IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

CASE NO: A143/2023

In the matter between:

ELWERADO McKENZIE Appellant

And

THE STATE Respondent

JUDGMENT HANDED DOWN ELECTRONICALLY ON 06 MARCH 2025

ADAMS, AJ

" At the southern tip of the continent of Africa, a rich reward is in the making…. This reward will not be measured in money ..... It will and must be measured by the happiness and welfare of the children, at once the most vulnerable citizens in any society and the greatest of our treasures. The children must, at last, play in the open veld, no longer tortured by the pangs of hunger, or ravaged by disease, or threatened with the scourge of ignorance, molestation and abuse, and no longer required to engage in deeds whose gravity exceeds the demands of their tender years. In front of this distinguished audience, we commit the new South Africa to the relentless pursuit of the purposes defined in the World Declaration on the Survival, Protection and Development of the Child."[1]

A. INTRODUCTION

[1] This matter illustrates why vulnerable child witnesses are entitled to the constitutional and statutory protection afforded to them when they testify and what happens when they are not adequately protected. Courts are under a constitutional and statutory duty to ensure that the rights and best interests of child witnesses are safeguarded during legal proceedings. This duty arises from both domestic and international legal obligations.[2]

[2] The appellant was convicted in the Regional Court on one count of rape in contravention of s3 of the *Sexual Offences and Related Matters Amendment Act 32 of 2007 (SORMA)*, and a further count of consensual sexual penetration of a child in

[1] Extract taken from Nobel Peace Prize Acceptance Speech by Nelson Mandela on 10 December 1993

[2] These include the Constitution of South Africa, the Criminal Procedure Act and the Children's Act, as well as Regional and International treaties like the UN Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of Children (ACRWC)

terms of s15(1) of the same Act. The offence set out in count 1 attracts a minimum sentence of life imprisonment by virtue of the provisions of section 51 (1), read with Part 1 of Schedule 2 of the *Criminal Law Amendment Act, 105 of 1997 ("the Act"),* unless substantial and compelling circumstances are present.

The Court a quo could not find substantial and compelling circumstances and consequently considered itself bound to impose the minimum sentence of life imprisonment in respect of count 1 and an additional six-year direct imprisonment on count 2 which the Magistrate regarded as a proportionate punishment.

B. THE STATE'S CASE

[3] The state presented evidence of the complainant and his aunt. In addition, the medical report(J88) setting out the observations and findings relating to the medical examination of the complainant after the incidents occurred was accepted into evidence by agreement between the parties.

3.1 The complainant was 13 years old when the incidents occurred, and 15 years old when he testified.

3.2 The complainant testified about three incidents which occurred during September and November 2014. Only the last two of these incidents were considered by the Magistrate in his judgment as they underpinned the charges the appellant faced in the court a quo. For the sake of completeness, I will refer in brief to all three incidents the complainant testified about.

3.3 The first incident occurred while the complainant was sleeping in the home of his aunt and uncle. His aunt was called by the state as a witness. The circumstance of the incident is not entirely clear as the complainant was in a deep sleep, and he was thus unable to recount exactly what happened.

3.4 The complainant was only able to recall that he felt the appellant's hand in his pants. The next morning, he had anal pain and discomfort, his underpants was wet, and his tracksuit pants was damp. The incident occurred while both he and the appellant were sleeping in the same bed at the appellant's insistence even though separate beds had been allocated to them.

3.5 As indicated the two charges proffered against the appellant are informed by the remaining two incidents. The rape as alleged in count two happened when the complainant was invited to sleep over at his uncle's house. When he arrived, he found the appellant there, but he was not aware that the appellant was also going to be there.

3.6 The evidence of the complainant is that the appellant told him to sleep in the same bed as him. The appellant instructed the complainant to lay on his side and switched off the room lights. Prior to switching off the lights, the appellant took cream from a red and white bag with his surname on it. He smeared the cream on the complainant's anus and inserted his penis. The complainant told him to stop but the appellant continued until he ejaculated.

3.7 The complainant explained that he did not report the incident as he was afraid of hurting his family because this was the second time that he was sexually violated and for that reason he also did not scream for help or raise the alarm in some other way. He did not tell his uncle and aunt about the incident even though they were in the same house.

3.8 The third incident happened a short while later. It was precipitated by a call the appellant placed to the grandmother of the complainant requesting the grandmother to send the complainant to appellant so that he could pray for an upcoming exam the complainant would be writing.

3.9 The complainant complied with the request. At the home of the appellant, the complainant was instructed by the appellant to lay next to him on his bed. The appellant smeared olive oil on the complainant's anus and inserted his penis. The complainant did not say or do anything. The complainant got ready to go to school and before he left the appellant gave him R10.

3.10 The complainant's evidence relating to the initial disclosure of these incidents and who the disclosure was made to was slightly confusing. The complainant indicated that he told both the school principal and his aunt as the so-called first report. It appears from his later evidence that he became confused with an earlier disclosure he had made to the principal in a matter unrelated to this incident. In relation to this incident, he was confident that he

told his aunt.

3.11 He recounted the circumstances leading up to and including the way the disclosure was made. The complainant informed his aunt of the incident by way of a handwritten letter after she had a discussion with him. The handwritten letter dated 14 November 2014 was the only way in which he felt comfortable making the disclosure as he was not able to tell her in person.

