



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

High Court Case No: **A202/24**

DPP Reference No: **10/2/5/1/3-71/24**

Lower Court Case No: **GSH (2) 09/23**

In the matter between:

WILLIAM WAGNER

Appellant

and

THE STATE

Respondent

Heard on: 14 March 2025

Delivered on: 7 October 2025

Coram: Le Grange J et Khoza AJ

ORDER

The following order is made:

1. The appeal against conviction and sentence is dismissed.

JUDGMENT

Khoza AJ (Le Grange J concurring)

Introduction

[1] This is an automatic appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (“the CPA”) read with sections 10 and 43(2) of the Judicial Matters Amendment Act 42 of 2013, against both conviction and sentence imposed by the Regional Court, Western Cape, held at Parow (“trial court”). The appellant was convicted for the rape of a 14-year-girl on 10 April 2024. He was sentenced on 11 July 2024 to life imprisonment in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“the Sexual Offences Act”).

Grounds of appeal

[2] The appellant challenged the conviction on the basis that the State had not proved its case beyond reasonable doubt. He submitted that the trial court erred in accepting the complainant as a credible witness despite her being a single child witness, her confusion over the date of the incident, and material contradictions in her accounts to the police, the doctor, and the court regarding the events before and after the alleged rape. It was argued that the cautionary rule was not properly applied and that his version was wrongly rejected as not reasonably possibly true.

[3] As to sentence, the appellant submitted that the trial court erred in failing to find substantial and compelling circumstances to depart from the prescribed sentence of life imprisonment, and that the sentence imposed was shockingly inappropriate.

[4] Against this backdrop, it is necessary to examine whether the trial court misdirected itself in its assessment of the complainant's evidence. The decisive issues on appeal are whether the trial court erred in accepting the complainant's evidence as credible and reliable, given the caution required for a single child witness, and whether the State proved its case beyond reasonable doubt.

Background facts and evidence

[5] The complainant and the appellant were known to each other. The appellant is married to the complainant's maternal aunt, Ms M[...]. During the July 2022 holidays, then 14-years old, the complainant was visiting the home of her paternal aunt's, Ms J[...], in Elsie's River whose home is situated adjacent to the appellant's house. The appellant's daughter and the complainant being cousins enjoyed a close relationship at the time.

[6] The complainant testified that on Tuesday, 5 July 2022, she went to the appellant's house to visit her cousin, and the appellant answered the door. She asked for her cousin. The appellant told her she was in the room. She entered the room but found that her cousin was not there. She heard the door close. She saw the appellant standing by the door. She asked him what he was doing. What transpired thereafter formed the basis of the charge against him.

[7] The complainant testified that the appellant seized her hands and pushed her against the door. She again questioned his conduct and attempted to free her hands to resist him. She was screaming and crying. The appellant closed her mouth and told her to keep her mouth shut. He held her hands on top of her head with one hand and unzipped the complainant's jeans with another hand. He then put his hand into her pants and inserted his finger into her vagina. When he was finished, he pulled up her pants and instructed her to leave. He warned her not to tell anyone, saying that if she did, her late father would not return home. He then unlocked the door, allowing her to leave.

[8] After the incident, the complainant returned to Ms J[...]’s house. She went straight to her room, locked the door, and cried. She did not disclose what had occurred to anyone. On Saturday, 9 June 2022, she returned to her mother’s home in Bonteheuwel. On Monday, 11 June 2022, she confided in her mother, Ms B[...], about the incident. Ms B[...] accompanied by the complainant’s younger sister and stepfather, then went with the complainant to the appellant’s house to confront him. Present were the appellant, his wife (Ms M[...]), his daughter, his son and his two brothers. The appellant denied the allegations.

[9] The complainant also testified that on Tuesday, 12 July 2022, she and her mother reported the incident to the police, and a criminal case was opened against the appellant. The following day the complainant was medically examined at Karl Bremer Hospital.

[10] Furthermore, she testified that the incident of 5 July 2022 was not the only inappropriate conduct by the appellant. On one occasion, he touched her buttocks, dismissing it as accidental. On another, while she and her cousin were fitting clothes, he entered the room, pulled her towards him, and touched her breasts. She did not disclose these earlier incidents to anyone, nor did she report them to the police.

