



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**Reportable/Not Reportable
Case No: AR135/2023**

In the matter between:

SKUMBUZO NSONSWANI HADEBE

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Regional Court, Port Shepstone (Ms V Dube sitting as court of first instance):

The appeal against conviction and sentence is dismissed.

JUDGMENT

Marion AJ (Poyo Dlwati JP concurring):

Introduction

[1] The appellant, Mr Skumbuzo Nsonswani Hadebe, was convicted of one count of rape by the Regional Court sitting in Port Shepstone, on 21 July 2022. On 26 July 2022 he was sentenced to life imprisonment. He exercised his automatic right of

appeal as provided for in s 309 of the Criminal Procedure Act 51 of 1977. The appellant is represented by Ms *Gasa* and the State is represented by Ms *Banda*. The State called seven witnesses and the defence called the appellant. The complainant was six years old at the time of the commission of the offence and eight years old at the time of testifying. He was admonished by the learned magistrate, Ms V Dube, to tell the truth. He testified with the assistance of an intermediary and in camera.

Facts

[2] The complainant told the court that on the 17 September 2020 he was playing with other children on the road outside his home. He lived in an area known as Gamalakhe. The appellant came and pulled him away from the other children and took him to his room. The appellant undressed the complainant, took off the complainant's clothes and removed his own pants and had sex with him. The complainant was questioned about what he meant by saying the appellant had sex with him. He responded that the appellant undressed him, took out 'his thing that he used to pee with' and inserted it in his buttocks and raped him. At the time, he had made the complainant lie on his stomach on the bed. The appellant had covered the complainant's face with a pillow. The complainant stated that he was lying with his face facing down on the bed.

[3] The complainant was asked several times whether he understood what he meant by the appellant took out something that he uses to pee. He maintained that the appellant took out something that he uses to pee and inserted it in his anus, and it was sore when the appellant did this to him. When asked whether he saw this thing that the appellant uses to pee, he replied he saw it when the appellant took it out and when he inserted it in him. The complainant testified that it was painful when the appellant inserted his penis into his anus. Whilst the appellant was raping him, his brother, AK, kicked the door open, entered the appellant's room and took the complainant away.

[4] When the complainant and AK arrived at their home, they reported what had happened to their mother, grandmother and brother who were all at home. Pursuant to the report, the appellant was called to their home, questioned about these

allegations and he apologised. The complainant, with the use of a photo album, submitted to court as part of the evidence, confirmed the appellant's home and the room where the rape took place. Under cross-examination by the defence, he maintained his version that the appellant raped him.

[6] The second witness called by the State was AK who testified through an intermediary, as he was 14 years old at the time of testifying. He was admonished to tell the truth. AK testified that he is the brother of the complainant in this matter. On the day of the incident, the complainant and the other children were playing on the road. He heard the complainant's cry coming from the appellant's room. He then went to the appellant's room and found the room door closed. He kicked the door open and found that the appellant was bending over the complainant, and they were on the bed. The complainant was covered with a pillow.

[7] AK testified that after hearing the complainant crying, he saw the appellant bending over him and told him to stop what he was doing. He then pulled his brother away from the appellant asking him 'what was happening' and took him home. AK confirmed that the appellant was raping the victim. When questioned about what he meant by saying the appellant was raping the complainant, he stated that the appellant had put his penis inside the complainant's anus. He testified that the appellant's pants and boxers were on his knees at the time he entered the room. AK also testified with the use of the photo album and confirmed his home and that of the appellant's. There was very little cross-examination of this witness.

