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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE No: A07/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: YES/NO

SIGNATURE: DIAMOND AJ

DATE: 27/8/2025

In the matter between:

MOSES NTOAMPE THEMA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

DIAMOND AJ:

[1] The Appellant, who was an accused in the Regional Court for the Regional Division of Limpopo held at Polokwane, was charged on the 29th of May, 2023, with two counts of rape, in that the Appellant was guilty of the crime of contravening the provisions of Section 3 read with Sections 1, 55, 56 (1), 57, 58, 59, 60, and 61 of the Criminal Law Amendment Act 32 of 2007, Sexual Offences and Related Matters also read with the provisions of sections 256, 257, and 261 of the Criminal Procedure Act 51 of 1977, and part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1977.

[2] The charge read that on or about January 2019, and near Seshego, the accused unlawfully and intentionally committed an act of sexual penetration with two nine-year-old Complainants, and, it is added on the charge sheet, without their consent.

[3] If convicted, the accused stood to be sentenced to a minimum of life imprisonment within the context of the above statutory provisions.

[4] The accused entered a plea of not guilty in respect of both charges.

[5] The state called as witnesses the two minor Complainants as well as their mothers.

[6] The accused testified on behalf of himself and called no further witnesses.

[7] The Appellant was eventually found guilty on the 3rd of October 2023 on the two counts, both contravening the provisions of section 3 of Act 32 of 2007, read with the provisions of section 51(1), Schedule 2, Part 1(b)(i) of Act 105 of 1997, in that the Complainants were proved to be 9 years old at the time of the commission of the offence.

[8] The regional court sentenced the Appellant on the 28th of November 2023 to two terms of life imprisonment.

[9] The Appellant noted an appeal to this court on the 11th of December 2023 and noted an appeal against both the conviction and the sentence imposed by the regional court.

[10] The first State Witness, one A[...] M[...] ("M[...]") is the biological mother of the second state witness, which will be called in this judgment, Complainant 1.

[11] M[...] testified that during January 2022 that the third state witness one T[...] R[...] G[...] ("G[...]") (G[...] is the biological mother of the Fourth State witness and will be called in this judgment, Complainant 2) approached her at her homestead in Seshego and had a discussion with her regarding the two Complainants.

[12] M[...] testified that G[...] told her that she, G..., sent Complainant 2 to buy tomatoes at a certain shop. When Complainant 2 returned to her, she had both tomatoes and perfume with her.

[13] When G[...] made this report to M..., both the first and the second Complainants were present at the homestead of M[...] in Seshego.

[14] G[...] reported that she confronted the Complainant 2 with the fact that she returned with perfume to her home, and it is at that stage that the Complainant 2 reported to G[...] that she and the first Complainant were raped in 2019.

[15] At this early stage of the record, the entire issue of the perfume is left hanging in the air, rather unsatisfactorily.

[16] The record continues to show¹ that both M[...] and G[...] then proceeded to the homestead of the Appellant (nicknamed "*Blah*"), since the Appellant was the person pointed out by the two Complainants as the person who raped them in 2019.

[17] The record shows that M[...] described the Appellant to be her neighbor living nearby, and she had known him for many years prior to 2019.

¹ During testimony, the third state witness, G..., testified that she and Complainant 2 together with her husband had previously attempted to approach the appellant but were not successful.

[18] At the homestead of the Appellant, M[...] and G[...] confronted the Appellant with the allegations of the First and Second Complainants.

[19] The Appellant denied the allegations of the two Complainants. There were discussions regarding certain details of the incident, to which I will return later in this judgment.

[20] M[...] then testified that after the denial of the Appellant,

"We then took the matter to the police."²

[21] The record is silent as to exactly when and how M[...] and G[...] reported the matter to the police, but it apparently happened on the same day.

[22] The sequence of events that occurred after the police arrested the Appellant is not satisfactory clear from the record.

[23] The police apparently then took the accused to Robert's spaza shop, that is the shop where Complainant 2 bought tomatoes.

