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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: **A197/2024**

(1) REPORTABLE: No

(2) OF INTEREST TO OTHER JUDGES: No

(3) REVISED:

DATE 20 OCTOBER 2025

SIGNATURE

In the matter between:

V[...] R[...] M[...]

Appellant

and

THE STATE

Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 20 October 2025.

JUDGMENT

RETIEF J (BAQWA J concurring)

INTRODUCTION

[1] The appellant, V[...] R[...] M[...], who was found guilty in the Regional Court, Tsakane, [Court *a quo*] of rape and sentenced to life imprisonment on the 27 May 2024 exercises his automatic right of appeal against his conviction and against the sentence imposed.

[2] The appellant was charged with contravening the provisions of section 3 of the Criminal Law Amendment Act, 32 of 2007 read with the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997 in that he on or about the 10 May 2020 unlawfully and intentionally committed an act of sexual penetration with a minor female person who, at the time, was six (6) years old [the minor]. The act of sexual penetration put to the appellant was that he inserted his penis into the minor's vagina. The appellant pleaded not guilty to the charge but was found guilty and sentenced to life imprisonment.

[3] The grounds of appeal raised by the appellant in respect of his conviction are anchored by three main (3) grounds. The initial attack is directed at OM's competence as a witness who, was admonished in terms of section 164 of the Criminal Procedure Act, 51 of 1977 [the Act]. Flowing from that, and in the event she is found to be a competent witness then, the appellant argues that as a single witness she was unable to give a clear account of the alleged rape incident and in consequence the reliance and weight placed on her testimony by the Court *a quo* to secure his conviction was an error. Lastly, the appellant argues that the medical evidence proffered by the expert, Dr TN Nkambule was inconclusive regarding the element of the charge put to him. The appellant maintains that his version was reasonable and possibly true because it was duly corroborated by Ms T[...] B[...], his girlfriend [Ms B[...]]. Therefore, the State failed to prove its case beyond a reasonable doubt.

[4] Regarding his appeal against the imposed sentence of life in imprisonment, the appellant argues that the sentence is shocking and inappropriate in that it is not proportionate to the to the facts of the case. The learned Magistrate, he argues, over emphasised the interest of the community. From the written and oral argument, the appeal on sentence was not the high watermark of this appeal as the thrust of the appeal was his conviction.

[5] To protect the identity of the minor, this Court will refer to her by using her initials, OM instead of her full name.

[6] This Court will first deal with the competency finding of OM before dealing with the grounds of appeal in that, should this Court find that the Court *a quo* misdirected itself in its finding that OM was indeed a competent witness, the appeal will be upheld without the necessity of dealing with any of the grounds of appeal. It is common cause that the States case of rape rested on the testimony of OM.

PRELIMINARY ENQUIRY

Was OM a competent witness?

[7] At the material time of the rape, OM was 6 (six) years old and, by the time she testified she was 9 (nine). It is common cause that because of OM's youthful age the learned Magistrate, without any initial enquiry into whether she understood the nature and import of the oath, accepted she could not be examined as a witness by administering the prescribed oath as prescribed in section 162¹ of the Act. *In lieu* of the prescribed oath, OM was admonished to speak the truth following an enquiry by the learned Magistrate who was of the opinion that she could distinguish between truth and lies. The Act caters for the admonishing of such a witness as OM, and such is provided for in section 164.

[8] Section 164 provides:

¹ (1) *Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court and which shall be in the following form:*
'I swear that the evidence that I give, shall be the truth, the whole true and nothing but the truth, so help me God.'

(2) *If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so."*

- “(1) Any person who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished² by the presiding judge or judicial officer to speak the truth.*
- (2) If such person wilfully and falsely states anything which, if sworn, would have amounted to an offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such imprisonment as is by law provided as a punishment for that offence.”*

[9] It is trite that the trigger event of section 164(1) is not understanding what it means to be sworn in as a witness, i.e., the nature and import of the oath itself. Only if the judicial officer after the enquiry is of the opinion that the person does not have the capacity to understand the nature and import of an oath, then the judicial officer should try and establish whether or not the witness can distinguish between truth and lies and if the enquiry yields a positive outcome, admonish the witness. It is this latter enquiry which the appellant challenges and not the absence of the former enquiry.³

[10] To unpack the appellant’s argument, it is helpful to reconsider the purpose of the enquiry which enables a judicial officer to formulate an opinion one way or another regarding the competency of a witness.