[8] Ms ZK, who is the grandmother to both the complainant and AK, was called as the third witness. She told the court that on the day of the incident, AK came in the company of the complainant and reported that the complainant had been raped by the appellant and that he fetched the complainant from the appellant's house. She testified that the mother of the complainant and AK was traumatised by this report. Ms ZK stated that she cried as she saw that the complainant was still crying and the complainant confirmed that the appellant raped him. The complainant explained to his mother and grandmother that the appellant had inserted his penis into his anus and had sexual intercourse with him. She testified that she examined the complainant and saw that there was semen on the complainant's anus. The matter

was then reported to the neighbours and the police. The community members came and together with the neighbours searched for the appellant who was brought to her house. The community members were shocked and upset and questioned the appellant as to why he had raped the complainant. The appellant stated to Ms ZK that he had just called the complainant to eat. The matter was then reported to the police and the complainant was taken to the doctor for a medical examination. Under cross-examination Ms ZK confirmed that she knew the appellant as a spiritual healer and that he once told her a prophecy and gave her water for which she gave him R50. It was put to her that she was the one who requested the appellant to administer medicine on the complainant and she denied that. It was further put to Ms ZK that the appellant would deny saying that he called the complainant to his house to eat.

[9] The next witness to be called by the State was Ms TPK, the mother of the complainant. She confirmed that both AK and the complainant reported that the appellant had raped the complainant. She was at home with her mother Ms ZK at the time of the report. Ms TPK's evidence revealed in detail the incident of the rape. The complainant was crying when he told them that the appellant had raped him. She confirmed the complainant's age and that he was born on 11 January 2014. The birth certificate confirming the complainant's age was attached to the record as an exhibit. She also confirmed that she never requested the appellant to administer any medication on the complainant. It was put to the witness that Ms ZK paid him R 50 to administer medication to the complainant which she denied.

[10] Dr Zinhle Abigail Ndamase (Dr Ndamase) who examined the complainant on 17 September 2020 testified on behalf of the State. She read the contents of the J88 into the record. The history recorded that the complainant was raped by his neighbour 'Ntsontswana Nyanga Hadebe'. It was recorded that the appellant had pulled the complainant into his house and inserted his penis into the complainant's anus. She also stated that the complainant had said that the appellant rubbed his penis against his penis. Dr Ndamase testified that the history given by the complainant was consistent with her conclusion arrived at in the physical examination. She noted fresh anal injuries that were found on the complainant,

consistent with anal penetration either by a penis or an object. The schematic drawing confirmed the injuries to the complainant.

[15] The next witness who testified was Warrant Officer J S Singh, who confirmed that he took the photographs and compiled the photo album that forms part of the record. He testified that the places captured in the photographs were pointed out to him by the complainant and his family on 4 October 2020. That, in essence, was the State's case.

[16] The appellant testified on his behalf and denied the allegations of the complainant. The appellant's version of events was that the complainant's grandmother requested him to administer 'muthi' on the complainant, as the complainant was experiencing a problem. The appellant administered the 'muthi' by using his finger and inserted his finger into the anus of the complainant. He stated that whilst doing this he was rough and demonstrated to the court a circular motion as he had inserted the 'muthi'. The appellant denied inserting his penis into the complainant's anus. Under cross-examination the appellant testified that no parent or guardian was present when he did this to the complainant.

Analysis

Ad conviction

[17] In this appeal, the appellant contended that he had disclosed the basis of his defence from the outset namely, that he was a traditional healer and that he administered medicine on the complainant. The appellant averred that the court *a quo* misdirected itself in not applying double caution to the two minor children's witnesses who testified at the trial (ie the complainant and AK). The appellant submitted that the complainant and his brother could not have had ample time to observe what the appellant was doing on the day of the incident. The appellant went further to state that the trial court erred in disregarding the appellant's version as reasonably possibly true.

[18] Ms *Banda* argued that it is trite that a conviction may follow if the evidence of a single witnesses is satisfactory. She stated there was no misdirection on the part of the court *a quo*. The trial court had found that the complainant had given a 'detailed

and concise narration' of the incident of rape. The appellant's version of inserting medicine into the complainant's anus was never put to AK, who was an eyewitness. Ms *Banda* argued that there was barely any cross-examination of the witnesses. She submitted that the State witnesses corroborated each other in material respects. She further stated that the medical findings proved that the injuries were consistent with the complainant's version.

