Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEAL CASE NO: CA37/2022

REGIONAL MAGISTRATES CASE NO: SRC/112/2015

In the matter between:

XOLANI HASHE **FIRST APPELLANT**

LEBOGANG XHAYA **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: HENDRICKS JP et WILLIAMS AJ

DATE HEARD : 19 JUNE 2024
DATE HANDED DOWN : 30 JULY 2024

JUDGMENT

ORDER

On appeal from: The Regional Court Klerksdorp, North West Regional Division, (Regional Magistrate Nzimande siting as court of first instance):

1. The appeal against conviction by the first and second appellants is dismissed.

2. The appeal against sentence by the second appellant is dismissed.

JUDGMENT

WILLIAMS AJ

Introduction

[1] The appellants were tried in the Regional Court, Klerksdorp on a count of rape in contravention of section 3 of Act 32 of 2007, read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended, as well as a count of robbery with aggravating circumstances. Both the appellants pleaded not guilty to both counts. The first appellant elected to remain silent on both counts. On count one, the second appellant contends that he had consensual sexual intercourse with the complainant and on count two he elected to remain silent. On 28 August 2020 the appellants were found guilty as charged on count one. The appellants were found not

guilty on count two and discharged. Therefore, count two requires no further discussion.

[2] On 31 March 2021 the appellants were sentenced. The first appellant was sentenced to twenty (20) years imprisonment and the second appellant was sentenced to life imprisonment. Both appellants were declared unfit to possess firearms. On 13 September 2021 the first appellant was granted leave to appeal. He is challenging the conviction only. The second appellant approaches this Court in terms of his automatic right of appeal. His appeal is against both conviction and sentence.

[3] I pause to state that there was an inordinate delay in finalizing this case in the court *a quo*. However, the trial court thoroughly addressed this issue and provided a comprehensive explanation for the delay. The court *a quo* highlighted factors, such as the COVID-19 pandemic, that contributed to the extended duration of the trial proceedings. It is important to recognize that the right to a speedy trial is a fundamental principle that applies not only to the appellants but also to the complainant. Furthermore, it is worth noting that both appellants were on bail.

[4] The grounds of appeal are broadly articulated, with the appellants challenging the trial court's acceptance of the State's evidence and

rejection of their own, as well as the trial court's determination that the State proved its case beyond a reasonable doubt. The first appellant argues that the trial court erred in accepting the complainant's identification of him as one of the perpetrators. The second appellant contends that the trial court erred in failing to find that his personal circumstances constituted substantial and compelling reasons to justify a departure from the prescribed minimum sentence of life imprisonment. He argues that the imposition of life imprisonment over-emphasizes the public interest, is disproportionate to the totality of the facts, and leaves no opportunity for his rehabilitation and reintegration into society. Additionally, the second appellant asserts that the sentence of life imprisonment unduly emphasizes the retributive aspect of sentencing.

Factual Background

[5] On count one the state alleged that on or about 22 November 2014, and at or near Extension 9, in Khuma, the appellants did unlawfully and intentionally commit an act of sexual penetration with the complainant; and that at the time of the offence the complainant was seventeen (17) years old.

[6] The State presented five witnesses' for testimony; to wit the complainant, TA, her boyfriend; TM; ES, to whom the complainant initially reported the incident; Warrant Officer Barnes-Harris, the

forensic expert responsible for the DNA profiling; and NH, the sister of the first appellant. The appellants testified in their own defence and chose not to call any witnesses.

[7] The evidence presented by the complainant, ("TA"), can be summarized as follows: At the time of her testimony, TA was twenty-two (22) years old. The State applied for TA to testify via a one-way mirror, a request to which the appellants had no objection. The trial court granted the application. On 22 November 2014, in the early evening, TA returned from Danielskuil to her family home in Khuma. After arriving, she contacted her then-boyfriend, TM, and they agreed to meet. TA met with TM and his friends and they decided to go to Joyce's tavern, where TM was consuming alcohol. TA chose not to drink on that occasion. After a brief period at the tavern, TA and TM decided to leave and walk to TM's parental home. As they were walking, they encountered three men approaching from the front. It seemed to her that they were targeting her because whenever she moved to her right side, the men would also shift to the right side, and when she moved to her left side, they would similarly move to the left side.

