



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO.: A231/2024
REPORTABLE**

In the matter between:-

ASANDA BATAYI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Batayi v S* (Case no A231/2024) [2025] ZAWCHC (24.06.25)

Coram: **NUKU J et MOOSA AJ**

Heard: 20 June 2025

Delivered: 24 June 2025 (delivered via email to the respective Counsel)

Summary: Rape - appeal against sentence of life imprisonment on multiple acts of child rape – appellant is a sexual predator – life sentence imposed on both counts of rape is not shocking or startlingly inappropriate – sentence confirmed on appeal.

ORDER

On appeal from the regional court at Khayelitsha, it is ordered that the appeal against the sentence on count 1 and count 2 is dismissed.

JUDGMENT

Moosa AJ (Nuku J concurring)

Introduction

[1] This is an appeal stemming from a criminal trial held in the regional court at Khayelitsha. The appellant was charged with two counts of rape in contravention of s 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 (the CLAA 32/2007). He pleaded not guilty to both counts.

[2] He was convicted on 25 July 2019 on both counts of rape. On 7 October 2019 he was sentenced to life imprisonment on each count pursuant to the minimum sentence regime in s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA 105/1997), both of which sentences were ordered to run concurrently under s 280(2) of the Criminal Procedure Act 51 of 1977 (the CPA).

[3] Pursuant to s 309(1)(a) of the CPA as amended by s 10 of Act 42 of 2023, the appellant exercised his automatic right of appeal against his conviction and sentence on both counts. However, at the hearing, appellant's counsel, Mr Sebueng, informed the Court that the appellant no longer seeks to appeal his conviction. Mr Sebueng informed the Court that the appellant only pursues the appeal against the sentence imposed by the trial court. Accordingly, this judgment relates to that limited aspect.

[4] For purposes of evaluating the sentence imposed and whether there are grounds to set it aside, it is necessary to traverse key aspects of the trial record a quo.

Salient backgrounds facts

[5] The appellant was charged and convicted with the rape of a minor female girl (ZM).¹ Her birth certificate showed that she was born on 25 September 2000.

[6] Pursuant to count 1, the appellant was convicted for unlawfully and intentionally committing an act of sexual penetration by inserting his penis into ZM's vagina without her consent on two occasions in 2014.

[7] Pursuant to count 2, the appellant was convicted for unlawfully and intentionally committing an act of sexual penetration by inserting his penis into ZM's vagina without her consent on multiple occasions during the period August 2011 to December 2011.

[8] ZM was 18 years old when she testified in the trial a quo. She testified that the appellant raped her multiple times during the latter part of the year 2011, and again twice in and during 2014.

[9] It is common cause that during 2011, the appellant lived with ZM and her family at their Khayelitsha home. The first time ZM was raped by the appellant during 2011 was towards the end of the year. ZM testified that she returned home from school in the afternoon one day with her brother, A[...]. After they undressed from their school uniforms and put on their after-school clothing, A[...] went outside the house to play. ZM was alone in the house with the appellant. ZM was doing her school homework. The appellant called her into his bedroom and told her to climb onto his bed. It was then that the appellant raped ZM.

[10] The second time ZM was raped by the appellant in 2011 is also after she and her brother, A[...], returned home from school. Again, the appellant was at home alone. ZM's parents were at work. The appellant was entrusted with ZM and A[...]’s after-school care.

[11] On the occasion of this second rape, the appellant gave A[...] money and sent him to the shop to buy something. The appellant told ZM to stay with him while A[...]

¹ In this judgment, the personal information of the complainant and her mother is protected through non-disclosure.

goes to the shop. When A[...] left, the appellant again told ZM to go into his room. While in that room, ZM recounted that the appellant said to her that she must undress herself and climb onto his bed. ZM did as she was instructed and the appellant then raped her. ZM was 11 years old at that time.

[12] The appellant then raped ZM a further three times on one weekend during November 2011 when ZM's parents went to the Eastern Cape for her grandfather's funeral. ZM and her two younger brothers were left at home alone in the appellant's care. ZM's parents trusted the appellant with their children's care.

[13] The appellant raped ZM on the Friday evening shortly after her parents left for the Eastern Cape and while her brothers were asleep. The appellant fetched ZM from her parents' room and took her to his room where he raped her on his bed.

[14] The appellant raped ZM on the next day too, being Saturday. She was alone at home with him. ZM's brothers were at the house of a neighbour whose child was graduating. While ZM was alone at home with the appellant, he again told her to go into his room. ZM was powerless. She did as she was told. There she was raped again.