[24] The legal representative of the accused put it to M[...] that the reason why they visited the spaza shop was because the Complainants 1 and 2 insisted that the accused was the one that gave them the perfume at the particular Spaza shop, and apparently, the accused wished to investigate that version. He consistently denied that he gave any of the children any perfume.

[25] It seems further to be common that the two Complainants conceded while at the spaza shop, that a taxi driver gave the perfume to Complainant 2 and it was not bought at the spaza shop, nor was it given by the Appellant to Complainant 2.

² P. 130 record.

[26] While the sequence of events at the homestead of the Appellant, as well as the events thereafter and the visit at the spaza shop is a bit vague and unsatisfactory on the record, the testimony of the two Complainants as to what happened on the day of the alleged incident, was very accurate and consistent.

[27] She testified that she and Complainant 2 were friends in 2019.

[28] The second state witness, that is Complainant 1, testified that during January 2019, she and Complainant 2 prepared to go to church.

[29] She testified that in the process of preparing for church³, she indicated to Complainant 2 that they should first visit the homestead of her mother at Chuvele.

[30] While on their way to the house of Complainant 1, they passed the shack of the Appellant. The Appellant requested them to visit him after they had gone to church.

[31] She testified that she knew the Appellant since her mother frequently sent her in the past to the Appellant's shack to borrow garden tools.

[32] She testified further that the Appellant's shack is next to their homestead.

[33] After they attended church, both Complainant 1 and Complainant 2 returned to their grandmother's place of residence.

[34] Around 5:00, she went to the homestead of the second Complainant and reminded the second Complainant that the Appellant requested them to visit him at his shack. And they decided to proceed to the shack of the Appellant.

[35] When they reached the shack of the Appellant, they found him seated on a crate outside the door of the shack.

³ The record is a bit unclear on the timing of this visit.

[36] The Appellant thereafter invited them into the shack, and he closed the door after which he consecutively raped first Complainant 2, and thereafter Complainant 1.

[37] I will not give any detailed description of how the rape took place in this judgment. However, I believe the following elements are important.

- Both Complainants one and Complainant two testified that there was an iron bed standing upright against the wall of the shack.
- Both testified that they saw a bucket, a primus stove, and certain tools such as a hammer, nails, and a screwdriver, were in the shack.
- Both testified that the Appellant threw a blanket on the floor and ordered the two Complainants to lie on their backs, after which the rape took place.
- Both identified the blanket as being a brown blanket.
- Both the Complainants were describing the way the rape took place, and their version substantially corroborated one another in all material respects.

[38] G[...] testified and confirmed that she confronted Complainant 2 with the perfume that she returned from the shop after having purchased tomatoes. She also confirmed that Complainant 2 lied to her about the origin of the perfume, initially indicating that she picked it up along the road. She confronted Complainant 2 with this version, stating that the version is unrealistic. Harsh words fell between her and Complainant 2. At some stage, she indicated to Complainant 2 that she wanted the truth, and eventually, Complainant 2 indicated that it was the Appellant that gave her the perfume and that the Appellant slept with her.

[39] Complainant 2 indicated that Complainant 1 was also raped, and it was at that stage that G[...] and Complainant 2 proceeded to the homestead of M[...], and the

sequence of events as testified by M[...] and which was described above, then unfolded.

[40] In the notice of appeal, the Appellant made several submissions: That the State did not prove the guilt of the Appellant beyond reasonable doubt; that the State witnesses gave evidence in an unsatisfactory manner, that there were improbabilities inherent in the State's version, that there were contradictions in the testimony of the two minor children.

[41] To assess the grounds of appeal relied on by the Appellant, it is necessary to consider the approach that the court should take when a court is confronted with contradictions in evidence, as well as inaccuracies and sometimes even untruthfulness.

[42] In the case of *S v PHK*⁴ the court summarised the approach that was articulated in the case of the *State versus Mafaladiso and Andere*⁵:

"In Mafaladiso it is summarised in the headnote that the juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement), is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement, which can stand in the way of what precisely was meant, and that

⁴ 2003 (2) SACR 234 (FB).