[11] During cross-examination, the complainant appeared uncertain whether the main incident occurred on 5 June or 5 July but ultimately maintained that it was 5 July. Her police statement and her testimony in court contained some discrepancies as to the surrounding circumstances, but not in relation to the core allegation of sexual penetration.

[12] The complainant’s version was corroborated by her mother, who testified that the complainant informed her of the incident after returning from Ms J[...]’s house. The complainant told her mother that, on Tuesday, 5 July 2022, she had gone to the

appellant's house in search of her cousin and then recounted what had occurred there: that the appellant walked in and closed the door, grabbed her hands, pressed her against the door, closed her mouth, unzipped her pants, put his hand in the pants and inserted his finger into her vagina.

[13] Ms B[...] further testified that she, together with her husband and the complainant, confronted the appellant at his home. During this confrontation, Ms M[...] cried and screamed, exclaiming: *"Oh no, my God ... not again."* The appellant denied the allegation and retorted: *"Why would I be so stupid?"* He then produced documents to demonstrate that he was on parole.

[14] Furthermore, Ms B[...] testified that she was shocked to learn of his parole status, as she had not previously known of it. She further confirmed that she thereafter took the complainant to the Elsie River Police Station to open a case. In addition, she testified that on 2 November 2023 Ms J[...] informed her that the appellant had sought to speak to her in order to persuade her to withdraw the case *"because things do not look so good."*

[15] The complainant's version was also corroborated by Dr F[...], who examined her at Karl Bremer Hospital. Dr F[...] also testified that he observed a cleft at the six o'clock position of the hymen, located at its posterior marginal edge. In his opinion, the injury was consistent with blunt object penetration, whether by a penis or a finger. He explained further that a finger, being bony in structure, could cause such trauma, while penile tissue was softer. The injury was indicative of a tear that had already begun to heal by the time of the examination. During cross-examination, he stated that he could not determine from his examination when the incident had taken place.

[16] Ms J[...] testified and confirmed what the appellant had asked her to do on 2 November 2023. She also stated that, on the day after the confrontation, the

appellant asked her for forgiveness in respect of what he was being accused of by the minor and her mother. This allegation was admitted by the appellant during his testimony.

[17] The appellant testified in his defence and denied raping the complainant. He raised an alibi as his defence, claiming that he was not at home between 10h00 and 12h00, the period when the incident was said to have occurred. He stated that he had taken his son to the Tygerberg Hospital at 07h00 and on his way back, he went to the park to play with his son and only returned later, around 12h00 or 12h30. On his return, his daughter was home alone and informed him that his two brothers had already left at 11h00 to do tiling work.

[18] Under cross-examination, however, the appellant contradicted himself: he initially confirmed his return time as 12h30 but later shifted it to 13h00 as the correct time of arrival. The version that he played with his son on his way home was not put to the State witnesses and only emerged from his evidence in chief and was challenged during cross-examination.

[19] The appellant denied seeing the complainant on 5 July 2022. He stated that his first encounter with her was only on Friday, 8 July 2022 when she requested permission to attend Sunday school activities with his family. No witnesses were called to corroborate his version.

[20] During the trial, the State led the evidence of four witnesses: the complainant, who was 16 years old at the time of testifying; her mother, Ms B[...]; her paternal aunt, Ms J[...]; and Dr F[...], the medical practitioner who examined the complainant. As stated above, the appellant testified in his own defence and called no witnesses.

Conviction

[21] It is trite that an appellate court is slow to interfere with the factual findings and credibility assessments of a trial court. Interference is justified only where there

has been a material misdirection or where the findings are plainly wrong. Absent such misdirection, due weight must be given to the trial court's advantage of seeing and hearing the witnesses. In this regard, see *R v Dhlumayo and Another* 1948 (2) SA 677 (A) and *S v Francis* 1991 (1) SACR 198 (A) at 204E.

[22] Section 208 of the CPA permits a conviction based on the evidence of a single competent witness. The cautionary approach required is not a rigid formula. In *S v Sauls* 1981 (3) SA 172 (A) at 180E, it was held that the court must consider the merits and demerits of the evidence and decide whether the truth has been told despite shortcomings or contradictions.