[8] TM ran away, leaving TA alone. She feared that the men might harm her, prompting her to run back towards the tavern, which was nearby and seemed like the only place of refuge. The first appellant pursued TA, while his two friends chased TM. When the first appellant caught

up with TA, she asked him to leave her alone. Under the illumination of a streetlight, known as an Apollo light, TA was able to clearly see and recognize the first appellant as someone she knew from school. The other two men were unknown to her.

[9] The first appellant grabbed TA by her wrists and began dragging her in the direction away from the tavern towards a gate at an unknown house. During this struggle, TA lost her shoes. The first appellant refused to allow her to retrieve them, calling her a whore. The first appellant waited for his friends to join them by whistling to them. Upon their arrival, one of the friends, who was holding a knife, entered the premises with TA and the first appellant, while the other friend remained on the street, observing. The friend with the knife ordered TA to lay on the ground. Being in a state of shock, she complied. He then proceeded to have sexual intercourse with her without her consent, while the first appellant stood by and watched.

[10] After the friend finished raping TA, the first appellant approached her and demanding that she performed *fellatio* with whereafter he proceeded to, without a condom, raped her. Despite the friend's insistence that they should leave, the first appellant continued, stating that he would soon be finished. Following the attack, TA gave her phone to the men as a form of evidence. The men told TA to remain behind and they departed.

[11] She then sought help from neighbouring houses, but no one answered. Eventually, she ran to the house of a woman she knew. She was in a state of shock and trembling. The woman promised to take TA to her parental home the following morning. TA spent the night in the room of the woman's son. The next morning, the woman took TA to her parental home. From there, they went to the police to report the incident. On the same day, 23 November 2014, TA was examined by a doctor. Later, when the police brought suspects for identification, TA was only able to identify the first appellant.

[12] After the incident, TA saw the first appellant again while she was traveling in a taxi driving pass him on the street. Although she occasionally mixed up the first appellant's name, referring to him as "Xolani" instead of "Qhobane," she was able to identify him in court as the individual she knew from school who, along with his friend, had raped her.

[13] TM testified that at the time of the incident on 22 November 2014, TA was his girlfriend. On the day of the incident, TM received a phone call from TA, who requested that he come and fetch her. TM met with TA, and they went to Joyce's tavern. While at the tavern, TM consumed alcohol but was still able to appreciate his surroundings. He did not see the appellants at the tavern.

[14] Approximately an hour and a half later, around 23:00, TM and TA decided to leave the tavern and headed to TM's parental home. As they were walking, they encountered the appellants and another individual. There was an Apollo light in the area, which allowed TM to clearly see the approaching figures. TM recognized the first appellant, whom he know as Xolani from their time together at school. They had known each other for about four years. He also recognized the second appellant from Extension 11, where he had known him for about a year, while playing soccer there and heard him being called Lebogang. TM was aware that the second appellant was a member of a gang in Extension 11. The third person was unknown to him.

[15] As the men approached, TM observed the second appellant picking up stones and noticed that the other two men appeared to be holding something, although he could not see what it was. He heard them saying that they should not run away. Concerned for their safety, TM advised TA that they should run away. Before they could escape, the second appellant threw a stone at TM, hitting him on the leg. TM and TA then fled in different directions. Although the second appellant and the other man chased after TM, he managed to outrun them. He jumped over a fence and fell, causing some commotion at the house where he landed.

[16] TM then returned to the tavern, limping, to find help to confront the attackers. He attempted to contact TA but received no response.

Eventually, his friends joined him, and they went in search of the three men. They located the men in the same street where the attack had occurred, but TA was not with them. TM and his friends then engaged in a stone-throwing confrontation with the three men, which continued until the men fled to Extension 11.