⁵ 2003 (1) SACR 583 (SCA).

the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness, and not every contradiction or deviation, affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made; the proven reasons for the contradictions; the actual effect of the contradictions with regard to the reliability and credibility of the witness; the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness's evidence, amongst other factors, are to be taken into consideration and weighed up. Lastly, there is the final task of the trial judge, namely, to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not, and to decide whether the truth has been told, despite any shortcomings. (At 593e - 594h.)"

[43] To balance all the above considerations requires that the court shall act with "judicial wisdom."⁶

[44] Hence, for an Appellant to rely on contradictions, improbabilities, and even elements of untruthfulness, such an Appellant must indicate clearly where the court *quo* erred. It is insufficient for an Appellant simply to point to the mere existence of contradictions, improbabilities, and unsatisfactory aspects in the evidence of the case.

[45] What is required of an Appellant is to indicate how the above shortcomings impact on the basic narrative of the case of the state, on which the state relies on for the conviction of an accused.

[46] In my view, the following remark of the Honourable Regional Magistrate is highly significant.⁷

⁶ PHK Par 21.

"The Complainants reported the incidents in 2022, more or less three years after the commission of the offence, and they only testified in 2023. It is highly improbable that the two Complainants at the respective ages of whether they were 12/13 or 13/14, would have the mental capacity to crafted(sic) their evidence to corroborate one another in such minute detail, it does not appear that they have been taught or coach (sic) to relay this specific version in court."

There is nothing to indicate that the children had any motives to implicate the accused falsely. Complainant 2 led her mother directly to the house of the accused. Complainant 2's mother did not know the accused at all. Complainant 1 knew him as her mother's neighbour Blah. It is also not disputed that the accused goes by the nickname Blah and that Complainant 1 was able, upon the description, to immediately identify the accused as Blah."

[47] It is furthermore significant that the Honourable Regional Magistrate devoted serious attention to those instances of inconsistencies and improbabilities as they appeared from the witnesses of the state's case.⁸

[48] The Honourable Regional Magistrate stated the following:⁹

"Discrepancies between the evidence of the witnesses related to the evidence of the victims about their return from church, when they would have gone to the accused, and upon their return, did they directly pass by the house of the Complainant, or did they go to the house of one of the Complainants first? And only later during the afternoon, whether the accused gave them one or two pillows to lay on."

[49] The Honourable Regional Magistrate proceeded as follows with regard to the discrepancies identified by the defense:

⁷ P. 484 record.

⁸ P. 488 - 490 record.

⁹ P. 489 record.

"Neither of these discrepancies is material to the extent that they should warrant the rejection of the evidence of witnesses. It is tried law that not every error will affect the credibility of a witness. The witnesses testified about a year and a half after the accused was apprehended and confronted and apprehended."

[50] I agree with the Honourable Regional Magistrate.

[51] It also needs to be remarked at this stage that the evidence of the state was presented in a somewhat clumsy manner, and that factor should be taken into account when assessing some of the responses of the witnesses of the State.

[52] Be that as it may, I agree with the Honourable Regional Magistrate that those instances of discrepancies or contradictions (if indeed there are such instances) are not nearly enough to drown out the overwhelming inferences to be drawn from the testimonies Complainant 1 and 2 that the rapes indeed occurred, and the manner and detailed descriptions of how it occurred.

[53] In my view, the appeal against the convictions should be dismissed.

[54] The Appellant also noted an appeal against the sentences imposed on him, that is, two terms of life imprisonment.

[55] The Notice of Appeal states as follows:

"An effective term of life imprisonment is strikingly inappropriate in that:

4.1 The Court erred in not finding that, given the circumstances of the Appellant, he can be rehabilitated into a law-abiding member of society.

4.2 The Court further erred in over-emphasizing the following factors:

4.1 The seriousness of the offence.

4.2 The interests of society.

4.3 Prevalence of the offence.

4.4 The deterrent effect of the sentence.

4.5 *The retributive element of sentencing.*

4.6. *The rape statistics in the country."*

[56] The notice of appeal, furthermore, states that the learned magistrate overlooked the fact that the appellant was a first offender.