[15] The appellant raped ZM for a fifth time in 2011 on the following evening, being Sunday night. ZM was sleeping in her parents' room when the appellant fetched her again. He took her to his room where he raped her on his bed. While he was busy raping her, ZM's mother phoned and told the appellant that she was close to home.

[16] When detailing these five rapes, ZM testified that she felt pain on each occasion in her vagina and that she told the appellant that this was painful for her, but to no avail. He continued to rape her despite her pain.

[17] The appellant was convicted of these rapes, all of which formed part of the charge in count no. 2. As stated above, he was sentenced to life imprisonment.

[18] ZM testified that her parents sent her to live with her grandmother in the Eastern Cape. She stayed there for two years, namely, 2012 to 2013. On her return

from the Eastern Cape at the end of 2013, the appellant was still living at her parents' home in Khayelitsha. On two occasions in and during 2014, and on dates which she could not recall, the appellant raped ZM when they were again alone at home.

[19] The appellant was convicted of these latter rapes which formed part of the charge in count no. 1. On this count too, he was sentenced to life imprisonment which was ordered to run concurrently with the life sentence imposed on count 2.

Issues for adjudication

[20] The trial court did not find substantial and compelling circumstances to exist. On that basis, the appellant was sentenced to the minimum prescribed sentence of life imprisonment on both counts as compelled by s 51(1) of the CLAA 105/1997.

[21] The appellant contends that the trial court erred in its decision not to find substantial and compelling circumstances which would merit a deviation from the statutorily prescribed sentence for rape. He contends that same exists so that he is entitled to a lesser sentence than the prescribed life imprisonment imposed.

[22] The narrow issue for determination is whether valid grounds exist for this Court to interfere with the trial court's sentence.

Legal principles on sentencing

[23] An appellate court must be slow to interfere with a trial court's discretion on sentence. It is a truism that the infliction of punishment is pre-eminently a matter within a trial court's discretion. See *S v Rabie* 1975 (4) SA 855 (A) at 857D.

[24] In *S v Malgas* 2001 (1) SACR 496 (SCA) para 12, it was held:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was

the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial court.'

[25] In *S v Pillay* 1977 (4) SA 531 (A) at 535E-F, the Appellate Division (now Supreme Court of Appeal) held that a 'misdirection', for purposes of an appellate court's jurisdiction being triggered,

'... means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the *Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably*'.
(Emphasis added)

Application of principles to the facts

[26] Appellant's counsel relied on the following considerations in support of his contention that substantial and compelling circumstances exist: (i) appellant is a first offender; (ii) appellant was 27 years old in 2011 when the rapes in count 2 were committed, and 29 years old in 2014 when the rapes in count 1 were committed; and (iii) the appellant's various personal circumstances as outlined in the pre-sentencing report dated 27 August 2019 marked Exhibit D.

[27] With regards to the appellant's status as a first offender, this consideration carries little weight when a court determines if substantial and compelling circumstances exist. This is clear from *S v Malgas* supra para 25 where the SCA held as follows with regards to deviation from minimum sentences:

'The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, *aversion to imprisoning first offenders*, personal doubts as to the efficacy of

the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.’ (Emphasis added)

[28] The rape in this case falls squarely within the ambit of Part I of Schedule 2 of the CLAA 105/1997, namely, rape committed by an accused in circumstances where the victim was raped more than once. The legislature ordained that even first offenders of such a heinous rape shall be sentenced to life imprisonment. This is a most appropriate response in the context of this case.

[29] As regards the appellant’s age, his counsel submits that he is ‘fairly young’ and that this is a mitigating factor. The description of the appellant as ‘fairly young’ is akin to describing him as ‘relatively young’, both ill-defined and vague concepts which cannot play any meaningful role for purposes of establishing substantial and compelling circumstances, unless some content is given to the meaning of ‘fairly young’. See *S v Matyityi* 2011 (1) SACR 40 (SCA) paras 14, 23.

[30] As regards age being used as a mitigating factor, our courts have decisively held that ‘a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 the respondent could hardly be described as a callow youth. At best for him his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness.’ (*S v Matyityi* supra para 14).

[31] No evidence was placed before the trial court as to the appellant’s level of immaturity, or any other influence which may have been brought to bear on him that caused him to act in the manner that he did. In fact, in the trial court, the appellant persisted in denying his guilt. This is further aggravating for purposes of sentencing and the trial court was correct in viewing it as such.

