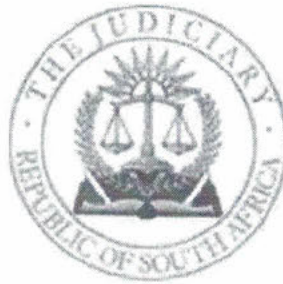


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED: YES/NO

09 SEPTEMBER 2025

DATE

SIGNATURE

Case No: A260/2024

In the matter between:

WANDER SIBUSISO ZWANE

APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT

FRANCIS-SUBBIAH J (MATLAPENG AJ CONCURRING):

[1] This is an appeal against sentence on a charge of rape of a minor. An offence of this nature invokes the sentencing provisions in *Section 51(1) of the Criminal law*

Amendment Act 105 of 1997 prescribing a minimum sentence of life imprisonment. The effective sentence of life imprisonment was imposed in the Regional Court of Soshanguve.

[2] The power of the appeal court to interfere with a sentence is constrained. In **S v Rabie** 1975 (4) SA 855 (A) the court held that the imposition of a sentence is solely within the discretion of the trial court and that a court of appeal will not interfere with that discretion unless it is satisfied that the trial court exercised its discretion unreasonably. In an evaluation of judicial discretion an appeal court may not interfere with a sentence merely because it would have imposed a different sentence than the one imposed by the trial court in **S v Skenjana** 1985 (3) SA 51 (A).

[3] In **Director of Public Prosecution KZN v P** 2006 (1) SACR 243 SCA, the Supreme Court of Appeal held that where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court remains an element for interfering with the trial court's sentencing discretion. Furthermore, the power of the appeal court to interfere with a sentence extends to a finding of irregularity and misdirection of sentencing powers.

[4] In **S v Pillay** 1977 (4) SA 531 (A) at 535E-F, the court held that:

"...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...."

[5] In determining an appropriate sentence the ideal outcome is to achieve a proper balance between this triad as it was entrenched in **S v Zinn** 1969 (2) SA 537 (A), namely: the nature of the crime, the personal circumstances of the appellant and the interests of society.

[6] It remains a question in this matter whether to deviate from the minimum sentences prescribed by the legislator for crimes against children who remain one of the most vulnerable members of a community. The legislator has made it clear that minimum sentences for specific offences such as rape are to be imposed. Courts are therefore obliged to impose these sentences unless they are truly convincing reasons for departing from them.

[7] The offence is serious as the legislature prescribes life sentence be ordinarily imposed for the commission of rape. In ***S v Malgas 2001 (1) SACR 469 (SCA)*** at para 8, the Supreme Court of Appeal held:

“... In short, the Legislature aimed at ensuring a severe, standardized, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence, the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations are to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.”

[8] It was submitted that the court *a quo* erred by not finding substantial and compelling factors to depart from the prescribed life sentence and the imposed sentence is shockingly inappropriate taking into account the circumstances of the appellant. In considering the factors cumulatively, it may construe as substantial and compelling factors which required a deviation from the prescribed life sentence.

[9] Life imprisonment can only be imposed if the court is of the view that the only appropriate sentence would be to keep the accused in custody until his natural life comes to an end. In **S v T** 1997 (1) SACR 496 (SCA), the court held the following:

"A sentence of life imprisonment authorizes the State to keep the person sentenced in prison for the rest of his life. Unless this result is considered to be appropriate, life imprisonment is not appropriate and should not be imposed. The fact that the judge sought comfort in the fact that the appellant could in future be released in terms of the Correctional Services Act, 1959, is in my view an indication that she thought that life imprisonment could prove not to have been the appropriate punishment."

[10] It is evident from the judgment that the sentencing court contemplated the possibility that the appellant would, at some stage, be released and able to reintegrate into society. This indicates that the court neither intended nor anticipated that the appellant would spend the remainder of his life in prison.

[11] The applicant's personal circumstances must be taken into account. At the time of the offence he was 29 years old. He is a first-time offender, has no criminal record and has shown no propensity to commit criminal offences. It was submitted on his behalf that this constitutes a justification for why he should not be permanently removed from society. He spent 1 year and 8 months in prison awaiting trial. He left school at grade 8 due to learning difficulties as he cannot read or write sufficiently. He also displayed a slow understanding of the questions asked by the probation officer during their consultation. He was not formally employed at the time of the offence. He is not married and has no children.