[57] In argument, the legal representative of the Appellant added that it should be regarded as a mitigating factor that the Appellant was 58 years old, that the Complainant suffered no physical injuries, and that the offence was committed in a non-violent manner.

[58] Section 51(1) Schedule 2(1) of the General Law Amendment Act 105 of 1997 provides that the minimum sentence for a first offender is a sentence of life imprisonment unless the court is satisfied that substantial and compelling circumstances exist which will justify the imposition of a lesser sentence.

[59] The court below considered the following mitigating circumstances when considering imposing the sentence:

- The court below took notice that the Appellant was 58 years old at the date of the sentence and considered this age as a mitigating factor, but not a bar to a sentence of imprisonment.
- The accused's wife passed on in 1994, and he has three adult children. The accused still supported his grown children financially, and the court considered the factor that a productive member of society contributing to the family's financial support is a factor that might play some role when the sentencing court is considering whether or not to impose a significant period of direct imprisonment.
- The accused reported that he suffers from an undisclosed chronic disease.
- The accused has already spent 23 months in custody awaiting his trial.

[60] The court below considered aggravating circumstances. The following aggravating circumstances were considered:

- The court must take into account the nature of the crime and the gravity of the offence.
- The court remarks that in that regional division, more than 50% of the matters on the court roll is sexual and gender-based violence with frequent incidences of sexual offences related to minor children.
- That there are disproportionately high levels of violence against women and children which has immeasurable and far-reaching effects on the health of the nation and its economy.
- That despite severe underreporting, there are 51 cases of child victimisation per day.
- The court refers to authority where it was stated that rape of women and children are rampant in South Africa. It has reached an alarming proportion.

[61] After having considered the above mentioned and further factors in more detail, the court could not find any reasons that would constitute compelling and substantial reasons to justify a deviation from the prescribed minimum sentence. The court states that the aggravating factors outweigh the mitigating factors.

[62] The only serious submission that the Appellant made on appeal with regard to his sentence is that the Honourable Court below did not give enough weight to his age of 58 years.

[63] The Supreme Court of Appeal of South Africa in a judgment, *the State v Solly Ramoba*¹⁰ ("*Ramoba*"), stated the following:

"It is trite law that the Court of Appeal may only interfere with a sentence imposed where it induces a sense of shock or is tainted by misdirection."

[64] In that judgment, the Supreme Court of Appeal cited a paragraph from the *State v Salzwedel*¹¹ and others in which it was held that,

"an appeal court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is disturbingly inappropriate or totally out of proportion to the gravity or magnitude of the offence or sufficiently disparate or vitiated by misdirections of a nature which shows that the trial court did not exercise its discretion reasonably."

[65] In the case of *Ramoba*, an accused who was 53 years old was sentenced on several counts. The net effect of the sentence was 52 years' imprisonment. That means that the effective term of sentencing was deemed to be 52 years' imprisonment, which was deemed to be shockingly inappropriate since it is generally accepted that a sentence designed to surpass the natural life span of an offender (which might happen in the case of *Ramoba*) ought not to be imposed. The Court set aside the sentences imposed by the Court below and replaced it with a 28-year effective term of imprisonment.

[66] The only significant submission that the Appellant's legal representatives made on appeal was that the advanced age (if the age of 58 years can be regarded as advanced) was not properly taken into consideration when the Court below considered the question whether there were compelling and substantial reasons to deviate from the mandatory life sentences.

[67] It is apposite at this stage to consider the effect of sentencing by a court on an accused.

¹⁰ 2017 (2) SACR 353 (SCA).

¹¹ 1999(2) SACR 586 (SCA).