[23] The appellant submitted that the trial court erred in accepting the complainant as a credible witness despite her being a single child witness, her confusion over the date of the incident, and material contradictions in her accounts to the police, the doctor, and the court regarding the events before and after the alleged rape.

[24] The submissions do not withstand scrutiny. The complainant was clear and unwavering in her account of rape by the appellant, which remained consistent across her evidence. In *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA), the court held that not every error made by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. The contradictions must be considered and evaluated on a holistic basis. In this instance, the discrepancies relied upon by the appellant concerned peripheral details relating to events before and after the assault.

[25] In any event, the discrepancies were satisfactorily explained under cross-examination and did not undermine her credibility on the central allegation: sexual penetration. The complainant's version was also materially corroborated by her mother, who confirmed the disclosure soon after the incident; and by Dr F[...], who

testified to an injury of the hymen consistent with penetration by a blunt object such as a finger.

[26] The trial court expressly acknowledged the need for caution in evaluating the testimony of a single child witness. Having had the advantage of observing the complainant's demeanour and consistency under cross-examination, the trial court found her to be credible and reliable. That finding, rooted in first-hand observation, is entitled to deference on appeal.

[27] On a holistic appraisal of the record, the complainant's account was credible, corroborated, and materially consistent, while the appellant's version was shifting, untested, and uncorroborated. The State accordingly proved its case beyond reasonable doubt. The conviction is sound in fact and law, and the appeal against conviction cannot succeed.

Sentence

[28] Turning to the complaint against the sentence.

[29] Section 51(1), read with Part I of Schedule 2 to the Criminal Law Amendment Act 105 of 1997, prescribes life imprisonment for the rape of a child under the age of 16, unless substantial and compelling circumstances justify a lesser sentence. The issue on appeal is whether life imprisonment is proportionate in the circumstances of this case.

[30] In *S v Malgas* 2001 (1) SACR 469 (SCA), the SCA emphasised that courts must give effect to the legislative intention that serious offences attract severe sentences, but not at the expense of justice. Departure from the prescribed sentence is justified only where compelling circumstances render the minimum unjust. *S v Dodo* 2001 (1) SACR 594 (CC) affirmed that proportionality remains the touchstone, while in *Vilakazi v S* 2009 (1) SACR 552 (SCA), Nugent JA stressed that not all rapes are equally serious, and life imprisonment must not be imposed mechanically.

[31] The appellant's principal challenge was that life imprisonment was disproportionate. He relied on *Malgas*, *Dodo* and *Vilakazi* to argue that the minimum sentence regime does not extinguish the sentencing court's discretion; that a sentence which is unjustly severe should not be imposed; and that a proper proportionality analysis was required. He further criticised the trial court for allegedly giving no consideration to prospects of rehabilitation, contrary to the principles articulated in *S v Khumalo* 1984 (3) SA 237 (A).

[32] In mitigation, the appellant testified that he was 40 years old at the time of the offence and 42 at sentencing. He suffers from chronic conditions including diabetes, hypertension and epilepsy, requiring ongoing medication. He is married with two children who occasionally require his assistance in attending medical appointments. He also referred to his wife's dependence and his brother's deteriorating health. However, he conceded that he was unemployed prior to his arrest and did not contribute financially to his household.

[33] The aggravating features were stark. The complainant, then 14, has endured psychological harm. She has panic attacks, flashbacks, suicidal thoughts, and estrangement from her cousin who was also the appellant's daughter and her closest friend. She remains in counselling. The appellant, her uncle by marriage, breached the trust inherent in that relationship.

[34] Most significantly, only a month earlier, on 2 June 2022, he had been convicted of a sexual offence against another 12-year-old girl, for which he received correctional supervision under s 276(1)(h) of the CPA. The commission of the present offence, so soon thereafter and without any indication of remorse, discloses a troubling pattern of predatory conduct and bespeaks poor, if any, prospects of rehabilitation.