[11] The Constitutional Court in the Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others⁴ stated that:

² ‘Admonished’ as a verb means to warn or reprimand someone firmly.

³ See **Matshiva v S** (656/12) [2013] ZASCA 124.

⁴ 2009 (2) SACR 130 (CC), par [167].

“The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth (own emphasis) gives assurance that the evidence can be relied upon. It is in fact a pre-condition for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth (own emphasis). The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused’s right to a fair trial where such evidence is to be admitted. To my mind, it does not amount to a violation of section 28(2) to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.”

[12] The purpose of the enquiry is therefore to ascertain whether a child understands what it means to tell the truth⁵ and not whether the child can demonstrate the abstract concepts of truth and falsehood.⁶ Notwithstanding this test, the appellant argues that the enquiry by the Magistrate of OM did not yield a positive outcome before she was admonished in that, OM could not tell the difference between a lie and the truth nor of the consequences of lying. To demonstrate the point, the appellant’s Counsel invited this Court to consider certain extracts from the record, in particular from extracts appearing in pages 88 to 102. These extracts record certain exchanges between the learned Magistrate and OM during such enquiry [highlighted portions]. The highlighted portions record the following exchanges:

“COURT: And if you find somebody who has stolen your books, and they say that they did not steal it will they be telling the truth?

OM: No.

⁵ “to tell the truth” as per definition from the Oxford dictionary means: to be frank. According to Merriam -Webster: that one is stating what one really thinks.

⁶ *Ibid*, footnote 4, par 167.

COURT: *And is it right to tell a lie?*

OM: *No.*

COURT: *Do you know why it is not right?*

OM: *No.*

COURT: *You don't know why it's not right to tell a lie? Maybe let me rephrase. If somebody tells a lie will there be consequences for the lies, they tell?*

OM: *No.*

COURT: *Do you understand the question Ma'am?*

OM: *Yes."*

[13] And further the Court was referred to the record at page 89, line 24 to page 90, lines 1 to 15:

"COURT: *Is it the right a thing to tell a lie? Is it right for them to lie?*

OM: *No.*

COURT: *And when a person lies, will there be consequences for that lying?*

OM: *No.*

COURT: *So, you are telling this Court that there is nothing wrong with lying? You just told me it's not right to lie but now you say there are no consequences.*

OM: No.

COURT: *I am not sure what you are referred to. If a person lies will there be any outcome, any result, any bad thing that happens of the lying?*

OM: No.

COURT: *There is no bad outcome of a person who is telling a lie? Do you understand what I mean?*

OM: Yes.

COURT: *Has it ever happened in class that somebody lied in class?*

OM: No.

COURT: *So, in your class there is no child that ever lied.*

OM: Yes.

COURT: *And at home?*

OM: No.”

[14] The appellant’s Counsel argues that from the highlighted portions and, for that matter from all the exchanges recorded between the learned Magistrate and OM, which make up 14 pages of the typed record, OM was not competent to testify. However, before dealing with the test, and only referring to the highlighted portions at this stage, it is clear from the extract that OM does indeed understand the difference between a lie and the truth in that she identified a lie when examples were put to her and confirmed that it is wrong to tell a lie. An example from the highlighted portion was when the learned Magistrate asked her if

somebody had stolen her books and that somebody said they had not stolen them, would they be telling the truth, her response was 'No'. In other words, they would not be telling the truth in such circumstances. In this way OM demonstrated an ability to identify a deliberate deception by means of inaccurate and misleading information. She too, confirmed that it was not good to tell a lie. In other words, it was not good to deliberately deceive.

[15] She further confirmed that she had not encountered people in her class nor at home who had lied. In context, being at school and at home, she had not observed consequences flowing from telling a lie. OM's manner of answering was direct and frank in this regard.

