. The appellant was the one who was supposed to protect the complainant as they were the only two who were staying the same yard. Rape is the most degrading of a person's dignity and invasion of a person's privacy. What aggravates most is that the complainant at her age had run on the street been naked in full view of the people who have come to attend the funeral. The court takes judicial notice that in villages if a person is found on

the street been naked is been seen as a witch and might be attacked or even killed. The complainant had risked been degraded, humiliated and attacked by community members as she might have been seen as a witch, by running away from a person whom she had raised and was supposed to protect her, been naked. In my view, there is nothing to fault the court *a quo* in sentencing the appellant to life imprisonment. The court *a quo* has considered all the facts placed before it and had therefore exercised its discretion properly by coming to the conclusion that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment. The appeal on sentence therefore stands to fail.

[50] In the result the following order is made:

50.1 The appeal against both conviction and sentence is dismissed.

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

I AGREE

MAKWEYA AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION POLOKWANE

APPEARANCES:

Counsel for the appellant	: **Adv NC Mathabatha**
Instructed by	: **Lekoloane attorneys**
Counsel for the respondent	: **Adv Rangwato**
Instructed by	: **DPP Polokwane**

Date heard: 9th June 2023

Electronically circulated on: 20th July 2023