[32] While the appellant’s personal circumstances sketched in the pre-sentencing report remain relevant even in cases where a minimum sentence is involved (see *S v Malgas* supra para 25), I am guided, however, by the following dictum in *S v Vilakazi*

2009 (1) SACR 552 (SCA) para 58 as to the reduced role which an accused's personal circumstances will play at sentencing in cases of serious sexual offences:

'In cases of serious crimes, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the question of whether the accused is married or single, whether he has two children or three, whether he is employed are in themselves largely immaterial to what that period should be and those seem to me to be what the kind of 'flimsy' grounds that *Malgas* said should be avoided.'

[33] The personal circumstances of the appellant do not, in my view, qualify as the kind of 'weighty justification' which would enable this Court to impose a period of imprisonment less than the minimum sentence prescribed by law. Consequently, the trial court's assessment in this regard cannot be faulted.

[34] To impose a sentence less than life imprisonment on either count in this case would be unjust and, in my view, result in a sentence which is unfair to the victim and society at large. Indeed, the victim and society would, in such circumstance, likely view the lesser sentence as shockingly or disturbingly inappropriate.

[35] An enlightened and just sentencing policy or practice requires that the punishment selected be one which 'best fits the unique circumstances of the case before court' and is sufficiently 'victim-centred' (*S v Matyityi* supra para 16).

[36] This is particularly so with rape. In *S v Matyityi* supra para 16, it was held:

'In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the state – it is an injury or wrong done to another person. ... As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values

namely human dignity. It enables us as well to vindicate our collective sense of humanity and humanness.'

[37] The appellant is a sexual predator – he preyed on a young girl. His appetite for rape knew no bounds. The multiple rapes perpetrated by the appellant was appalling and caused outrage, understandably so. His victim, ZM, was a child and a relative whom the appellant had a duty to protect. The appellant was invited into ZM's home by her parents when he migrated to the Western Cape from the Eastern Cape in search of work. ZM's parents provided the appellant with shelter and help to find gainful employment. They also trusted him to be alone in their home with their three young children, including their only daughter (ZM). The appellant betrayed that trust by using it to gain access to ZM so that he could violate her by raping time after time.

[38] ZM was in the appellant's care after school when her parents were at work, and when her parents went away to the Eastern Cape for a funeral. He raped ZM no less than five times in 2011 (count 2) and twice in 2014 (count 1). On the weekend in November 2011 when her parents went to the Eastern Cape, he raped ZM on the Friday, the Saturday, and the Sunday. The appellant was relentless.

[39] The fact that the appellant on one occasion in 2011 sent ZM's brother, A[...], out of the house to buy something at a nearby shop, is a telling fact strongly indicating that the appellant did not act impulsively on this occasion (nor on any of the other instances too). He planned ZM's rape by craftily creating an opportunity to do so when he sent A[...] away to the shop. The same aggravating consideration applies equally when regard is had to the fact that, on each occasion when the appellant raped ZM, there were no adults around in the home who could protect ZM by stopping the appellant. His actions were, thus, not only deplorable but calculated.

[40] In addition to the emotional trauma which ZM, as a rape victim, necessarily suffered from the brutal invasion of her bodily (i.e., physical) integrity, as a young girl she was burdened with the fear of reporting the incidences of rape because of the familial relationship and out of fear of retaliation from the appellant.

[41] By all accounts, ZM was a virgin when she was first raped by the appellant. He robbed ZM of her innocence, and the wonder and pleasure of experiencing her womanhood at a time and a place of her choosing (ie, when she was ready).

[42] For all these reasons, I find that the magistrate did not misdirect herself when she found that there were no substantial and compelling circumstances which merit a lesser sentence than that prescribed by law. I am also satisfied that the sentences imposed were blended with a healthy dose of compassion and mercy. Counts 1 and 2 involved the commission of more than one rape which occurred on different days. As such, they cannot be considered as one uninterrupted act. In the exercise of her discretion for sentencing purposes, the magistrate treated each of the rapes comprising count 1 and count 2 respectively as one for sentencing on each count.

[43] It was for this reason that the appellant was not sentenced to life imprisonment for each of the seven acts of rape comprising counts 1 and 2 but to life imprisonment for each count separately. As the magistrate's exercise of her discretion cannot be faulted, and no valid basis was argued on appeal, interference with the sentences would be an overreach. See *HL v S* (A51/2019) [2019] ZAWCHC 49 (26 April 2019).

Order

[44] In the result, I would propose that the appeal against the sentence on both count 1 and count 2 be dismissed.

F. MOOSA
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so Ordered.

L.G. NUKU

JUDGE OF THE HIGH COURT

Appearances

For appellant: Adv I.M Sebueng
Instructed by: Cape Town Justice Centre

For respondent: Adv. M.J September
Instructed by: Office of the Director of Public Prosecutions, Cape Town.