[16] Furthermore, if the highlighted portions were argued in context and Counsel for the appellant engaged with the test itself namely, whether OM actually understood the meaning of telling the truth and not just the difference between lies and truth a different result may have emerged. It is therefore relevant to do the exercise by considering the highlighted portions in context.

[17] Context is everything and too, how the questions were framed or, at times, reframed especially when two questions were asked simultaneously and only one answer by a "yes" or "no" was given. It is noted that if two questions were asked at once or a contradicting statement with a question was posed at the same time, it is difficult for the reader to determine what OM's direct answer was to the question. This happened during the enquiry. This Court remains acutely aware that OM was only 9 (nine) when she underwent the enquiry. Returning to the record, in the 14 pages, there was an exploration by the learned Magistrate yielding the following results.

[18] OM clearly demonstrated an understanding that one should not lie nor steal and that one should look after one's property, her school books. However, OM repeatedly stated, with reference to the examples put to her, that no consequences follow those who tell a lie. OM's answers relating to consequences flowing from such lies all related to examples put to her about those in her class at school and not in general terms. According to OM no one lies in her class.

Therefore, no consequences had been observed by OM at that time. OM however did appreciate the fact that consequences do flow from actions. In context, she stated that she looked after her own school books because if she did not, they could be stolen. OM's understandings at school as discussed are apparent from the following enquiry, starting from page 88-92 of the record:

"COURT: *Are you attending school?*

OM: Yes.

COURT: *In what grade are you this year?*

OM: 4.

COURT: *Oh, you are you grade 4, lovely.*

OM: Yes.

COURT: *What are your favourite subjects?*

OM: *isiZulu your Worship.*

COURT: *Is there a reason why you like the subject?*

OM: *Because it's assisting me.*

COURT: *I take it you are doing well in isiZulu?*

OM: Yes.

COURT: *Have you got friends at school?*

OM: Yes.

COURT: *Do you play with your friends during break?*

OM: Yes.

COURT: *And the school already given you books?*

OM: Yes.

COURT: *Everybody has their own books?*

OM: Yes.

COURT: *Is there a time when you share books?*

OM: No.

COURT: *I think it is because everyone has their books.*

OM: Yes.

COURT: *And everyone must look after their books.*

OM: Yes.

COURT: *Do you look after your books?*

OM: Yes.

COURT: *And is it the right thing not to look after your books?*

OM: No.

COURT: *Why is it not right, why is it wrong not to look after your books, do you know?*

OM: Yes.

COURT: Can you tell me why?

OM: They steal.

COURT: And stealing, is it the right thing to steal?

OM: No.

COURT: And if you find somebody who has stolen your books, and they say they did not steal it will they be telling the truth?

OM: No.

COURT: And is it right to tell a lie?

OM: No.

COURT: Do you know why it is not right?

OM: No.

COURT: You don't know why it's not right to tell a lie? Let me rephrase it. If somebody tells a lie will there be a consequence for the lies that they tell? (own emphasis- two question)

OM: No

COURT: So, anybody can just lie there is no consequences to that?

OM: No ."

[19] Then from line 21 on page 90- line 11 page 92:

COURT: So, we are still at school.

OM: Yes.

COURT: When you're in class, are there times when some children make noise and disturb other children in class?

OM: Yes.

COURT: I still want clarity whether you understand wrong and right that on its own, is it the right thing to do disturbing other children in class?

OM: No.

COURT: And the child that is disturbing the class, making noise in class, when I have found by the teacher that they are making noise and disturbing other children and they say that they do not make noise, will they be telling the truth?

OM: No.

COURT: So, they will be lying, you agree with me, they will be lying?

OM: Yes.

COURT: Is it the right a thing to tell a lie? Is it right for them to lie?

OM: No.

COURT: And when a person lies will there be consequences for lying?

OM: No.

COURT: So, you still telling the Court that there is nothing wrong with lying? You told me it is not right to lie, but now you say there is no consequences.

OM: No.