[68] In the often-quoted judgment of *State v Mhlakaza and another*¹², the Supreme Court of Appeal per a judgment delivered by Justice Harms specifically addressed the role of a sentencing court regarding the duration of imprisonment. Justice Harms stated as follows:

"The function of a sentencing court is to determine the maximum term of imprisonment a sentenced person may serve; it is not, except in a special case, its function to determine how long the person will actually serve. This is a matter for the prison and parole authorities."

[69] In a judgment of the Appellate Division in the case of *State v Nkosi Hefer* JA¹³ stated the following with regard to the circumstances of the accused in that case as well as the approach to sentencing (what follows is my translation of the Afrikaans judgment. The original Afrikaans appears in the footnote¹⁴:

¹² 1997 (1) SACR 515 (SCA).

¹³ 1993 (1) SACR 709(A).

¹⁴ Die omvang, aard en erns van appellant se wandade spreek vir sigself. Wat veral opval is sy brutaliteit en sy gevoelloosheid teenoor sommige van sy slagoffers. Respek vir hulle lewens en liggame het hy sekerlik nie getoon nie en vir lulle goedere natuurlik nog minder. Die byna dierlike wyse waarop hy die luste van sy vlees bevredig het, moet ook nie misgekyk word nie. Dit, en sy impulsiewe gewelddadigheid waarmee hy volhard het selfs na sy aanvanklike arrestasie en ontsnapping terwyl hy 'n voortvlugtende van die gereg was, dui sterk daarop dat sy straf nie alleen as boetedoening moet dien nie, maar dat sy vonnis, ter beskerming van die gemeenskap, hoofsaaklik gerig moet wees op die voorkoming van dergelike optrede in die toekoms. Sou daar enige werklike vooruitsigte op hervorming gewees het, mag die resultaat anders gewees het, maar daar is geen aanduidings dat die appellant vatbaar is daarvoor nie. Dit is waar dat hy horn, na sy eerste teregwyssing gedurende 1973, vir ongeveer 15 jaar weerhou het van ernstige misdaad. Dit is ook waar dat die vlaag misdade wat tans ter sprake is, gepleeg is nadat hy vrygelaat is uit die gevangenis en gevind het dat hy sy werk kwyd was. Hy het egter nie probeer te kenne gee dat al sy oortredings uit nood gebore was nie en, gesien die aard daarvan, sou so 'n aanspraak in elk geval onsinnig wees. Hy het eenvoudig doelbewus besluit op 'n loopbaan as beroep misdadiger en daarmee volgehou totdat hy aangekeer is. Hy het 'n geharde rampokker geword wat gewoon is om sy wil gewelddadig te laat geld. Daar is geen rede om enigsins te vermoed dat hy in die toekoms 'n ander weg sal inslaan nie. Daarom kan effektiewe beskerming slegs aan die gemeenskap verleen word deur te probeer verseker dat hy nie weer vrygelaat word nie.

Die Verhoorregter het ongetwyfeld dieselfde doel voor oë gehad met sy weiering om toe te laat dat die vonnisse op die afsonderlike aanklagte gelyktydig uitgedien word. Ek verkies egter 'n eenvoudige vonnis van lewenslange gevangenisstraf wat meer realisties is omdat di! nie een is wat die appellant nooit sal kan uitdien nie en boonop sal meebring dat daar - weens die bepalings van art 64 van Wet 8 van 1959, soos gewysig - verantwoordelike beheer oor sy aanhouding behoort te wees. Soos aangedui in *S v Young* 1977 (1) SA 602 (A) op 610G kan daar, anders as wat die geval met verhoorhowe is, nie probleme ontstaan wanneer hierdie Hof 'n gesamentlike vonnis ople vir meerdere oortredings wat tesame geneem word vir doeleindes van vonnis nie. Dit is wat ek van voorneme is om te doen.