[17] Afterwards, TM and his friends went to their respective homes. The following day, TM passed by TA's parental home but did not enter as he was apprehensive of the presence of elders. He saw TA but did not speak to her about her well-being. It was only two to three days later, when TM was approached by the police to provide a statement regarding the incident, that he learned about what happened to TA.

[18] ES testified that she resides in Khuma and knows TA because her son was in a relationship with one of TA's friends. On 22 November 2014, at approximately 05:00 in the morning, ES was at home sleeping when she was awakened by a knock and the sound of someone crying at her door. Upon answering the door, she found TA crying. ES invited TA into her home and inquired about the cause of her distress. TA informed her that she had been raped by someone who had attended the same school as her. However, TA did not provide a name of the perpetrator. ES then asked TA for her mother's phone number and called her mother. Following this, ES accompanied TA to her parental home. During their conversation, TA did not mention being involved in

a stone-throwing altercation, nor did she specify the location of the assault.

[19] Warrant Officer Barnes-Harris testified that she has been employed by the South African Police Service for the past 11 years. She is assigned to the Biology Section of the Forensic Science Laboratory in Pretoria. She holds a Bachelor of Science degree, specializing in genetics, which she obtained in 2004, and a Bachelor of Science Honours degree in Human Genetics, completed in 2005. In her role as a reporting officer, she is responsible for evaluating STR (Short Tandem Repeat) analysis results and compiling reports for court. Her duties include determining whether the DNA evidence supports an inclusion or a match; calculating the statistical probability of such matches; and providing expert testimony in court. In this case, the DNA evidence excluded the first appellant as a contributor to the DNA profile obtained. Conversely, the second appellant was linked to the DNA evidence as a contributor. She mentioned that there are several reasons why a person's DNA might not be detected in some cases. These include the use of a condom, the absence of ejaculation, a very low sperm count, infertility, the amount of DNA deposit by a perpetrator may not be sufficient to meet the threshold, and lastly if there was no penetration at all. She mentioned that it is important to note that the absence of detectable DNA does not necessarily indicate that penetration did not occur. DNA evidence serves as supportive evidence but is not conclusive on its own. If there are multiple sexual perpetrators, it is possible that the DNA of one or more perpetrators

might not be detected. There are several factors that can influence the presence or detection of DNA evidence. For instance, the loss of DNA material can occur due to various reasons, such as bathing, victim drainage or if the victim is menstruating.

[20] NH testified that the first appellant is her younger brother. She knows the second appellant from Extension 11. On 23 November 2014, she was at home with the first appellant, her mother, and her sister Mamela. On that day, a friend of the second appellant, named Vusi, came to their house with a cell phone. Vusi wanted Mamela to keep the cell phone and, in return, give him some money. He said that he would repay her with money later and take the cell phone back. She was present during the conversation between Mamela and Vusi. Vusi explained that the cell phone belonged to his friend, the second appellant, and that the second appellant needed money for school fees. Vusi wanted to pawn the cell phone and promised to return with money later to retrieve it. Mamela gave Vusi approximately R300.00 in exchange for keeping the cell phone. Vusi took the money and left with the understanding that he would return with the money to get the cell phone back. Two days later, the police came to their house looking for the first appellant and questioned him about the cell phone. She provided them with information about the cell phone, and they subsequently took the cellphone from Mamela.

[21] The first appellant testified that he knows TA, as they attended the same school. He confirmed that he has known her boyfriend, TM, for a long time, as they also attended the same school. On 22 November 2014, during the early evening, he was at Joyce tavern with other people, namely Patrick, Letsia, Edward and Vusi. They were sitting together inside the tavern, and they were drinking. He saw TA at the tavern on that day in the company of the second appellant. He never saw her with TM. He in fact never saw TM at the tavern that night. At that time, he did not know the second appellant. He only started to know the second appellant because of the court case. The second appellant was known to Vusi. As the tavern was about to close, the second appellant approached Vusi and informed him that a man had taken his girlfriend. Vusi then agreed to assist the second appellant in locating the man and confronting him.