3.12 The version of the appellant was put to the complainant during cross-examination wherein the appellant denied the incidents and that the incidents could not have happened as the complainant testified because the appellant being a prophet in the church was precluded from sleeping over at a congregant's home. In addition, the appellant disclosed an alibi that he was in Ceres during the whole of September 2014.

3.13 In relation to the third incident, it was further put to the complainant that at that time of day, the appellant's mother and another person would have been at home and it was contended that for that reason the incident could not have happened.

3.14 Several questions were posed to the complainant which were quite intrusive and unsuited to cross examination of a child witness and these

aspects will be discussed along with some other concerns later in the judgment.

3.15 The aunt confirms the version of the complainant in relation to the fact that the appellant often slept over, she estimated at least six times. In addition, she testified that it is at the request of the appellant who was a prophet in their church, that the complainant would also sleep over when he(appellant) was there. The church had several “prophets”, and the workings of the prophets were unfamiliar to her and her husband.

3.16 In relation to the prohibition on sleepovers for prophets, the aunt testified that the appellant had told them that they should not tell anyone about him sleeping over because prophets were not permitted to do so. In addition, she confirmed the evidence of the complainant that her daughter slept in the main bedroom with her and her husband, when the appellant and the complainant slept over. There were double-bunk beds in the room and the door was always closed when the complainant and appellant slept there.

3.17 She suspected that the appellant was molesting the complainant, and she asked the complainant about the unrelated case as a means to make subtle enquiries relating to her suspicion. She confirms that the complainant did not want to speak, and that he disclosed what happened in a letter she identified in court. When the complainant wrote about the prophet, she knew

that it was the appellant because he was the only prophet who had slept over at her house.

3.18 The aunt also explained the reason why she spoke to the complainant. She had observed the occasions where the appellant and the complainant would have slept in the same room. She was aware that the complainant had been subjected to previous sexual abuse. She was concerned due to the rumors she had heard at church about the appellant. She had observed that the complainant had huge respect for the appellant and trusted him as he would a big brother or father figure. His face would glow when they spoke of the appellant.

3.19 The aunt showed the letter to her husband, the complainant's uncle, and they reported the matter a few days later, first to the complainant's parents, and later to the police.

3.20 She testified about a Friday evening when she, her husband and other church members were in Ceres, and they bumped into the appellant. An arrangement was made for the appellant to sleep at their house the following Saturday. On that Saturday the appellant and the complainant slept in her daughter's room. Her daughter M[…] and another person named C[…] slept with her in the main bedroom. They left the church after they became aware of the incidents.

3.21 Cross examination consisted of further denials and a repeat of the alibi defense. In response to a query as to why she allowed the appellant to sleep over in a room with the complainant, when she was aware that he had already been a victim of a sexual offence, she noted that they trusted the appellant.

C. THE APPELLANT'S CASE

[4] The appellant, his mother and the person he stayed with in Ceres testified on his behalf.

4.1 In his testimony, the appellant repeated the bare denial of complicity in the sexual violation of the complainant. The appellant denied any sleepovers at the home of the aunt and uncle of the complainant but confirmed the evidence of the complainant and his aunt to the extent that he confirmed that after the complainant's family joined the church, they became acquainted with each other.

4.2 Additionally, he confirmed he visited the home of the complainant's aunt and uncle as they would invite each other for Sunday lunches. Furthermore, he confirmed that the complainant was included in the lunches and that he spent time with the complainant, although they never really spoke. He only stopped short of admitting sleepovers as he confirmed his presence at the home where the complainant alleges the incidents happened, something which was only revealed when he testified.

4.3 The impression created throughout the evidence for the state was that the appellant never set foot at the home in question, that he only had fleeting encounters with the family of the complainant and even less contact with him, even in the face of overwhelming and undisputed evidence to the contrary.

4.4 In addition, important aspects not revealed to the state witnesses for comment were disclosed when the appellant testified. These include reference to WhatsApp messages received from the daughter of the aunt who testified after the case was opened. The appellant said the WhatsApp messages was an attempt to get him to say that he had slept at their house.

4.5 Despite stating that the complainant did not have a cellphone, the appellant testified that the complainant knew about the bag with the appellant's surname on it because he would have seen it on Facebook. In so doing he inadvertently corroborated the evidence of the complainant that he was the owner of the bag the complainant testified about.

4.6 This bag was described accurately and the complainant testified that he saw it in the bedroom when he and the appellant slept over at the home of his aunt and uncle. The appellant stated that whilst the case was ongoing, the complainant sent him a friend request on Facebook, which he never replied to, probably to explain how the complainant could have seen the bag on the social media platform. This was new information which was never put to the complainant.

4.7 The appellant sought to impugn the character of the complainant during his evidence, and I will return to this aspect later in the judgment. In cross-examination the appellant did not do fair well and contradicted himself in relation to his alibi regarding the exact duration of his stay in Ceres. From the initial whole month of September, it became apparent during his evidence that he had visited the area where the complainant's aunt and uncle reside towards the end of September.

4.8 Significantly, the evidence of the complainant's aunt that when they saw the appellant in Ceres arrangements were made for him to sleep over at their home the Saturday night when the complainant testified the second incident occurred, stood uncontroverted. His evidence also confirms that he was at his home after the 9th of November when the third incident is said to have occurred at the home of the appellant.