COURT: I'm not sure what you referring to. If a person lies will there be any outcome, any result, any bad thing that happens of the lie?

OM: No

COURT: There is no bad outcome out of a person who is telling a lie?"

OM: Yes.

COURT: Has it ever happened in class that somebody lied in class?

OM: No

COURT: So, in your class there is no child that ever lied?

OM: Yes"

[20] OM's observations in class and at school were clear but the learned Magistrate was still not content with her answers, he then moved the enquiry to questions relating to a sport OM enjoyed, soccer. This line of questioning was a poor attempt, the questions confusing, and at times leading suggesting the answer, but more importantly the enquiry had nothing to do with the whether OM understood that consequence flowed from telling a lie on the sports field but centred around whether it was wrong to kick a fellow team mate. OM confirmed it

was wrong and confirmed that the consequence was that the player “*He must go out of the gate.*” The learned Magistrate finally stating:

“COURT: *That if you do wrong there are results, you’ve seen it in your soccer team.*

OM: Yes.”

[21] The learned Magistrate reasoned that if OM accepted that consequences are seen to flow from wrong behaviour on the sports field then, because she accepts lying constitutes wrong behaviour, then she must appreciate that telling a lie has consequences too. A rational consequence and a result which was apparent before the questions relating to about soccer were posed.

[22] After considering the outcome of the enquiry as a whole, the learned Magistrate was of the opinion that OM was considered to understand the meaning of telling the truth, she was accepted as competent to give evidence and she was admonished to tell the truth. The Magistrate reminded OM to tell the truth during the course of her testimony and, at the appropriate times. OM acknowledged the instruction and confirmed that she would. Her testimony remained frank, consistent and having regard to the material evidence, as will be dealt with, reliable.

[23] This Court is satisfied that the learned Magistrates was correct to accept her as a competent witness. Her ability to testify to what had happened to her in May 2020 was established.

[24] To give context to the remaining grounds requires this Court to consider the evidence. The State relied on three witness to discharge its onus. The evidence of OM who testified in camera through an intermediary, on the evidence of Ms RM V[...], OM’s grandmother with whom she lived and Dr TN Nkambule the medical expert regarding his finding. The appellant testified in his defence and also called Ms T B[...] [Ms B[...]], his girlfriend.

EVIDENCE

[25] To commence, a general comment, this Court is reminded that the Court *a quo*'s finding of fact and credibility are presumed to be correct, this is because the Court *a quo*, and not the Court of Appeal, has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies. A reminder of what the Court stated in S v Francis⁷. Furthermore, that it is only in exceptional cases that an Appeal Court will be entitled to interfere with the Court *a quo*'s evaluation of oral testimony. Against this background the salient material facts from the evidence.

[26] The material facts of this case are uncomplicated, they revolve around an opportunity to commit rape and whether the clinical findings support the rape testified to. The appellant is OM's uncle. OM lives with Ms V[...], her maternal grandmother whom she refers to as 'Gogo' [grandmother]). OM trusted and was fond of the appellant seeing him as a father figure. According to the appellant, OM refers to him as 'daddy'.

[27] What follows is a salient account of material facts only. On or about the 10 May 2020, OM, with her grandmother's consent, accompanied the appellant to the home of his girlfriend, Ms B[...]. Ms B[...] and her parents live on the same property. OM and the appellant spent the afternoon at Ms B[...]s home. OM testified to playing at her house that afternoon. Ms B[...] and the appellant both testified that OM played with Ms B[...]s niece and nephew. Later that afternoon the appellant received a 'please call me' from OM's grandmother who now, wanted the appellant to return OM back home. At approximately 16h25 the appellant left Ms B[...]s home to take OM home. When OM left Ms B[...]s home, she was not visibly upset, nor was she crying nor did she express she was in any pain. In fact, the appellant testified to her OM hugging Ms B[...]s parents and her niece and nephew when she said goodbye to them before leaving for the grandmother's house. OM testified that it was on route home that the appellant stopped at his house. His house is on the way to her grandmother's house. It was during this

⁷ 1991 (1) SACR 198 (A) at 198J-199A.