"The scope, nature, and seriousness of the Appellant's misconduct speak for themselves. What is particularly striking is his brutality and his lack of feeling towards some of his victims. He certainly did not show respect for their lives and bodies, and naturally even less for their possessions. The almost animal-like manner in which he satisfied the lusts of his flesh should also not be overlooked. This, and his impulsive violence with which he persisted even after his initial arrest and escape while he was a fugitive from justice, strongly indicate that his punishment should not serve merely as retribution, but that his sentence, for the protection of the community, should be aimed primarily at preventing such conduct in the future. Had there been any real prospects of reform, the result might have been different, but there are no indications that the Appellant is amenable to such reform. It is true that, after his first conviction during 1973, he refrained from serious crime for approximately 15 years. It is also true that the spate of crimes currently under discussion was committed after he had been released from prison and found that he had lost his job. He, however, did not attempt to suggest that all his offences were born out of necessity and, given their nature, such a claim would in any event be absurd. He simply and deliberately decided on a career as a professional criminal and persisted in it until he was apprehended. He became a hardened robber accustomed to enforcing his will violently. There is no reason to suspect in any way that he will choose a different path in the future. Therefore, effective protection can only be afforded to the community by attempting to ensure that he is never released again.

*The Trial Judge undoubtedly had the same objective in mind with his refusal to allow the sentences on the separate charges to run concurrently. I, however, prefer a single sentence of life imprisonment, which is more realistic because it is not one which the Appellant will never be able to serve, and in addition will mean that due to the provisions of section 64 of Act 8 of 1959, as amended - there ought to be responsible control over his detention. As indicated in *S v Young* 1977 (1) SA 602 (A) at 610G, unlike the position with trial courts, there can be no problems when this Court imposes a combined*

*sentence for multiple offences taken together for purposes of sentence. That is what I intend to do."*¹⁵

[70] Harms J. A in the case of Mhlakaza also made the following remark on page 521G of the report:

"Apart from the fact that courts are not entitled to prescribe to the executive branch of government as to how and how long convicted persons should be detained (see the clear exposition by Kriegler J in S v Nkosi (1), S v Nkosi (2), S v Mchunu 1984 (4) SA 94 (T)) courts should also refrain from attempts, overtly or covertly, to usurp the functions of the executive by imposing sentences that would otherwise have been inappropriate.

[71] In my view, the above remarks of the Appellate Division and Supreme Court of Appeal should be understood as follows for the purposes of sentencing in this case: -

[72] The Correctional Services Act, 1998 (Act No. 111 of 1998) stipulates as follows in Section 73(6)(b)(iv):

"(b) A person who has been sentenced to-

(i) periodical incarceration must be detained periodically in a correctional centre as prescribed by regulation;

(ii)

(iii)

(iv) life incarceration for an offence committed after the commencement of Chapters IV, VI and this Chapter may not be placed on day parole or parole until he or she has served at least 25 years of the sentence,."

and further in section 73 (6)(b)(vi):

"any term of incarceration, excluding persons declared dangerous criminals in terms of section 286A of the Criminal Procedure Act, may be

¹⁵ Emphasis added.

placed on day parole or parole on reaching the age of 65 years provided that he or she has served at least 15 years of such sentence."

[73] It is therefore clear, in my view, that a sentence of life imprisonment does not entail imprisonment for the rest of the life of such a sentenced person.

[74] The question regarding the length of imprisonment of a sentenced person depends on the discretion of the executive branch of government in accordance with their parole policies and legislative context.

[75] In my view, the judgments of *Mhlakaza* and *Nkosi* referred to above, underscore the principle that a court should resist the temptation to circumvent the discretion of the executive authority, to release a person on parole, by carefully crafting a sentence that would ensure indefinite detention and incarceration of a sentenced person.¹⁶

[76] It is against this backdrop that the remarks of the court in *Ramoba* should be understood. In that case, the court below crafted a sentence that would, if implemented, have the net effect of an incarceration period that would extend the anticipated lifespan of the accused.

[77] The Court in *Nkosi*, when confronted with the same scenario, indicated, per the judgment of Hefer JA, that a judgment of life imprisonment does have inbuilt safeguards of proper supervision as a result of the stipulations of the 1959 Correctional Service Act (Act 9 of 1959). For that reason, he preferred a simple life sentence to compounded sentences for several crimes simultaneously.