4.9 The witness Elton Witbooi corroborated the appellant's version that he lived with him in Ceres during September, but in contrast to what was put to state witnesses, he stated the appellant returned to Cape Town for a few days, whereafter he went back to Ceres. He also contradicted the appellant on important and material aspects relating to appellant's return to Cape Town at the end of October.

4.10 The appellant's mother confirmed that they lived in a one-room Wendy house with no privacy. She struggled with her evidence and did not make a

favorable impression. She unconvincingly tried to show that she had a routine and would have been at home if the complainant came to her house as he alleged.

D. THE GROUNDS OF APPEAL AND SUBMISSIONS MADE IN THIS COURT

[5] The appellant raised several grounds of appeal, the following being central:

5.1. The complainant was a single, child witness who was neither credible nor reliable and that the court *a quo* erred in rejecting his version and accepting the evidence of the State.

5.2. The delay in reporting the matter and confusion around who the first report witness was.

5.3. The Regional Magistrate overemphasized the medical evidence which is a neutral factor, and the medical findings relate to an incident in 2013 prior to the incidents which form the basis for the complaint in this matter.

5.4. In relation to sentence the grounds of appeal is that there were substantial and compelling reasons to be found in the appellant’s personal circumstances which justified a lesser sentence.

[6] Before us the appellant's counsel conceded that he could not sustain any grounds of appeal against conviction. However, he had no instructions to abandon the appeal against conviction and it is accordingly apposite to deal herein with the central aspects as indicated.

[7] Counsel for the State held firm to the submissions contained in their heads of

argument setting out the strengths of the State case and the inherent weaknesses in the case for the appellant as evinced by the myriad of contradictions and improbabilities on the few aspects where interestingly he disagrees with the witnesses for the state case. In many respects, the evidence of the appellant serves to corroborate either directly or indirectly the evidence presented by the State.

E. A DISCUSSION OF THE RELEVANT LEGAL PRINCIPLES

a. The power of an appeal court to interfere

[8] It is well established that the power of a court to interfere on appeal with the factual findings of a trial court are limited. A court of appeal will be reluctant to interfere with the trial court's evaluation and findings in respect of oral evidence unless such findings are misdirected, and clearly incorrect. This is mainly because the trial court has the advantage of having seen and heard witnesses, which is not the case in the appellate court. A trial court is in a more favorable position to make credibility findings which an appellate court will be hesitant to interfere with, unless as stated there is a misdirection. In that case, interference will be warranted. This court therefore must consider whether there is such a misdirection on the part of the trial court.[3]

[9] In **S v Francis**[4] the Supreme Court of Appeal held:

> *"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."*

[3] See R v Dhliwayo and Another 1948(2)SA 677(A); *S v Francis* 1991 (1) SACR 198 (A) at 204E.
[4] 1991 (1) SACR 198 (A) at 204e

b. The Delay in Reporting the Matter (First Report)

[10] Section 59 of the SORMA states as follows:

> *"In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof."*

[11] The provision is clear that no court may draw inferences, adverse or otherwise only from the length of a delay in reporting. A first report, the initial voluntary complaint made by a victim after an alleged rape, is not a mandatory requirement for a rape charge to proceed. The absence of such a report or uncertainty as to whom the first report was made to does not invalidate the prosecution's case. Courts assess the totality of evidence to determine whether the charge has been proven beyond a reasonable doubt.[5]

[12] It is so that the complainant kept silent on the rapes, even when his aunt questioned him directly. However, the reasons why he did not raise the alarm and kept quiet were explained partially during the evidence of the complainant and further by the circumstances inherent in the matter.

[13] This is a classic case where there is a massive power imbalance between the complainant and the appellant. The appellant was a well-respected and loved prophet of a church who took an interest in the complainant and offered to support

[5] See S v Vilakazi [2016] ZASCA 103 at paragraph 15

him by praying for him. The complainant looked up to him as an older person with social standing in their community. This statement is confirmed by the evidence of the aunt and to some degree by the evidence of the appellant himself.

[14] For these reasons, this ground of appeal is without merit and cannot be sustained.

c. The Cautionary Rule

[15] It is accepted that the evidence of young children must be approached with caution. The cautionary rule relating to the evidence of children has been debated in numerous authorities. In **Maila S**[6] the approach endorsed by the Supreme Court of Appeal is set out in these terms:

> *"[16] ... To ensure that the evidence of a child witness can be relied upon as provided in s 208 of the CPA, this court stated in **Woji v Santam Insurance Co Ltd**, that a court must be satisfied that their evidence is trustworthy.*

[16] This court has, since *Woji,* cautioned against what is now commonly known as the double cautionary rule. It has stated that the double cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single child witness' evidence, tested through (in most cases, rigorous) cross- examination, should be "trustworthy". This is dependent on whether the child witness could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers. Furthermore, the child witness's evidence must not have changed dramatically, the essence of their allegations should still

[6] [2023] ZASCA 3

stand. Once this is the case, a court is bound to accept the evidence as satisfactory in all respects; having considered it against that of an accused person. "Satisfactory in all respects" should not mean the evidence line-by-line. But, in the overall scheme of things, accepting the discrepancies that may have crept in, the evidence can be relied upon to decide upon the guilt of an accused person. What this Court in **S *v* Hadebe**[7] calls the necessity to step back a pace (after a detailed and critical examination of each and every component in the body of evidence), lest one may fail to see the wood for the trees.