[19] In *S v Dyira*,¹ the court held that:

'The requirement in such a case is, as always, proof of guilt beyond reasonable doubt, and, to assist the courts in determining whether the onus is discharged, they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution (*R v Mokoena* 1956 (3) SA 81 (A) at 85, 86). This means that the courts must be alive to the danger of relying on the evidence of only one witness, because it cannot be checked against other evidence. Similarly, the courts have developed a cautionary rule which is to be applied to the evidence of small children (*R v Manda* 1951 (3) SA 158 (A) at 162E -163E). The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness, as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity (*S v Viveiros* [2000] 2 All SA 86 (SCA) para 2). Here, more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness (*Schmidt Law of Evidence* 4-7).'

In my view, the court *a quo* carefully considered the cautionary rules in evaluating the evidence of the complainant and his brother. The court found both the complainant and AK to be honest and trustworthy witnesses. I agree with the State that their evidence was consistent, and that they corroborated each other in material respects. The court *a quo* correctly cited the case of *S v Gentle*² where the court stated,

¹ *S v Dyira* 2010 (1) SACR 78 (ECG) para 6.

² *S v Gentle* 2005 (1) SACR 420 (SCA) para 18.

'It must be emphasized immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, *on the issues in dispute* (cf *R v W* 1949 (3) SA 772 (A) at 778-9).' (Emphasis in the original.)

The medical evidence as recorded in the J88 was also strong and corroborated the complainant's version. The court also considered the evidence of the other State witnesses to be reliable and truthful. The learned magistrate considered that the complainant made an honest mistake in pointing out the appellant as the person in photo three in the album. This was rectified by the evidence of Warrant Officer Singh, who confirmed that the person in that photograph was a police officer who accompanied him to the scene on the day the photographs were taken. This was not material or a case of mistaken identity as the appellant was well known to the complainant and AK and properly identified by them during the trial.

[20] The cross examination by the appellant's representative in the trial court could have been more robust and thorough. I cannot but draw an adverse inference from the failure to put the appellant's version relating to the insertion of medicine to the key witness, namely AK. The lack of proper cross examination of the State witnesses must be criticised. The appellant disputed the overwhelming evidence against him. Under cross examination he was a poor witness and eventually admitted to inserting his finger in a rough manner into the complainant's anus. He confirmed that there was no guardian or family member present when he did this. The appellant's version is tantamount to admitting that he raped the complainant.

[21] On a conspectus of all the evidence, the appellant was correctly convicted of raping the complainant by the court a quo. The appeal against conviction must accordingly fail.

Ad Sentence

[22] It was submitted on behalf of the appellant that the court a quo erred in finding that no substantial and compelling circumstances existed to impose a lesser sentence than the minimum prescribed by the legislature. It was further argued that the trial court failed to consider a few factors that would have allowed the court to deviate from the minimum sentence of life imprisonment. These factors were listed

as: the complainant did not have any visible injuries, the appellant was 36 years old, he had a minor child aged five years, he was self employed prior to his incarceration as a traditional healer, he supports his child and immediate family and that he was intoxicated on the day of the incident. It was also argued that he had spent two years in custody awaiting trial. It was argued that cumulatively these factors amount to being substantial and compelling circumstances which would allow the court to deviate from handing down a life sentence. Ms Gasa argued that the sentence was disproportionate in the circumstances.

[23] Ms *Banda* argued that sentencing falls primarily within the discretion of the trial court. She quoted the case of *S v Anderson* in her heads of argument, which states the following: ‘the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interests of justice require it.’³ She further argued that rape is a very serious offence⁴ and that each case must be dealt with on its own peculiar facts.⁵ The State argued that the court *a quo* had exercised its discretion judicially, reasonably and properly and had taken into account the triad of factors in sentencing namely, the seriousness of the crime, the appellant’s personal circumstances and the interests of society. The State argued that the court *a quo* had correctly found that the appellant’s incarceration awaiting trial for two years was not a substantial and compelling circumstance to deviate from the prescribed minimum sentence. The State contended that the trial court had weighed all the mitigating factors against the aggravating factors and that there was no misdirection in sentencing the appellant to life imprisonment.