[78] The central question in this case is whether substantial and compelling circumstances exist which will justify the imposition of a lesser sentence. It is important to note that in the cases mentioned above, that is, the case of *Nkosi*, and the court did not consider the appeal against the sentence against the backdrop of a

¹⁶ In this regard, see also the following journal article: Reform ACJ, 'Indefinite Imprisonment in South Africa :The Difference between Life and Indefinite Imprisonment'
<<https://uwcscholar.uwc.ac.za/bitstreams/b5c35279-ac08-4cab-b488-ebf1f12a2alb/download>> accessed 15 August 2025.

prescribed minimum sentence, as is the case in this appeal. In the case of *S v Pillay*, the court described substantial and compelling circumstances as follows:

*"A court must consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders. For circumstances to qualify as substantial and compelling, they need to be exceptional in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender."*¹⁷

[79] Henriques J sates further in *Pillay* that where a court is convinced - that after considerations of all the factors – an injustice would be done if the minimum sentence is imposed, then the court should characterise such factors that would lead to an injustice and that would constitute substantial and compelling circumstances to deviate from the prescribed minimum sentence.

[80] Now, it can certainly be argued that a sentence that is designed to outlast the life expectancy of an accused person is in itself an injustice and for that reason, such a sentence would qualify as substantial and compelling reason to deviate from the prescribed minimum sentence.

[81] The question therefore in this case is this: If a person aged 58 is sentenced with life imprisonment, (and in this instance, two sentences of life imprisonment that will be served concurrently), can that be regarded as a sentence which will have the net effect of a term of incarceration stretching beyond the anticipated life expectancy of the accused. I do not think so. In fact, the legislative context within which the Department of Correctional Services can detain the accused is prescribed by legislation and parole policies, and such a sentence does not mean the detention of the accused for the rest of his life. Had it been otherwise, then all life sentences would have been inappropriate, since any life sentence would be for the natural life of a sentenced person, irrespective of his age.

¹⁷ Emphasis added.

[82] The question of the age of a convicted person has received significant attention in judgments in the past.

[83] *Carnelley M and Hootor S*,¹⁸ discuss the question of age and sentencing in South African criminal law. They state as follows:

"It has been said that the rationale for the reduction in sentence is compassion. It "evokes a note of compassion in considering the bleak recompense of imprisonment in the afternoon of his years" (S v Heller supra 55C-D). Furthermore, old age can sometimes be seen as a second childhood, a time when some elderly can become less responsible. Added hereto, they are more sensitive to some forms of punishment, especially imprisonment (Van der Merwe 5-26). Van der Merwe notes that "this factor really means that the sensitivity of the offender to punishment is higher, that he would suffer more given a specific quantum of punishment, and that imprisonment for a certain period might really turn out to be life imprisonment" (5-26A), although the courts have warned that it should guard against misplaced pity (S v Munyai supra 255i-j)."

[84] When all the above is taken into consideration, the question remains whether this Court is of the opinion that there are substantial and compelling reasons to deviate from the prescribed minimum sentence.

[85] Although the sentence imposed by the court below can certainly be seen as a heavy sentence, it is in my view not a sentence in itself that leads to an injustice within the context of the meaning in *Pillay* above, given the circumstances of the case and given the ages of the victims at the date that the offences took place.

[86] I also fail to see that any of the factors which are relevant to the sentence occur seldomly or are rare. On the contrary, it is unsettling, as was pointed out by the court below, that this type of offense (where minor children are the victims) occurs

¹⁸ *Advanced Age as a Mitigating Factor*· (2008) 29 *Obiter* 268.

with surprising frequency in South Africa as a whole, but also within the jurisdiction of the regional court below.

[87] In my view, therefore, the appeal against the sentence should also be dismissed.

I consequently make the following order:

The appeal against both conviction and sentence is dismissed.

DIAMOND AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

I AGREE

KGANYAGO J
JUDGE OF THE HIGH OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

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Date heard: 28th March 2025

Electronically circulated on: 27/08/2025