[17] Careful consideration of the evidence of the complainant viewed in the totality of all the evidence clearly shows the complainant's evidence to be consistent, reliable and credible. The many ways in which his evidence is corroborated by the evidence offered by the appellant provides further guarantee for the reliability thereof.

[18] In my view, the magistrate's rejection of the appellant's version cannot be faulted, given the inherent shortcomings in the evidence he presented to the court. The appellant testified that the incidents could not have happened as the complainant testified because for the first count he was in Ceres and the second count there were other people present at his house. On both scores, the evidence presented fell short of setting out the scenario presented during cross examination of the state witnesses.

[19] The evidence tendered by and on behalf of the appellant did not live up to the promise of what was made during the presentation of the state case. Upon being asked why these aspects had not been put to the State witnesses in cross-examination, the appellant sought to suggest that he may not have told his attorney

[7] *S v Hadebe and Others* 1998 (1) SACR 422 (SCA).

in consultation. He was unable to explain why, despite the attorney taking instructions in court, he did not use that opportunity to instruct the attorney accordingly.

[20] The appellant impressed as an evasive witness and his evidence leaves one with the distinct impression that these aspects were last minute fabrications. He is contradicted on material aspects by his own witnesses and the evidence he presented was clearly aimed at creating both physical and social distance between himself and the complainant. In these attempts he failed spectacularly.

d. The Medical Evidence

[21] Indeed, counsel for appellant, quite correctly, also did not persist in the argument that the Court a quo did not properly reflect on the fact that the J88 report setting out the observations and findings of the medical practitioner after a medical examination was performed on the complainant should not be considered in relation to this matter.

[22] The submission sought to imply that the finding of the doctor was that the injuries he saw related to old injuries sustained during the previous incident in 2013 where the complainant was raped. These submissions are not borne out by the content of J88, which refers to the 2013 incident in the context of relevant medical history and not in relation to the incident under investigation.

[23] It is settled law that the presence or absence of physical injuries, such as anal

injuries in rape cases, does not solely determine the outcome of a case. Put differently, it is important to note that the absence of visible injuries does not negate the occurrence of sexual assault, as many survivors may not exhibit physical signs despite experiencing significant trauma.

[24] In any event the evidence of the complainant is that a form of lubrication either cream or olive oil was used during the incidents of penetration. Therefore, each case is assessed on its own merits, considering all available evidence.

[25] Having considered the conspectus of evidence presented, this court finds no misdirection on the court a quo's findings that the State had proved the allegations against the appellant beyond reasonable doubt. The complainant, being a single witness, came across as an honest, reliable and credible witness. He was subjected to torturous cross examination and remained consistent in his evidence. Additionally, his evidence is corroborated in important respects by other witnesses, including the appellant. The court a quo had no reason to reject his evidence.

F. A DISCUSSION OF THE RELEVANT LEGAL PRINCIPLES IN RELATION TO SENTENCE

[26] The crux of the argument for the appellant is that the Court *a quo* did not properly consider that his personal circumstances, when weighed with the fact that he is a first offender, amount to substantial and compelling circumstances. Additionally, counsel for the appellant seems to suggest that this is not a matter

where the complainant was grabbed off the street and dragged into bushes, and this should somehow be considered in the appellant's favor.

[27] As far as the appeal against sentence is concerned, the Act is peremptory when the facts of the case fall within the provisions of Schedule 2 to the Act. The complainant was under 16 years of age at the time of the rape and the appellant thus face a minimum sentence of life imprisonment as outlined in the legislation. The sentencing court must consider within the context of all relevant information and factors presented whether there are substantial and compelling circumstances which would justify a deviation from the prescribed minimum sentence.

[28] In **Director of Public Prosecutions, Kwazulu-Natal v Ngcobo and Others**[8] Navsa JA observed:

> *"Traditional objectives of sentencing include retribution, deterrence and rehabilitation. It does not necessarily follow that a shorter sentence will always have a greater rehabilitative effect. Furthermore, the rehabilitation of the offender is but one of the considerations when the sentence is being imposed. Surely, the nature of the offence related to the personality of the offender, the justifiable expectations of the community and the effect of a sentence on both the offender and society are all part of the equation? Pre- and post- Malgas the essential question is whether the sentence imposed is in all the circumstances, just."*

[29] What is suggested by counsel for the appellant is tantamount to minimizing the brutality of rape out of "maudlin sympathy" for the rapist. This is untenable in our

[8] 2009 (2) SACR 361 (SCA) at paragraph 22

society, which is experiencing a scourge of child rapes characterized by sexual predators manipulating situations to corner perceived soft targets into vulnerable situations where they can be exploited. Severe sentences are reserved for heinous crimes. Rape is regarded as a savage crime that robs children of their dignity in the most invasive, degrading and humiliating manner.

[30] The complainant was a child brutalized by a person who was highly regarded and respected by his family and by him. He is reported to have viewed the appellant as an older brother/father figure. The appellant was calculating and manipulative in how he arranged for opportunities to brutalize the child. He did not hesitate to use his position as a spiritual leader to manipulate the complainant's family to present the complainant for him to use at his whim. He invaded and violated the privacy and dignity of the complainant in his family home where he ought to have been in a safe space, and in the second instance under the guise of praying for an upcoming test.

