



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

Case no: A94/25

In the matter between:

THANDUXOLO NASHWA

Appellant

and

THE STATE

Respondent

Coram: FORTUIN J et JONKER AJ

Heard: 1 August 2025

Delivered: Electronically on 25 August 2025

JUDGMENT

JONKER AJ (FORTUIN J concurring):

INTRODUCTION:

[1] The appellant appeals against both his conviction and sentence arising from the rape of a 13-year-old committed on 21 November 2021. He was convicted by the

Regional Magistrate sitting at Wynberg ('the regional magistrate') on one count of rape, in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The regional magistrate imposed a sentence of 18 years' imprisonment, having deviated from the prescribed minimum sentence upon finding that substantial and compelling circumstances existed. The appellant exercised his automatic right of appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 ('the CPA') and supplemented his grounds of appeal accordingly.

[2] The appellant's challenge to the conviction is primarily directed at the reliability of the complainant's evidence, who was a single minor witness. He submitted that the trial court erred in placing reliance on the corroboration between the complainant's account and that of her mother, without adequately addressing the material inconsistencies between their respective versions. In respect of sentence, the appellant contended that the regional magistrate failed to undertake a holistic assessment of the alleged substantial and compelling circumstances. He further argued that the sentence imposed was excessive and did not accord with the interests of justice or those of society.

[3] The complainant was 13 years old at the time of the alleged offence and 15 years old when the trial commenced.

[4] The State presented the evidence of four witnesses: the complainant, her mother, Dr Tukwayo, and the investigating officer, Sergeant Abrahams. The complainant testified via closed-circuit television, assisted by an intermediary.

[5] The appellant testified in his own defence and did not call any witnesses.

THE EVIDENCE ON CONVICTION

[6] The complainant testified as follows: She knew the appellant, who had resided across from her and her mother at their hostel. They would occasionally converse about topics such as school and cooking. She regarded the appellant as

an older brother. The complainant was uncertain whether the appellant was aware of her age but she testified that he was aware that she was in school.

[7] The complainant's account of the events on the day in question was as follows: she had attended a party and returned home by 21:00. She went to bed but awoke feeling nauseous at approximately 23:00. After using the bathroom, she encountered the appellant, who asked her to assist him with the light in his room. Upon entering his room, the appellant closed the door, pushed her onto his bed, and covered her mouth with his left hand. He then removed her shoes and clothing, proceeded to penetrate her, and raped her for approximately 30 minutes.

[8] The complainant testified that she was crying and calling for her mother. Her mother heard her cries, banged on the door, and eventually kicked it down. She stated that the appellant looked towards the door and ceased the assault. Her mother pushed the appellant off her and instructed the complainant to return to their room, after which the mother physically assaulted the appellant.

[9] The complainant reported the incident to the police the following day and underwent a physical examination at Heideveld Hospital. In her statement to Detective Sergeant Abrahams, given the day after the incident, she confirmed that the complainant conveyed to her that the appellant had penetrated her for a duration of 30 minutes and had ejaculated.

[10] The complainant's mother testified that she had known the appellant for two years, as their rooms were situated opposite one another. She was unaware that the complainant and the appellant had ever spoken. She confirmed that the complainant returned home at 21:00 and went to bed. Later that evening, the complainant awoke feeling dizzy and went to the toilet. At approximately 23:00, the appellant knocked on her window, requesting that she unlock the hostel door, which she did before returning to her room.

[11] When she later went to look for the complainant, she inquired with the appellant whether he had seen her. The appellant peeped through his door and responded that he had not. Shortly thereafter, she heard the complainant crying and

noticed a radio being turned up. She then heard her daughter scream, "Mama." In response, she kicked down the door and found the appellant on top of the complainant, making movements on top of her. She testified that the appellant was raping the complainant. She pushed him off, instructed the complainant to return to their room, and proceeded to assault the appellant. Although she did not witness the actual penetration, as the appellant had his back to her and was beneath a blanket, she testified that his penis felt wet when she pulled him off the complainant.

[12] Dr Tukwayo testified on behalf of the State. She is a medical practitioner who examined the complainant on 22 November 2021, a few hours after the incident, and completed the J88 medico-legal report. Her testimony was based on the information recorded in the report. She collected samples from the complainant, which were subsequently sent to the laboratory for testing.

[13] She observed a fresh tear on the posterior fourchette, an area of the external genitalia, and another fresh tear at the 6 o'clock position on the hymen. Dr Tukwayo testified that such injuries are typically caused by forced vaginal penetration, either by a penis or a finger, and described them as blunt-force trauma injuries consistent with forced entry by an erect penis. The freshness of the injuries suggested they had occurred within the preceding 72 hours. She further testified that whether ejaculation occurred had no bearing on her examination or findings, and that her report only reflects the history provided by the patient.