[22] He did not see TA anymore. She was no longer with the second appellant. They did not waste any time and they left the tavern to go find the man. It was himself, the second appellant, Patrick, Edward, Vusi and Ama. They found TM together with his friends and they started to throw stones at each other. TA was amongst the group of TM. TM's group ran away, and his group went back to Extension 6, where they reside. The others went to their respective homes and he, the second appellant and Vusi went to Vusi's parental place and they went to sleep. The next morning Vusi came to his home. He did not see Vusi but he only heard his voice. He did not know why Vusi was at his home, but he heard from his sister that Vusi came to pawn a

cellphone in return for money. He did not participate in the transaction and was not aware of the cellphone's ownership. He denied the allegations of rape against him. He also testified that although he does not have children, he is fertile and had previously impregnated his ex-girlfriend, who terminated the pregnancy. He confirmed that his birth certificate shows his name spelled as Xobani Hashe. He was confronted with a previous statement in which he claimed his name was Xolani instead of Xobani, which he denied, asserting that his name is correctly spelled as Xobani.

[23] The second appellant testified that he knew TA from school and from a place where they sell relish. He knew her quite well because she was in a relationship with his friend. He did not know the first appellant personally. He only knew him by sight. On 22 November 2014, in the late afternoon, he went to a container where they sell meat and met TA there. He asked her about her plans for the day and informed her that there was going to be a bash at Joyce tavern. TA confirmed that she planned to attend the bash. He told her that he would meet with her there. They then parted ways. He met TA at Joyce tavern between seven and eight o'clock in the evening. They spent some time together. He bought her beers while they were looking for a place to sit. After nine o'clock, they left Joyce tavern and went to his sister's house, where they had consensual intercourse. Afterwards, TA wanted to go to her aunt's place, so he accompanied her as far as Filjos, whereafter he returned to Joyce tavern to meet up with Vusi. Vusi is a mutual friend of both himself and the first appellant.

[24] He informed Vusi that he wanted to check if TA went to her aunt's place or if she met up with her boyfriend, Tshepo. They found TA with TM and a group of other people. He recognized TM from seeing him at soccer games in Extension 11. TA and TM were holding hands. When they approached them, TM ran away to join his friends. He asked TA about TM, inquiring if he was her boyfriend. After a while, TM's friends began throwing stones at them. He asked TA for her cellphone so that she could bring TM to him in order to discuss the situation with him. He took her cellphone, and they went to Vusi's parental home. The next day, TM called TA's phone, and he answered. TM started swearing at him. He then spoke to Vusi and asked him to talk to the first appellant, as he knew Vusi was going to visit the first appellant's sister. He also confirmed that he was the one who threw a stone at TM that hit him.

[25] During cross-examination he stated that he and TA was in a love relationship. He was questioned as to why it was not put to TA that they had been in a relationship, given her testimony that he was unknown to her. This was the first instance of mentioning that TA had been in a romantic relationship with him. It was also put to him that, according to TA's testimony, she only arrived in Khuma in the early evening, which contradicts his claim that he met her at the meat container in the afternoon around four to five o'clock. Additionally, it was pointed out that while his attorney had put to TA that they had sexual intercourse at his residence, he is now asserting that the intercourse occurred at Max's place. Furthermore, when TA stated that

she did not know Max, it was not clarified that she knew Max, who is also known as Vos.

Discussion

[26] The findings of fact and credibility made by the trial court are accorded a presumption of correctness. This is because the trial court, unlike the appellate court, had the advantage of observing the witnesses directly and is thus in a better position to determine where the truth lies. It is well established that an appeal court will be slow to interfere with the trials court's findings, unless such findings are clearly wrong. In **S v Francis** 1991(1) SACR 198 (A) at paragraph [198 j- 199 as it was held:

> *"The powers of the court of appeal to interfere with the findings of fact of a trial are limited. In the absence of any misdirection the trials court's conclusion, including the acceptance of a witness' evidence is presumed to be correct. To succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence -a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony."*

[27] Both TA and TM corroborated each other on all material aspects of the case. They testified that they were together at the tavern and left the tavern together, at which point they encountered the appellants and a third man. They each fled in different directions out of fear for their safety, with TM being chased by the second appellant and another individual. TM also confirmed TA's testimony that she arrived in Khuma early in the evening, as she had phoned him upon her arrival. Furthermore, TM verified TA's statement that she did not consume alcohol that night.