[31] The child was powerless to resist because the appellant orchestrated situations which led to the complainant being instructed by adult family members to go to the places where he was violated by the appellant.

[32] The circumstances as outlined in the evidence presented to the court a quo indicate that the appellant used the initial rape to groom the complainant into accepting a sexual encounter where he was rewarded with R10 (ten Rand) for compliance. In this instance the message of being paid after the sexual act was clear.

[33] The personal circumstances of the appellant, while favorable, cannot be described as extraordinary. The trial is replete with the many ways in which the appellant seeks to portray himself as a good person and he had no qualms about tainting the image and reputation of the complainant by describing him as hanging out on the streets abusing alcohol and smoking in public at times he should have been in school.

[34] He does this knowing that he used his position as leader in the church and trusted family friend to impose his unwelcome affections upon the child, robbing him of his innocence. It was conceded that the appellant did not display any remorse and without remorse, there could be no meaningful dialogue about his prospects of rehabilitation.

[35] In the result I do not find any substantial and compelling circumstances that would have warranted the Magistrate deviating from the prescribed minimum sentence. The incarceration while awaiting finalization of the matter in the court a quo does not in my view, justify any deviation on the facts and in the circumstances of this case. In the circumstances and for the reasons outlined, the appeal against sentence must also fail.

G. THE PROCEEDINGS IN THE COURT A QUO WHICH PROMPTS UNEASE

[36] I would be remiss if I do not remark on certain aspects which was noted in the proceedings in the court a quo and which is unsettling to say the least. At the

commencement of this judgment, I noted the constitutional imperative to safeguard the rights of vulnerable child witnesses. It is apparent from the record that the complainant in this matter, a vulnerable young child was failed on many levels during the proceeding in the court a quo.

[37] The record is a sad reminder of the vulnerability of children in what is exceedingly becoming a cesspool where humans and most notably children have become increasingly vulnerable to the cruelty of adults in and outside the courtrooms. It is important that judicial officers fulfill their duties to protect child witnesses. What follows below is a discussion on some relevant principles which are of particular importance in relation to the approach by court officials in treating vulnerable children during court proceedings.

a. The Duty to Protect Vulnerable Child Witnesses

[38] It is well established that vulnerable children find the criminal justice system extremely intimidating and challenging when they are called to testify as witnesses or as victims of criminal acts. The importance of realising a justice system that not only affords an accused person the right to a fair trial but also protects and safeguards the rights of the children involved as victims and witnesses to the crime is thus undeniable.

[39] Courts in the criminal justice system must find a balance between the rights of the accused person to a fair trial and the protection and safeguarding of the rights of child victims and child witnesses. Emphasis must be placed on the role of the judiciary to ensure that the delicate balance is maintained and the rights of all

impacted by crime are promoted and secured.

b. The Constitution

[40] The South African Constitutional Court has held that the guarantee of equality 'entitles everybody, at the very least, to equal treatment by courts of law.' [9] In relation to criminal trials, the equality clause[10], and the clause which protects the right of an accused to a fair trial[11], are mutually reinforcing.[12] Witnesses and accused persons alike are afforded the same fair trial rights and the prohibition against unfair practices like excessive, protracted and unfair cross-examination.

[41] In **Director of Public Prosecutions, Transvaal v the Minister of Justice and Constitutional Development**[13] the Constitutional Court acknowledged that children are uniquely vulnerable and that they require specific attention when brought to testify in court. The Constitutional Court provided guidelines on how child victims and witnesses should be accommodated in court proceedings relating to sexual offences, requiring the state to ensure children's best interests remain intact when they appear in court as victims or witnesses.

c. The best interest of the child principle

[42] The best interests of the child principle is protected and entrenched in several legislative provisions in the *Constitution, the Children's Act 38 of 2005 and the Criminal Procedure Act 51 of 1977 (CPA) (as amended by the Criminal Law (Sexual*

[9] S v Ntuli 1996 (1) BCLR 141 (CC) at para 19; Prins loo v Van der Linde 1997 (6) BCLR 7 59 at para22
[10] The Constitution in (section 9(1)
[11] The Constitution section 35(3)
[12] S v Ntuli (supra) at paras 18-20
[13] 2009 (4) SA 222 (CC)

Offences and Related Matters) Amendment Act 32 of 2007 (Criminal Law Amendment Act). These provisions protect child complainants and witnesses from undue stress or suffering that might result from being present in court and recounting their ordeals.

[43] Section 28(2) of the Constitution requires that the best interests of the child are of paramount importance in all matters concerning the child. In the context of child complainants and witnesses, section 28(2) demands protection of children while giving evidence in court to prevent hardship and secondary trauma. The concept of the best interests of the child entrenched in section 28 of the Constitution is aimed at ensuring the full and effective realization and enjoyment of all children's rights as provided for.

d. International Obligations

[44] South Africa has an obligation under international law to ensure the protection and care of child witnesses as is necessary for their well-being.[14] The United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of Children(ACRWC) supports four guiding principles, namely non-discrimination, the right to life, survival and development,[15] participation[16] and the best interests of the children concerned,[17] which are instrumental in safeguarding children's rights. These rights extended to children, in my view, apply equally to children when they become witnesses in court proceedings.