[14] The appellant testified in his defence. He denied having raped the complainant and denied having a close relationship with her. He claimed not to know her age, although he admitted that she was still in school.

[15] He testified that on the evening in question, he knocked on the complainant's mother's window to be let into the hostel. After she opened the door, he went to the bathroom, where he found the complainant lying next to the toilet. According to him, she told him that she was drunk and afraid to go home because her mother would be angry and beat her. She allegedly asked if she could sleep in his room until the following morning. Feeling sorry for her and not wanting her to get into trouble, he allowed her to stay.

[16] He claimed to have left her in his room while he went to the toilet, fetched money, and left to buy beer. When he returned, the complainant was awake and sat up. They were sitting together on his bed when he asked her when she planned to leave. The complainant then allegedly begged him not to disclose her whereabouts to her mother, who was at that moment walking through the corridor, looking for her. According to the appellant, the complainant whispered in his ear not to say anything because she was drunk.

[17] He denied penetrating or raping the complainant. He testified that it was when the complainant's mother kicked down the door that prompted the complainant to begin crying. The appellant testifies that he had shorts on when the complainant's mother entered the room and that she pulled his shorts and his penis. He stated that the complainant was wearing only her underwear and that her clothes were on a chair, which she had removed herself. He confirmed that the complainant's mother proceeded to assault him.

[18] The regional magistrate found the complainant's evidence to be clear, satisfactory, and consistent with the probabilities. She was regarded as a reliable witness. Her version of events was corroborated by both her mother's testimony and the medical evidence presented by Dr Tukwayo. To the extent that there were contradictions between the evidence of the complainant and her mother, the regional magistrate held that such discrepancies were not material. The appellant's version was rejected by the regional magistrate.

[19] In his grounds of appeal, the appellant raised the issue of the conflicting versions provided by the complainant and her mother concerning the events of the day in question. He contended that both he and the complainant had consumed alcohol on the day of the incident. The appellant submitted that the discrepancies in their respective testimonies were material. He noted that the complainant's mother was unaware that the complainant and the appellant had previously interacted. She was also unwilling to concede that her daughter had been under the influence of alcohol on the day in question. Furthermore, while the mother testified that she caught the appellant in the act of raping the complainant, the complainant's version

was that the appellant had stopped the assault by the time her mother entered the room. The appellant also pointed to a contradiction regarding the issue of ejaculation: although the complainant stated in both her police statement and to the doctor that the appellant had ejaculated, she altered her version during her testimony.

[20] The appellant submitted that the court a quo misdirected itself in accepting the complainant's evidence as honest and reliable, despite material contradictions between her version and that of her mother. He argued that the court erred in rejecting his version, particularly in circumstances where there were no internal inconsistencies in his account of the events surrounding the alleged rape. The appellant further contended that the J88 medical report did not corroborate the complainant's evidence as it did not identify him as the perpetrator. The DNA report in respect of the evidence collected by Dr Tukwayo was not available at the trial. He also submitted that the court ought to have approached the evidence of the complainant, as a single child witness, with the requisite caution.

EVALUATION

[21] It is well established that an appeal court will be slow to interfere with the factual findings of a trial court unless such findings are shown to be clearly wrong. See in this regard *S v Francis*¹ where it was held that:

'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 trial 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

¹ *S v Francis* 1991 (1) SACR 198 (A) at 198j - 199a.

the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony.'

[22] The limitation on an appeal court's powers was again confirmed by the Supreme Court of Appeal in *S v Crossberg*²:

"It is indeed so that this court's powers to interfere on appeal with the findings of fact of a trial court are limited."

[23] The evidence of the complainant's mother corroborated the complainant's version in respect of the events immediately preceding and following the alleged rape. However, she was unable to provide direct evidence corroborating the complainant's account of the rape itself, as she was not present during its occurrence. In the room, she found the appellant naked, under a blanket and positioned on top of the complainant, making thrusting movements. She then proceeded to assault the appellant by grabbing his exposed penis.

[24] The complainant's evidence was credible and of a high standard. The record reflects that she responded to questions directly, without hesitation, and did not evade answering. The complainant's recollection of the events was clear. Where her evidence differed from that which was set out in her statement, was adequately addressed by the complainant. The medico-legal evidence supported her allegation that she had been raped. Whilst it is so that the J88 does not go as far as identifying the appellant, it does confirm that the complainant was penetrated.