[12] The appellant and his five siblings were raised by a single mother under circumstances of extreme poverty. At times, the family survived only through handouts from members of the community. When the appellant was 11 years old, he was left

alone with his mother, who had become so ill that he had to transport her in a wheelbarrow to her sister's house each morning before attending school, and again after school. His mother passed away when he was 16 years old. He never knew his father.

[13] Despite his dire circumstances the appellant indicated that he never thought of stealing or doing anything that was against the law to survive. The victim's mother further confirmed that the appellant was a handyman, and members of the community would hire him to carry out such tasks. She had sympathy for him due to his difficult upbringing. The appellant was regarded as a good, kind and humble person by his family and the victim's mother who reported that the appellant had always maintained respect and humility towards people.

[14] Taking these factors cumulatively into account, it was argued that the sentencing court failed to take cognizance of these factors into account and further the effect which life imprisonment would have on the appellant. In **S v Skenjana** 1994 (2) SA 163 (W) 168 E-G where the court expressed its opinion as follows:

"As I observed in *S v Khumalo and Another* 1984(3) SA 327(A) at 331, it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner. Wrongdoers "must not be visited with punishments to the point of being broken." (per HOLMES JA in *S v Sparks and Another* 1972(3) SA 396(A) at 410G).

[15] The sentencing court held that the seriousness of the offence outweighed the personal circumstances of the appellant. It is trite law that a court retains the discretion to consider whether substantial and compelling circumstances exist that would render the prescribed sentence unjust in a particular case. The question is whether the appellant's personal circumstances reduce his moral blameworthiness to such an extent that the imposition of a life sentence would be disproportionate. While such

circumstances never excuse the commission of the crime, they may nonetheless mitigate the severity of the sentence.

[16] The appellant hails from circumstances of extreme poverty, having lived his entire life without access to adequate support structures or educational opportunities. He is described as a person of generally good character and is well regarded within his community. Notably, he has no prior convictions and had not previously come into conflict with the law.

[17] While these factors do not excuse the offence, they are nonetheless relevant to the assessment of his capacity for rehabilitation and serve to mitigate, to some extent, his moral culpability. In the circumstances, the imposition of a sentence of life imprisonment would be disproportionate. A finite term of imprisonment would adequately reflect the seriousness of the offence while also taking into account the appellant's personal circumstances and the broader objectives of sentencing—most notably, the protection of children and society at large.

[18] I acknowledge the need for deterrence in cases involving sexual violence against children. Such offenses inflict profound harm on vulnerable victims and rightly call for lengthy custodial sentences. However, deterrence does not necessitate life imprisonment in every case. A substantial but finite sentence can still serve the objectives of retribution, deterrence, and community protection, while also giving proper weight to the individual circumstances of the offender. In this case, the absence of prior convictions, the appellant's disadvantaged background, and the strong community support suggest that a life sentence would be so severe as to be unjust, and inconsistent with the principle of individualized sentencing.

[19] It follows that the sentencing court erred in concluding that there are no substantial and compelling circumstances present when imposing a sentence of life imprisonment, which is harsh in the circumstances. Taking all circumstances into

account substantial and compelling reasons exist to deviate from the prescribed minimum of life imprisonment. The interest of justice will be adequately served by sentence of 25 years imprisonment which reflects the seriousness of the offence, protects society from the appellant and yet remains proportionate to this appellant.

[20] In the result the following order is made:

21.1 The appeal is upheld.

21.2 The sentence of the *court a quo* is set aside and substituted with.

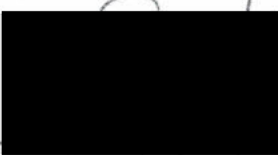
21.3 The appellant is sentenced to 25 years imprisonment backdated in terms of Section 282 of the Criminal Procedure Act 51 of 1977 to 19 August 2024.


R FRANCIS-SUBBIAH

Judge of the High Court of South Africa

Gauteng Division, Pretoria

I agree,


R. S MATLAPENG

Acting Judge of the High Court of South Africa,

Gauteng Division, Pretoria

APPEARANCES:

COUNSEL FOR THE APPELLANT: ADV. F Van As

INSTRUCTED BY : Pretoria Justice Centre , Pretoria

COUNSEL FOR THE RESPONDENT: ADV. EM Mafunisa

INSTRUCTED BY : Director of Public Prosecutions, Pretoria

HEARD ON : 27 August 2025

JUDGMENT DELIVERED ON : 09 September 2025

This Judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties.

The deemed date and time for the delivery is 09 September 2025.