---

[14] Fambasayi R and Koraan R "Intermediaries and the International Obligation to Protect Child Witnesses in South Africa" PER/PELJ 2018(21) -DOI http://dx.doi.org/10.17159/1727-3781/2018/v21i10a2971
[15] Article 6 of the CRC; see also a 5 of the ACRWC
[16] Article 12 of the CRC; see also aa4(2) and 7 of the ACRWC
[17] Article 3 of the CRC; see also a 4(1) of the ACRWC

[45] For courts to give full effect to the realization of these rights, courts must consider the best interest principle on the merits of each case by considering the specific child in the matter before it. This approach will give effect to the 'voice of the child' principle espoused in *the Children's Act*[18] and will promote an environment where the dignity of the child is respected, and the child is able to assert his or her right to express his or her opinion freely and to participate in matters concerning himself or herself. This principle is firmly entrenched in national and international law.

[46] The rights as reflected in terms of *the Children's Act* and the factors to be considered where the evidence of vulnerable child witnesses is sought to be placed before children's courts are equally relevant to criminal proceedings, and they are already taken up in general best practice or legislation but possibly not codified to the extent that it is in *the Children's Act.* The parts of the general principles provided for in *chapter 2 of the Children's Act,* which I deem relevant to the proceedings in matters like the matter on appeal before us and which factors should in my view be given due consideration in such matters, are reflected below.

> ***"6. General principles***
>
> *(1) The general principles set out in this section guide—*
>
> *……*
>
> *(2) All proceedings, actions or decisions in a matter concerning a child must—*
>
> *(a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and*

[18] Section 6(2) of the Children's Act 38 of 2005

principles set out in this Act, subject to any lawful limitation;

(b) respect the child's inherent dignity;

(c) treat the child fairly and equitably;

(d) protect the child from unfair discrimination on any ground…..,

(3) If it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child.

(4) In any matter concerning a child—

(a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and

(b) a delay in any action or decision to be taken must be avoided as far as possible.

(5) A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

[Commencement of s 6: 1 July 2007.]

7. Best interests of child standard

() Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely—

(g) the child's—

(i) age, maturity and stage of development;

(ii) gender;

(iii) background; and

(iv) any other relevant characteristics of the child;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(l) the need to protect the child from any physical or psychological harm that may be caused by—

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

9. Best interests of child paramount

In all matters concerning the care, protection and wellbeing of a child the standard that the child's best interest is of paramount importance, must be applied.

10. Child participation

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

[47] In addition, further guidance may be found in the *UN General Assembly's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Declaration of Basic Principles)[19] which provides a framework for responding to the unique challenges and needs of victims.

[48] The duty of courts to protect vulnerable children during court proceedings is a constitutional and legislative priority. It is imperative that children are not subjected to excessive cross-examination while maintaining the integrity of the justice system and preserving the fair trial rights of the accused. Despite existing legal frameworks, there are concerns that magistrates sometimes fail to adequately safeguard child witnesses from excessive or inappropriate cross-examination, which can lead to retraumatization and compromised testimony. The appeal before us is one such instance.

[19] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985), adopted on 29 November 1985 at the 96th plenary meeting, A/RES/40/34 referred to in the article by Fambasayi and Koraan supra.

[49] A cursory glance at the record of the proceedings in the lower court exposes that those officials present in the court did not pay much attention to the stress that the child was forced to endure because no one intervened. A reading of the record also reveals the many ways in which the criminal justice system failed the child.

[50] The complainant suffered when he was exposed to prolonged, intrusive, inappropriate and at times impermissible cross-examination at the hands of the legal representative of the appellant. It may be as counsel for the appellant before us alluded that this is not a 'run of the mill' case because it involved a victim and perpetrator of the same sex. It is possible that the parties may, for one or other inexplicable reason have been unsure of how to handle the situation. The child in question was required to relive the horror of the crime in court in the presence of everyone, including the appellant.

[51] The complainant was asked to relate the sordid details of the traumatic experiences that he had experienced at the hands of the appellant, who was a trusted adult, while he was constantly questioned about returning to the accused when he knew what he had done to him. The complainant was told that what he alleges is probably not true since he voluntarily went to the home of the appellant.

[52] Apart from being an incorrect reflection of what happened because he was instructed to go to the appellant by his grandmother, it also reinforces feelings of guilt

and shame as the victim is blamed for what happened to him instead of placing the blame with the appellant where it belongs. The plight of this child was seemingly not the concern of those present in court and regrettably, the horror was permitted to continue with no objection from the prosecutor who is the child's representative in court or the Magistrate who is constitutionally mandated to protect the rights of the child.

[53] It is accepted that child witnesses experience significant difficulties in dealing with the adversarial setting of a court and they do not completely understand the language of legal proceedings or the functions of the various role-players. Our legal system provides for a procedure that involves confrontation and extensive cross-examination. The challenges mentioned are exacerbated in cases of criminal prosecutions for sexual offences due to the emotional stress and fears inherent in the child being required to recall traumatic events that (s)he is required to testify about.[20]

[54] The prosecution of sexual offences is much more intricate than that of most other crimes, especially sexual offences involving child victims. The victims of these crimes usually come from the most vulnerable groups of our society and must be provided with additional protection.