[28] The first appellant's version is a bare denial. He contends that the trial court erred in accepting the complainant's identification of him as one of the perpetrators, asserting that there were significant issues affecting the reliability of the identification. In **S v Mthetwa** 1972 (3) AD 266 at 768 the following was said:

> *"Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight. The proximity of the witness, his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused's face, voice, build, gait, and dress, the result of identification parades, if any, and of course, the evidence by or on behalf of the accused. The list is not exhaustive."*

See also **R v Dladla and Oth***ers* 1962 (1) SA 307 (A) at 310 C-E:

> *"One of the factors which in our view are of the greatest importance in a case of identification is the witness' previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased. Even in the case when a witness has some difficulty in the witness-box in giving an accurate description of the facial characteristics and clothes of the person whom he has identified, the very fact that he knows him provides him with a picture of the person in the round which is a summary of all his observations of the person's physiognomy, physique and gait, and this fact will greatly heighten the probability of an accurate identification. In a case where the witness has known the person previously, questions of identification marks, of facial characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made."*

[29] The trial court was satisfied that, based on TA's evidence, the first appellant was correctly identified as one of the perpetrators who assaulted TA. TA testified that she knew the first appellant from school, and this evidence was corroborated by the first appellant himself, who confirmed that they had attended school together and were acquainted. Although TA initially could not see properly when the three men were approaching them from the front, she recognized the first appellant when he grabbed her wrist, at which point she identified him as someone she knew. The proximity and physical contact, when the

first appellant was holding her wrists, along with sufficient lighting, allowed TA to clearly identify him as the person who dragged her towards the tree where the rape occurred. Additionally, TA's identification of the first appellant was partly corroborated by TM, who testified that the first appellant was one of the three men they encountered that night and from whom they fled. During the proceedings, TA, who was testifying behind a one-way mirror, was asked to step forward to see if she could identify the first appellant as the individual she knew from school and who, along with his accomplice, had raped her. She successfully identified the first appellant but did not recognize the second appellant. Furthermore, ES, to whom TA made the initial report of the rape, confirmed that TA had informed her that the perpetrator was someone she knew from school. The forensic expert clarified that although there was no DNA evidence directly linking the first appellant to the crime, this does not necessarily mean that he was not involved in the sexual assault.

[30] The second appellant was linked to the rape through DNA evidence, but he claims that the encounter was consensual. TA was unable to identify him as one of the men who raped her and denied knowing him. The second appellant testified that he knew TA from school and from a place where they sell relish, and that he was familiar with her because she was in a relationship with his friend. It is undisputed that TM and the second appellant were acquainted prior to the incident, with TM recognizing the second appellant as one of the three men who confronted them that night and identifying him as the one who struck

him with a stone and chased after him. The trial court accepted that TA did not know the second appellant before the incident and rejected his version.

[31] The second appellant confirmed that he was in possession of the cellphone, which corroborates TA's testimony that she had given the cellphone to them as evidence against them. However, his explanation as to how he came to be in possession of the cellphone is implausible. Particularly since if his only intention was to use the phone to lure TA and TM and to question whether he was in a relationship with TA, it is unclear why he would have given the cellphone to Vusi to pawn. Additionally, there was a contradiction in the evidence. NH testified that Vusi came to their house with the cellphone, whereas it was put on behalf of the second appellant that he asked the first appellant to find a buyer for the cellphone, which the first appellant then sold to his sister.

[32] The first appellant's testimony that after meeting TM and his group, he, the second appellant, and Vusi went to Vusi's place and spent the night there confirms that at one point they were indeed a group of three, as TA and TM testified. I cannot fault the trial court's analysis of the evidence and agree that the State proved its case against the appellants beyond a reasonable doubt. The appeal of both appellants against their conviction stands to be dismissed.