[35] The State submitted that these aggravating features decisively outweighed any mitigation, and that the trial court had properly applied the triad in *S v Zinn* 1969 (2) SA 537 (A). We agree. This case is materially different from *S v SMM* 2013 (2) SACR 292 (SCA), where the SCA reduced a sentence of life imprisonment following the rape of a 13-year-old by her uncle. In that matter, the offender was a first offender, there was potential for rehabilitation, and there was no evidence of lasting psychological harm to the complainant. None of those mitigating features are present before us.

[36] Similarly, the present matter is distinguishable from *S v De Beer* 2018 (1) SACR 229 (SCA). In *De Beer*, the complainant was only eight years old when she was raped. The stepfather, though he abused a position of trust, was a first offender. The assaults were limited in scope, and the regional court imposed a sentence of 15 years' imprisonment, 5 years of which were suspended. On appeal, the High Court increased the sentence to life imprisonment. The SCA, however, found no basis to interfere with the regional court's sentence. It accordingly set aside the life sentence imposed by the High Court and reinstated the regional court sentence holding that the circumstances did not justify a life sentence.

[37] What distinguishes the present matter from *De Beer* is that the appellant before us, is a repeat sexual offender who re-offended scarcely a month after a prior conviction for a sexual crime against another young girl. This immediate recidivism displays a pattern and progression of predatory behaviour, together with an absence of remorse. The mitigating factors that justified a lesser sentence in *De Beer*, namely the first offender status and limited scope of assault, are wholly absent here.

[38] In *Bailey v S* 2013 (2) SACR 533 (SCA), the appellant, the biological father of the 12-year-old complainant, pleaded guilty, expressed remorse, and claimed drug use as a mitigating factor. The Court nevertheless held that these circumstances fell far short of substantial and compelling. His prior convictions, the incestuous nature of

the crime, and the devastating impact on the complainant placed the matter in the most aggravated category, and life imprisonment was upheld.

[39] Taken together, *De Beer* and *Bailey* illustrate the proper application of the minimum sentencing regime: where substantial and compelling circumstances are truly exceptional, a departure from a life sentence may be justified. But where aggravation predominates, the prescribed life sentence must follow.

[40] The present case, however, aligns with the aggravated category exemplified in the *Bailey* category, not the moderated circumstances of *De Beer*. The appellants' swift relapse into offending after a prior conviction, his pattern of predation and his lack of remorse mark him as incorrigible. They extinguish any realistic prospect of rehabilitation and leave deterrence and the protection of society as the dominant sentencing considerations. In such circumstances, nothing short of life imprisonment can adequately reflect the gravity of the offence and the risk posed by the offender.

[41] On the contrary, as in *Bailey*, the aggravating features predominate. No substantial and compelling circumstances exist to justify a lesser sentence, and proportionality therefore demands the statutory maximum of life imprisonment.

[42] Applying the *Zinn* triad, the seriousness of the crime, the interests of society, and the appellant's personal circumstances must be balanced. Here, the gravity of the offence, the breach of familial trust, the recent conviction for a similar crime, and the absence of remorse decisively outweigh the limited mitigation. As *S v Vilakazi* 2009 (1) SACR 552 (SCA) makes clear, where the crime warrants severe punishment, personal circumstances recede into the background.

[43] Proportionality therefore does not demand a lesser sentence. It demands the opposite. Life imprisonment, though severe, is the sentence that accords with the

gravity of the crime, the offender's culpability, and the harm inflicted. The regional court was correct in finding no substantial and compelling circumstances.

[44] An appellate court's power to interfere with sentence is limited. No material misdirection has been shown, nor is there any striking disparity between the sentence imposed and what this Court would itself have imposed. On the contrary, the sentence imposed is exactly that which this Court would itself have imposed. The threshold for interference is not met.

[45] It follows that no substantial and compelling circumstances exist to justify a departure from the prescribed sentence, and the appeal against sentence must fail.

[46] In the result, the following order is proposed:

- a) The appeal against conviction and sentenced is dismissed.

GSS KHOZA
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

A LE GRANGE
JUDGE OF THE HIGH COURT

Appearances

For the Appellant: Att. A de Jongh

Instructed by: Legal Aid South Africa

For the Respondent: Adv. C Smit

Instructed by: Director of Public Prosecutions: Western Cape