[25] The appellant's version differed in cross examination from the version that was put to the complainant by his legal representative relating to the complainant showing affection to the appellant. The appellant was himself a single witness. He did not call any witness to corroborate his version of events, despite having had the opportunity to do so. No evidence was led to support his claim or to cast doubt on the complainant's version. In particular, he failed to present any witness who might have confirmed his account or suggested that the perpetrator could have been

² *S v Crossberg* 2008 (2) SACR 317 (SCA) at para 149.

someone else. The absence of corroboration weakens his defence and leaves the complainant's evidence largely unchallenged. Whilst the primary issue in this matter centres on the timeline of events as reflected in the respective versions before the court, it is not in dispute that the complainant was present in the appellant's room. It is also not disputed that she did not consent to sexual intercourse.

[26] The appellant's version was so improbable and inconsistent with the overall probabilities that it could not reasonably be true. His testimony was contradicted by the complainant, her mother, and the medical evidence. Viewed in its entirety, his version lacked credibility and had to be rejected—particularly in light of the objective medical evidence, which remained undisputed. His version could not be reconciled with either the medical findings or the corroborative accounts of the complainant and her mother. This Court agrees with the findings of the trial court.

[27] The court finds no basis to interfere with the regional magistrate's judgment on conviction. The magistrate duly applied the necessary cautionary rules applicable to the evidence of single witnesses and child witnesses.

[28] The appellant has failed to persuade this Court to uphold his appeal against conviction.

EVIDENCE ON SENTENCE

[29] The appellant was convicted of contravening section 3 of the Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007 in particular section 3(b)(i), the rape of a victim under the age of 18 years. Section 51(1) of the Criminal Law Amendment Act 105 of 1977 (hereafter referred to as 'the Act') provides for life imprisonment as the prescribed sentence for certain aggravated instances of murder and rape. Part I of Schedule 2 contains the relevant circumstances and refers, *inter alia*, to murder when committed by a person, acting in the execution or furtherance of a common purpose or conspiracy, and rape where the victim is a person under the age of 18 years. Although it is prescribed, life imprisonment does not have to be imposed in every case. This is because section

51(3) of the Act provides that a lesser sentence than life imprisonment may be imposed if the court is satisfied that substantial and compelling circumstances exist.

[30] When determining whether there are substantial and compelling circumstances to justify a lesser sentence a trial Court must consider all factors that may reduce the blameworthiness of the offender and mitigate culpability to come to the conclusion whether substantial and compelling circumstances exist or not. This aspect was set out clearly in the well-known decision of *S v Malgas*³. The Court summarised its approach as follows:

“A. Section 51 has limited but not eliminated the court’s discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances

C. 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.

D. The specified sentences are not to be departed from lightly or 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.

E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity

³ *S v Malgas* 2001 (1) SACR 469 (SCA) at 470-471.

of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided."

[31] The regional magistrate in imposing sentence, applied the triad of factors established in the well-known case of *S v Zinn*⁴, which requires consideration of the crime, the offender, and the interests of society. The principle was articulated as follows in that case:

"It then becomes the task of this Court to impose the sentence which it thinks suitable in the circumstances. What has to be considered is the triad consisting of the crime, the offender, and the interests of society."

⁴ *S v Zinn* 1969 (2) SA 537 (A) at 540G.

[32] The regional magistrate considered whether substantial and compelling circumstances existed to justify a deviation from the prescribed minimum sentence. She took into account the appellant's personal circumstances, including his age. However, she also considered the enduring impact on the complainant, noting that the trauma of the rape would leave lasting emotional scars.

[33] The magistrate cited appropriate legal authority in support of her conclusions. She found no basis to depart from the prescribed sentence but, as an act of mercy, imposed a sentence of 18 years' imprisonment rather than life imprisonment. She further ordered that the appellant's details be entered into the National Register for Sex Offenders, declared him unsuitable to work with children, and found him unfit to possess a firearm.

[34] Sentencing requires a careful balancing of aggravating and mitigating factors. The sentencing court must weigh the seriousness of the offence, the personal circumstances of the offender, the interests of society, and the impact on the victim, while also exercising the requisite measure of mercy dictated by the particular circumstances.

[35] This Court has carefully considered the sentence imposed by the regional magistrate. Her approach was both rational and balanced. She appropriately considered the crime committed, the interests of society, and the appellant's personal circumstances. Her reasoning reflects the principles of deterrence, prevention, retribution, and rehabilitation. She also demonstrated mercy in reducing the sentence from the prescribed minimum. All relevant factors were properly evaluated in accordance with established legal principles and case law. In the context of this matter, the sentence of 18 years' imprisonment does not induce a sense of shock. This Court finds no irregularity or misdirection in the sentence imposed by the court a quo.

[36] In the circumstances, I propose the following order:

ORDER

[37] The appeal is dismissed, and both the conviction and the sentence are confirmed.

E JONKER
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

C FORTUIN
JUDGE OF THE HIGH COURT

Appearances:

For Appellants: Adv L Adams

For Respondent: Adv JJ Seethal