Sentence

[33] What remains to be considered is whether the trial court erred in sentencing the second appellant to life imprisonment. It is well-established that an appellate court will only interfere with the sentencing discretion of the trial court, if there has been a clear misdirection. See **S v Malgas** 2001 (2) SA 1222 (SCA):

> *"[12] 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 trail 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 trail court and the sentence which the appellate court would have imposed had been the trial court is marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasized 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 difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

[34] In **S v Bogaards** 2013 (1) SACR 1 (CC), the Constitutional Court stated as follows:

> *"[41] Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentence imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."*

[35] It was submitted on behalf of the second appellant that the approximately four-year delay before the trial commenced should be considered as a substantial and compelling circumstance for deviating from the prescribed minimum sentence of life imprisonment. However, the trial court rejected this argument, finding that the delay did not constitute a valid basis for deviation from the prescribed sentence. The trial court noted that shortly after the second appellant's arrest, he was granted bail but was subsequently re-arrested for a separate matter.

At the time of the offence, the second appellant was 20 years old, and he was 26 years old at the time of sentencing. He had completed Grade 12 and achieved Level 3 in Boiler making at Vuselela College, with plans to begin Level 4 studies when he was arrested. Although he was unemployed, he engaged in piece jobs repairing electrical appliances. The second appellant was not married but had a three-year-old daughter. He had previous convictions, though unrelated to the present offence.

[36] At the time of the incident, TA was 17 years old. An impact report, admitted into evidence, paints a poignant picture of her ongoing suffering. Six years after the incident, TA was still struggling to cope, to the extent that her employer had to refer her for counseling. The report reveals that TA is heartbroken due to the invasion of her privacy; she has lost trust and faith in men; and she is unable to maintain any relationship with men. She suffers from panic attacks and overwhelming feelings of anxiety.

[37] It is settled law that a court can only deviate from the prescribed minimum sentence if there are substantial and compelling circumstances that justifies such deviation or the imposition of the sentence would be disproportionate to the offender, the offence and the interests of society.

[38] In **Malgas** *supra*, Ponnan JA stated that:

> *"Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for certain crimes. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts. The specified sentences are not to be departed from lightly and for flimsy reasons."*

[39] In **Director of Public Prosecutions v Thabethe** [2011] ZASCA 186; 2011 (2) SACR 567 (SCA) at 577G-I, the SCA said that:

> *"Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and the advancement of human right and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting members of society. Our courts have an obligation to impose sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, of the kind which reflect the natural outrage and revulsion felt by the law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system."*

[40] The trial court carefully evaluated all relevant mitigating factors in determining an appropriate sentence, and was not persuaded that

there existed substantial and compelling reasons to depart from the mandatory minimum sentence of life imprisonment. The second appellant had three previous convictions. The victim of their egregious crime, TA, was only 17 years old. Furthermore, the second appellant was the individual who initially assaulted her.

[41] In my view there is nothing in the personal circumstances of the appellant or the facts of the matter, which constitute substantial and compelling factors justifying a deviation from the prescribed minimum sentence of life imprisonment. I therefore cannot fault the decision of the trial court for imposing a sentence of life imprisonment.

Order

[42] In the result, the following order is made:

1. The appeal against conviction by the first and second appellants is dismissed.

2. The appeal against sentence by the second appellant is dismissed.

[redacted]

Z WILLIAMS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

[redacted]

RD HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES:

FOR THE APPELLANTS	**:**	**ADV K MONGALE**
INSTRUCTED BY	**:**	**LEGAL AID MAHIKENG** **NO. 742 DR. JAMES MOROKA** **MAFIKENG JUSTICE CENTRE** **MMABATHO**
FOR THE RESPONDENT	**:**	**ADV T D MUNERI**
INSTRUCTED BY	**:**	**THE DIRECTOR OF PUBLIC PROSECUTIONS, MAHIKENG** **MEGA CITY COMPLEX** **3139 SEKAME ROAD,** **MMABATHO** **018 381 9021**