[24] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA) requires a prescribed sentence of life imprisonment to be imposed for a conviction of rape where the complainant is raped more than once or where the complainant is a

³ *S v Anderson* 1964 (3) SA 494 (A) at 495D-E.

⁴ *S v Chapman* 1997 (3) SA 341 (SCA) at 345A-C.

⁵ *S v Samuels* [2010] ZASCA 113; 2011 (1) SACR 9 (SCA) para 9.

child under the age of 16 years,⁶ unless in terms of s 51(3)(a) of the CLAA, substantial and compelling circumstances exist that justify a lesser sentence. The complainant in this matter was six years old when he was raped by the appellant.

[25] *Malgas v S*⁷ is the locus classicus of what constitutes substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence. The court stated the following:

‘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.’

[26] In *Malgas*,⁸ the court further stated:

‘[8] . . . a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, 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 . . .

[9] . . . The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders

which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from

⁶ This was the stated age in the CLAA at the time when the offence was committed. The age has now been increased to 18 years following amendments by the Criminal and Related Matters Amendment Act 12 of 2021.

⁷ *Malgas v S* [2001] 3 All SA 220 (A) (*Malgas*) para 25.

⁸ *Malgas* paras 8 and 9.

consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.’

[27] It is trite that a court of appeal can only interfere with a sentence handed down by the court *a quo* if there was a material misdirection by the trial court or if the sentence was shocking or disturbingly inappropriate.⁹

[28] In *S v Jansen*,¹⁰ the court stated the following:

‘Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society . . . It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution.’

In *casu*, the complainant was six years old, and the appellant was someone he knew as a neighbour. The appellant took advantage of his position when he raped the complainant, and this was an aggravating factor. It was also aggravating that the appellant had a previous conviction of a similar offence, and this weighed heavily against him. The victim impact statement showed clearly the physical and psychological trauma suffered by the complainant. The complainant suffered recurring nightmares and the court process caused secondary trauma. The complainant’s schooling suffered causing him to fail. This incident also affected AK psychologically and he also failed at school as a result.

[29] In *S v Ludidi and Others*,¹¹ the court stated:

‘A court cannot approach a life sentence as anything other than a sentence which is imposed for the rest of that person’s life. It cannot be “reduced” by the period spent in custody awaiting trial and it would be improper for a court to take into account the possibility of parole.’ (Footnote omitted.)

⁹ *Malgas* para 12.

¹⁰ *S v Jansen* 1999 (2) SACR 368 (C) at 378g-379b.

¹¹ *S v Ludidi and Others* [2024] ZASCA 162; 2025 (1) SACR 225 (SCA) para 14.

I am of the view that the time spent by the appellant awaiting trial is not a substantial and compelling circumstance to allow the court to deviate from the prescribed minimum sentence in light of the aggravating factors in this matter.

[30] I can find no reason to interfere with the sentence imposed by the court a quo as there is no misdirection on its part. The prescribed minimum sentence imposed in this case does not result in an injustice to the appellant. In *S v Vilakazi*¹² the court explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial or compelling circumstances. In deciding whether substantial and compelling circumstances exist, one must look at traditional mitigating and aggravating factors and consider the cumulative effect thereof. The sentence of life imprisonment in the circumstances of this case is not 'shocking', 'startling' or 'disturbingly inappropriate'. The court a quo further fulfilled the objectives of sentencing namely, retribution, deterrence, prevention, and rehabilitation in deciding on an appropriate sentence. This type of sentence will prevent and deter the appellant from committing such an offence again and will send a clear message to all like-minded people wanting to commit such offences against children.

Order

[31] In the result, the following order shall issue:

The appeal against conviction and sentence is dismissed.

MARION AJ

POYO DLWATI JP

¹² *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA).

Date of Hearing: 15 August 2025

Judgment : 12 September 2025

Appearance:

Appellant: Ms B Gasa

Instructed by: Legal Aid South Africa
Pietermaritzburg

Respondent: Ms Banda

Instructed by: Director of Public Prosecutions
Pietermaritzburg