



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

Reportable/Not reportable

Appeal number: A147/2024

In the matter between:

ZAKHONZE STEPHEN DASHEKA

Appellant

and

THE STATE

Respondent

Neutral citation: *Dasheka v S* (A147/2024) [2025] ZAFSHC 173 (12 June 2025)

Coram: Loubser J *et* Opperman J

Heard: 10 March 2025

Delivered: 12 June 2025

Summary: Criminal law and procedure – appeal against conviction of raping a four-year old child and the sentence of life imprisonment

ORDER

The appeal against both conviction and the sentence is dismissed.

JUDGMENT

Loubser J (Opperman J concurring)

[1] The appellant in this appeal is a 49-year old male person who was convicted in the Bloemfontein Regional Court of raping a four-year old girl by penetrating her vagina and her anus with his finger. On 23 June 2023 he was sentenced by the court *a quo* to life imprisonment in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997. He now appeals both his conviction and sentence. Having been sentenced to life imprisonment, the appellant enjoys an automatic right of appeal in terms of s 10 of the Judicial Matters Amendment Act 42 of 2013.

[2] The record of proceedings shows that the child in question was living with her 75-year old grandmother in her house in Freedom Square, Bloemfontein. The appellant stayed in a room in the same house, which he rented from the child's grandmother. The child herself testified through an intermediary in the proceedings. At the time she gave her testimony, she was already seven years old and in grade 2. The State also called the grandmother to testify. A medical report by a forensic nurse was handed in by the State, in which it was indicated that the medico-legal examination of the child the morning after the alleged events, revealed no injuries on the genitals and the anus of the child. However, it is also indicated in the report that the absence of injuries does not exclude the happening of the incident reported by the victim.

[3] The child testified that on Christmas morning, the appellant called her to his room while indicating that he had bought her new clothes. He then closed the door behind them

and showed her the new clothes. The appellant went on to undress the child's pants and panty, and made her sit on the bed. Thereafter he inserted his fingers into her vagina and her anus. It was painful and she started to cry. When her grandmother came to the room to enquire why she was crying, she told her what the appellant had done.

[4] The grandmother testified that she was sleeping in her own room on that morning, and she heard the appellant calling the child saying that he had bought her Christmas clothes. She then heard the child crying, and she got out of her bed to go and investigate. She saw the child coming out of the room of the appellant, holding her panty in her hand. The child then told her what had happened.

[5] When the appellant testified in his defence, he confirmed that he had bought the child clothes for Christmas, and that she entered his room to receive the clothes on his invitation. According to him, he then gave her the clothes and told her to go and fit it in her grandmother's quarters, which she did. She later returned indicating that it was a perfect fit, he testified. In cross-examination, he conceded, though, that his rent was fully paid and he was on good terms with the grandmother. He also denied that the child was crying at all.

[6] In his judgment on the merits of the matter, the presiding magistrate dealt with the cautionary rule with regard to child witnesses and remarked that the child had made a very favourable impression on him. He added that the child withstood extreme cross-examination and explained the events in great detail. The magistrate went on to describe the grandmother as an excellent witness. As for the appellant, the magistrate found that he did not make a favourable impression on the court. He rejected the appellant's version of denying anything that could implicate him with a sexual offence, and came to the conclusion that his version was clearly opportunistic, unreliable and untrustworthy.

[7] Now, an appeal court's power to interfere with the findings of the trial court on the aspect of credibility, is limited. In *S v Francis*¹ the court remarked as follows in this regard: 'This court's powers to interfere on appeal with the trial court are limited. . . . 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.'

[8] As a result hereof, and upon a proper consideration of the evidence adduced in the

¹ *S v Francis* 1991 (1) SACR 198 (A) at 204C-E.

court *a quo*, I have no hesitation in finding that the appellant has been correctly convicted. His appeal against conviction stands to be dismissed.

[9] The appeal against sentence remains to be decided. The appellant was sentenced to life imprisonment in terms of s 51(1) of the Criminal Law Amendment Act. In sentencing the appellant, the trial magistrate found that there were no substantial and compelling circumstances justifying a deviation from the minimum sentence of life imprisonment prescribed by the said Act. In the appeal it was submitted on behalf of the appellant that the court *a quo* had erred in finding as such. The fact that he was 49 years of age, that he has two children, that he is not married, that his highest level of education is Grade 9, that he is for all intents and purposes a first offender and that he was unemployed doing only odd jobs, that the child sustained no injuries and that the penetrations were done by a finger and not a penis, justified compelling and substantial circumstances, it was submitted.

[10] This brings to mind a number of principles relating to the question of substantial and compelling circumstances. A court of appeal can generally only interfere with a sentence if it is clear that an irregularity during the sentencing stage, that the court *a quo* misdirected itself in respect of the imposition of sentence, or that the sentence imposed was disturbingly or shockingly inappropriate.² A court of appeal is also not free to interfere with the sentence if it might have imposed a different sentence had it been the court of first instance.³ Furthermore, courts should not depart from the prescribed minimum sentences lightly and for flimsy reasons.⁴ A proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.⁵

[11] In the present matter the aggravating circumstances of the matter consist mainly of the following: the victim was a little girl of only four years, the appellant raped her on her own premises where she was supposed to feel protected and safe, and lastly, he was in a position of trust since he was an adult man living on the same premises.

[12] Again, I have no hesitation in finding that the aggravating circumstances far outweigh the proposed mitigating factors. It follows that the court *a quo* correctly held that there were no compelling in substantial circumstances present.

² *S v Petkar* 1988 (3) SA 571 (A) at 574C.

³ *S v Nechehe* 2005 (2) SACR 386 (W) at 388C.

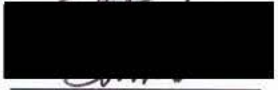
⁴ *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) para 23.

⁵ *S v PB* [2012] ZASCA 154; 2013 (2) SACR 533 (SCA) para 20.

[13] I make the following order:

The appeal against both conviction and the sentence is dismissed.




Loubser, J

I concur:




Opperman, J

Appearances:

For the Appellant:

S. Kruger

Legal Aid, Bloemfontein

For the Respondent:

S. Tunzi

Instructed by:

The Office of the Director of Public Prosecutions:

Free State, Bloemfontein