[55] The record of the proceedings in the lower court tells a sad tale of a child who was left at the mercy of a legal representative who went to town on inappropriate and impermissible cross-examination. Counsel before us and in the court a quo

[20] Klink v Regional Court Magistrate NO and Others 1996 (3) BCLR 402 (E) 403.

repeatedly sought to apportion blame for what had happened to him squarely on the shoulders of the victim.

[56] This was facilitated in the court a quo by repeated statements and questions relating to the improbability of the allegations being true if the complainant on his own accord and quite willingly went to the house of the appellant in circumstances where he had already been raped by him. Before us on appeal it was submitted that surely this points to a degree of voluntariness.

[57] This was not only a patently incorrect statement considering the evidence but also amounts to victim-shaming, is a highly inappropriate line of questioning and should not have been allowed by the Magistrate. One must never lose sight in the circumstances of this matter that the complainant was 13 years old at the time the incidents happened, and the appellant was a respected prophet and trusted family friend who was 34 years old at the time of the respective incidents.

[58] The protection of vulnerable witnesses during cross-examination is a critical aspect of ensuring a fair trial. A pertinent case that addresses the court's duty in this regard is **S v Mokoena; S v Phaswane**[21]. This case involved two separate criminal matters where child victims of sexual offenses were required to testify. The primary concern was the adequacy of protective measures for these vulnerable witnesses during the trial process, particularly during cross-examination.

[59] The High Court emphasized the need to protect vulnerable witnesses, especially children, from the potential trauma associated with cross-examination.

[21] 2008 (2) SACR 216 (T)

The court highlighted the importance of creating a supportive environment to facilitate the testimony of such witnesses without causing additional harm or distress.

[60] The judgment underscored the court's duty to implement protective measures, such as appointing intermediaries, allowing testimony via closed-circuit television (CCTV), and other appropriate accommodations to shield vulnerable witnesses from the potentially intimidating atmosphere of the courtroom.

[61] Central to our discussion is whether the Regional Magistrate adequately safeguarded the best interests, rights and well-being of the child witness, particularly in relation to certain questions posed to him in cross examination by the legal representative of the appellant.

[62] It is necessary for the judiciary to take responsibility to adapt procedures to safeguard vulnerable witnesses during cross-examination. It highlights the balance that courts must maintain between the rights of the accused and the protection of vulnerable individuals, ensuring that the legal process does not subject them to further trauma. This judgment reinforces the principle that courts must actively protect vulnerable witnesses from excessive or aggressive cross-examination, ensuring that the pursuit of justice does not come at the expense of the well-being of those most susceptible to harm.

[63] From the record of the proceedings in the court a quo it is apparent that the Magistrate ought to have intervened in the following circumstances:

63.1. The defense counsel's cross-examination included repetitive questions

that sought to confuse the child witness.

63.2. The tone and demeanor of the questioning appeared intimidating, causing distress to the Child. In this regard, the child was repeatedly questioned about the fact that family members were present in proximity during the first and second incident and yet he did not raise the alarm or cry for help.

63.3 These inappropriate questions, which have no bearing on any issues to be determined in the matter, ought not to have been allowed to continue as it only added to the trauma and stress the child was experiencing. It almost certainly exacerbated existing feelings of guilt and shame as the response to these questions from the child was that he did not want to cause further distress as it would have been the second time he fell victim to sexual violation and for this reason he kept quiet and did not alert anyone to what was happening.

63.4 The child's testimony was critical, but the court had a duty to ensure that his dignity and emotional well-being were safeguarded. The cross-examination, both in terms of duration and content of the questions, was not dignified and was detrimental to the well-being of the child. The high watermark of the cross-examination consisted of informing the victim that he was to blame for what happened to him and because he went to the home of the appellant, he was at best a willing participant or at the very least he could have refused to go and avoided what happened. These issues are apparent right through the record and were not only restricted to the complainant.

63.5 His aunt was similarly questioned about her decision to allow the

complainant, whom she knew to have been violated before, to be alone with the appellant, a trusted family friend. It should be borne in mind that the aunt was not an accused in this matter. With the benefit of hindsight, it may not have been in the best interests of the complainant to have allowed it, but the appellant was trusted by the family and acted as a big brother/father figure to the complainant. In these circumstances, such questions were similarly inappropriate.

63.6. The court a quo also permitted questions of prior sexual conduct without first entertaining an application as provided for in terms of section 227(2) of the CPA.[22]

[64] The court is empowered by the provisions of section 166 of the CPA to restrict the defense counsel to conduct himself in line with the obligation to conduct cross-examination in a manner consistent with professional ethics and the child's constitutional rights. The relevant section allows a trial court to limit cross-examination to avoid repetitive or irrelevant questioning and maintain a respectful tone which gives effect to the obligation to treat the child with dignity and respect. Allowing questions of this kind that would not be allowed in matters involving other offences, affronts the rights entrenched in section 9 of the Constitution which guarantees equal protection of the law.

---

[22] 227 Evidence of character and previous sexual experience Cases
……
(2) No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless- (a) the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or (b) such evidence has been introduced by the prosecution.

[65] In **Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others**[23] the Constitutional Court held that the existing provisions were insufficient in protecting child witnesses from the potential trauma of testifying in open court.