time, at the appellant's house and in his bedroom and, on his bed that OM testified to the rape incident occurring. Dr Nkabinde, the medical practitioner who testified and completed the J88, recorded how OM described the rape. He recorded that OM was raped by her father at his place in the afternoon at approximately 16h00 and that the perpetrator *"undressed, kissed, put her to bed, closed the door and raped" her.*"

[28] The appellant denies having OM in his house at approximately 16h00 when the sun started to go down. He however testified that OM did come to his house earlier that day, before they both went to Ms B[...]’s house. He testified that OM came looking for money to buy chips ostensibly stating that her grandmother had sent her for the money.

[29] After the rape incident, the appellant returned OM to her grandmother's house. Once at the home, OM was visibly unhappy. According to her grandmother, OM was crying and had no appetite as she did not want to eat her food. According to the appellant OM did not want to eat her food as she was full, having eaten whilst at Ms B[...]’s house, other than that, the appellant testified that OM was fine when he left her.

[30] OM's demeanour prompted her grandmother to enquire what was wrong. It was then that OM replied that the appellant *"- he took his penis and inserted in my private part or down there."* The grandmother immediately wanted to confront the appellant about it and in an attempt to find him returned to Ms B[...]’s home in search of him. However, the appellant was not there and the grandmother immediately informed Ms B[...] that OM had been raped by the appellant. Thereafter, Ms B[...] accompanied OM and her grandmother back to her home. There, Ms B[...] visually inspected OM's private parts to determine whether there was any truth in her claim. Ms B[...] testified that according to what she observed, OM had indeed been raped. Both Ms B[...] and the grandmother testified that OM was crying and was in pain and they both took OM to the hospital to be examined. The appellant also arrived at the hospital shortly thereafter, however he did not linger. The police arrived at the hospital, Dr Nkambule examined OM and recorded

his clinical findings. Specimens were taken in evidence kit 19D7AA9310 but such were not tendered into evidence. Dr Nkambule observed that OM's entire genital area was bruised, and her hymen swollen. No use of physical force nor anal penetration of was, excluded in his report.

[31] Flowing from the salient facts a discussion of the grounds of appeal is required.

GROUND OF APPEAL

The value of OM's testimony as a single witness?

[32] The appellant argues that OM as a single witness was unable to give a clear account of the alleged rape incident. The nub of the appellant's argument lies in the fact that OM's evidence at times was confusing and difficult to follow. The appellant's Counsel argued that when OM described how the rape incident took place, OM testified that she was lying on her back, the appellant was standing on top of the bed, and whilst standing, penetrated her private parts. This description of how the rape occurred argues the appellant's Counsel is not physically possible. Furthermore, she contended that OM, other testifying that she felt pain, that she tried to scream and that the appellant closed her mouth with his hand, her testimony did not speak to what happened after the appellant raped her.

[33] Once again, context is everything. When OM initially was asked to describe how the rape incident occurred in her own words, the following emanates from the record:

PROSECUTOR: *Ok, what then happened when you got to the bedroom?*

OM: *Then he undressed me.*

PROSECUTOR: *He undressed what?*

OM: *My pants, your Worship and my underwear.*

PROSECUTOR: *Please continue.*

OM: *Then he followed by undressing himself.*

PROSECUTOR: *Undressed himself what?*

OM: *His pants that was dressed and his underwear, your Worship.*

PROSECUTOR: *Please proceed.*

OM: *Then he climbed on top of me your Worship."*

[34] Then what followed was that the appellant: "OM: *Then he inserted his penis, your Worship, in my front part*", OM describing "*in my front part*" as her private part.

[35] A simple logical sequence of events in her own words was given by OM without prompting, other than a prompt for her to proceed. However, when asked to describe the appellant's exact position in relation to the bed, at the moment he inserted his penis into her private parts, the record indicates that confusion followed. The question posed to OM by the prosecutor appeared not to be clear to OM necessitating the prosecutor to repeat the question. During the confusion, the record indicates that OM's answered the question but that the prosecutor did not accept the answer. Unfortunately, whatever OM's initial answer was appeared to be 'unsatisfactory' to the prosecutor. This answer was not recorded. What followed and what was recorded was that the prosecutor repeats to OM: "*-No, the uncles, the uncles, how was the uncle?*" Ostensibly the appellant's position. It is only then that OM answered that he was in a standing position. Whether OM's answer was with regard to the appellant's position in relation to the bed is unclear. This is why after her response, the prosecutor prompts her by posing a leading question suggesting where the standing took place. He asks OM "*standing on top of the bed?*" OM confirms the standing position on the bed. At this moment, the

prosecutor does not ask a question but makes a statement suggesting an answer when he says, “*And he put his penis inside your private part whilst standing and you were lying on your back?*” to which, OM simply replies ‘yes’. Directly after this OM testifies that regarding the rape incident, “*Some I do not remember, Your Worship.*”

[36] Contrary to the appellant’s concern OM did testify that after the appellant inserted his penis she screamed, and the appellant covered her mouth with his hand. She further testified that after he inserted his penis she felt “*something painful.*” Pain followed act of rape. It is not clear if the appellant ejaculated but OM simply testified that the appellant took a towel and wiped himself and instructed her to rinse herself. She complied.

[37] None of OM’s evidence regarding her initial description of the rape, that the appellant climbed on top of her, was disturbed during cross-examination. All that was put to her was that the appellant did not rape her and that it was ‘Gogo’/ the grandmother put her up to it, which OM denied.

[38] Nonetheless, OM was a single child witness and the appellant raised that the Court *a quo* did not apply the cautionary rule properly in that OM’s evidence lacked the degree of trustworthiness which would allow the State to overcome the burden of proof. The appellant’s Counsel then invited the Court to consider the factors raised in S v Hanekom⁸, namely: “*That the cautionary rule was a red flag, warning a court to bear a number of factors in mind when evaluating evidence. These factors include evasiveness on the part of the witness, lapse of a significant period of time between the incident complained of and the trial, the possibility of the witness having a grudge against the accused, or a motive falsely to implicate him, and the fact that, in general, a child might have difficulty separating reality from fantasy.*”

[39] Other than highlighting the factors, the appellant did not deal with nor engage with the factors by the evidence accepted by the Court *a quo*. In fact,

⁸ 2011(1) SACR 430 (WCC).

OM's evidence as dealt with, was not disturbed by cross-examination, nor was a motive established nor a grudge suggested nor, for that matter was it suggested that she had described a fantasy due to inconclusive clinical findings. OM was under the age of 7 (seven) at the time and the relevance of certain of the factors too irrelevant warranting consideration. The relevance of S v Hanekom matter on this basis is not clear.

[40] There were no material inconsistencies which could support the notion that OM, together with the medical evidence that OM's account was not a reality. OM's relationship with the accused was close, she trusted him like a father. Her evidence was candid, straightforward, there is no reason why the Court *a quo* should not have found her evidence trustworthy.

[41] The further inconsistency the appellant raised was that OM could not give a clear answer as to her understanding of the word 'rape' and it was questioned why she used the word when she testified. But this is not correct. A clear answer was in her initial description when she described what happened to her as previously mentioned. She did not initially use the word 'rape'. However, what was elicited under cross-examination was that OM could not remember when she first heard of the word rape and that she had not spoken about rape with her grandmother or with anyone for that matter. It was never put to her that she did not understand the word rape nor was she asked to explain what she meant by rape in her own words. What is clear from her testimony is that when she gave an account of the incident, she described it as the appellant inserting his penis into her private parts. Such understanding not disturbed on the record.

[42] The appellant's ground having regard to all the evidence must fail as raised and no interference warranted.

[43] Now to the medical evidence based on the clinical findings.

What was the weight of the medical evidence?

[44] The appellant argues that the evidence of Dr Nkambule's clinical findings do not support the charge that the appellant inserted his penis into OM's vagina because, other than bruising of her private parts no other injuries were found and that the outcome samples which were handed to the police were unknown.