[66] The Court emphasized the need for a more flexible and responsive approach to accommodate the interests of vulnerable witnesses while ensuring the integrity of the judicial process. It underscored the importance of creating a child-friendly environment to facilitate the testimony of young witnesses without causing additional harm or distress.

[67] This judgment reinforced the court's duty to implement protective measures for vulnerable witnesses. It highlighted the necessity of maintaining the balance between the rights of the accused with the need to protect vulnerable witnesses from secondary victimization during the trial process. It affirms the judiciary's responsibility to adapt procedures to safeguard vulnerable individuals, thereby promoting a more compassionate and just legal system.

[68] Reflection on the record of the proceedings in this appeal before us shows the Magistrate to have acted conservatively and cautiously in his approach to ensure that the fair trial rights of the appellant were respected and safeguarded. This is apparent if consideration is given to the extreme latitude in allowing the types of

[23] [2009] ZACC 8

inappropriate questions permitted in cross-examination of the complainant. As indicated, the record is replete with examples of this.

[69] In my view the Magistrate ought to have taken steps to ensure that the appellant's right to a fair trial is appropriately balanced against the complainant's constitutional right to dignity and protection from harm. Courts are constrained to prevent vulnerable witnesses from being re-distressed, exposed to additional trauma and secondary victimization during the trial process.

[70] I am mindful that:

> *"[r]ape is a topic that abounds with myths and misconceptions … For many rape victims the process of investigation and prosecution is almost as traumatic as the rape itself."*[24]

[71] A further feature of the type of offence featured in this appeal is the pre-conceived ideas and myths surrounding how a victim should feel, and act as evinced in questions such as why complainants did not fight back or scream because there were people in close proximity. These are the type of questions put to the complainant in the court a quo during cross-examination.

[72] It is significant that what is expected of victims in sexual offences does not apply to victims in other offences such as robbery or assault. It is common for security consultants to advise the public that in circumstances where a perpetrator demands property (money or a car), not to resist or fight back and to surrender the item(s) in question. I have yet to hear cross-examination of a complainant in an

[24] S v De Beer -unreported judgment SCA Case No 121/2004 at para 18

assault or robbery case where the complainant is asked why (s)he did not scream or fight back against the assailant, yet those types of questions are commonplace in sexual offence matters.

[73] In **Holtzhauzen v Roodt**,[25] Satchwell, J acknowledged that:

> *"not all rapes are the same. Indeed, it is probably trite to say that the capacity for human experience is so infinite and unpredictable that no crime is quite the same as another . . . Rape is an experience so devastating in its consequences that it is rightly perceived as striking at the very fundament of human, particularly female, privacy, dignity and personhood."*

[74] In S v Van Wyk[26] a clinical psychologist was permitted to testify regarding the symptoms experienced by the rape victim. During sentencing, Davis J makes special reference to the suffering endured by the victim and refers to the symptoms as a post traumatic rape syndrome. It is unfortunate that instances where psychologists' evidence is presented in the lower court are exceptionally rare, as the benefit to the court in understanding the victim, which will inform a more informed approach can be invaluable.

[75] Research indicates the following salient points:

> *"Rape is about controlling the victim, male victims experience similar, or the same emotional consequences as female victims and male victims are more likely to be attacked by multiple assailants. There is also a predisposition for male and female*

[25] 1997 4 SA 766 (W) 778E-G
[26] 2000 (1) SACR 45 (C)

children to become victims of rape as they are easy targets and easily accessible."[27]

[76] The time has come for judicial officers to extend the principle of fairness of the process to how witnesses and particularly those who are vulnerable are treated. Recognition ought to be given to inherent power inequalities, most notably in offences of a sexual nature as this quite often, as in this instance, is the reason for delayed disclosure and the secrecy and shame that often plagues these victims.

[77] There is no prototype victim and the experience as well as how they react during and after the incident is different for each one. In my view the benefit of receiving evidence from a clinical psychologist can be of great assistance in these matters, particularly when presenting the evidence of children so that a proper picture of the child and his or her abilities is before the court which will promote and facilitate a better understanding of the witness and will be beneficial in the evaluation of such evidence.

[78] I pause to state that the concerns expressed in the approach to cross-examination are not meant to detract from the carefully considered judgment underpinned by sound reasoning on the merits which buttress the conviction in the court a quo. The judgment clearly sets out the basis on which the Regional Magistrate makes his findings with reference to the strengths inherent in respect of the case presented by the State and the shortcomings in the case presented by the appellant.

---

[27] Male victims of sexual assault: a review of the Literature -PMC https://pmc.ncbi.nlm.nih.gov/articles/PMC10135558

[79] The Regional Magistrate clearly and succinctly sets out the corroboration found for the evidence of the complainant. The judgment is illustrative of a proper analysis and evaluation of all evidence presented which form a well-reasoned basis for the convictions. In respect of sentence, the Magistrate provides equally compelling reasons for the respective sentences imposed on which he cannot be faulted.

In the result the following order is made:

The appeal against conviction and sentence is dismissed.

_____
MF ADAMS
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

_____
C FORTUIN
JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPELLANT

ADV A PARIES

Instructed by: R DAVIES ATTORNEYS
1ST FLOOR, BENZAL BUILDING
BARRACK STREET
CAPE TOWN
8001

FOR THE RESPONDENT

ADV N AJAM

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
CAPE TOWN