[45] The evidence of Dr Nkambule must be seen against the accepted facts. The completed J88 medical report was marked as Exhibit C. Before dealing with the content thereof the Court *a quo* turned to the definition of rape as an act of sexual penetration as defined in the Sexual Offences and Related Matters Amendment Act, 32 of 2007. The definition of rape was considered and applied as being the unlawful and intentional act of sexual penetration of a person without their consent. To give context to sexual penetration the Court *a quo* considered and applied the definition to the facts being definition in the wide sense, meaning any act which causes penetration to any extent whatsoever into the genitals of one person or beyond the genital organs, anus or mouth of a person. The extent of penetration in respect of the charge put to the appellant would be penetration to any extent of 'the vagina.'

[46] It was against this backdrop the Court *a quo* accepted the evidence and clinical findings of Dr Nkambule in support of the charge. The findings were that OM's entire genital area was bruised, and her hymen was swollen. Although there were no clefts, no tears, no scars or discharge found, the report indicated that the clinical findings were conclusive and consistent with a sexual assault and that neither physical force nor penetration of the anus could be excluded.

[47] The clinical findings of Dr Nkambule stands and therefore the bruising of the labia minora which, anatomically surrounds, *inter alia*, the vagina together with the swelling of the hymen, the hymen too anatomically located at the vaginal opening itself, both injuries are sufficient to have included penetration to any extent whatsoever of OM's 'vagina'. The Court *a quo* was correct to accept such findings in support of the charge.

[48] This Court is not inclined to interfere with the finding of conviction, nor with the acceptance of OM's evidence. The remaining issue of sentence is now dealt with.

SENTENCE

[49] Life imprisonment is the prescribed minimum sentence for a conviction of rape of a minor, as in this case. The Court *a quo* relying on the approach of S v Malgas⁹ that stated that: "*When it comes to the prescribed minimum sentence, the court must approach the sentence as the one that is prescribed by law*".

[50] Furthermore, the Court *a quo* approached the application of prescribed minimum sentence correctly in that it dealt with the possibility of a deviation on consideration of substantial and compelling circumstances. The Court *a quo* considered all the circumstances of the appellant before it, including what was stated in the pre-sentence report, being exhibit E and the appellant's personal circumstances. The only reason for mentioning the pre-sentencing report, was to confirm that the appellant's previous convictions, admittedly old, were factors to the character of the appellant, namely a propensity to commit offences. Such offences are that in 1996 he escaped custody at the age of 21, in 2000 he was convicted of robbery and in 2008 he was convicted of rape. The Court *a quo* could not find any compelling circumstance warranting a deviation of the prescribed minimum sentence.

[51] The appellant's Counsel stated that the sentence was not in proportion with the facts of the case in that according to the J88 the minor suffered no injuries other than bruising. This argument is rejected outright in that not only is rape, let alone rape of a minor child, a serious offence such as constantly been expressed by the Courts,¹⁰ but the severity of the physical injuries does not detract from the harm and *sequelae* the act causes. This was and clearly expressed in S v C¹¹ where the Court stated that:

⁹ 2001 (1) SACR 496 (SCA).

¹⁰ **S v Chapman** 1997 (2) SACR 3 (SCA) at 345C-D.

¹¹ 1996 (2) SACR 181 (C) at 186D-F.

“Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim; he murders her self-respect and destroys her feelings physically and mentally and her security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life, a fate often worse than loss of life.”

[52] The Court *a quo* when it imposed the sentence it exercised its discretion properly and prescribed the lawful minimum sentence. This Court will not interfere with the Court *a quo* in this regard.

[53] The appeal on the basis of sentence as raised must fail.

[54] In the circumstances I propose the following order:

1. The appeal is dismissed.

LINDA RETIEF

Judge of the High Court
Gauteng Division

I agree,

SELBY BAQWA

Judge of the High Court
Gauteng Division

Appearances:

For the Appellant: Adv L Augustyn

Instructed by attorneys: Legal Aid of South Africa
Ref: Advocate L Augustyn

For the Respondent Mr GCJ Maritz

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Date of hearing: 31 July 2025

Date of judgment: 20 October 2025