

**IN THE HIGH COURT OF SOUTH AFRICA  
NORTHERN CAPE DIVISION, KIMBERLEY**

**CASE NUMBER: CA&R 17/2025**

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Regional Magistrates: YES / NO

Circulate to Magistrates: YES / NO

In the matter between:

**P[...] R[...]**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *R[...] v The State* (CA&R 17/2025) [2025] 31 October 2025.

**Coram:** Stanton J et Tyuthuza AJ

**Heard:** 13 October 2025

**Delivered:** 31 October 2025

**Summary:** *Criminal appeal against sentence – Conviction of rape of an eight-year old girl – Whether the trial court erred in finding no substantial and compelling reasons to deviate from the prescribed sentence of life imprisonment – All relevant factors were considered – Trial court weighed the mitigating factors and the aggravating factors and correctly found that no substantial and compelling circumstances exist to deviate from the prescribed minimum sentence of life imprisonment – Appeal against sentence dismissed.*

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## ORDER

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1. Condonation is granted for the late filing of the appeal.
  2. The appeal against the sentence is dismissed.
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## JUDGMENT

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***Stanton J***

### **Introduction:**

- [1] The appellant was charged with one count of contravening s 3 read, with s 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape), read with s 51(1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”), and further read with s 120 (4) of the Children’s Act 38 of 2005. The appellant was arraigned before Magistrate De Villiers in the Regional Court, Kimberley, (“the trial court”) He was legally represented; and had been advised, prior to the commencement of the trial, that he could be sentenced to life imprisonment, if convicted on the charge of rape, absent any substantial and compelling circumstances.
- [2] The appellant pleaded guilty to the charge proffered against him. He was convicted on 24 May 2023; and on 14 July 2023, he was sentenced to life imprisonment in terms of section 51(1) of CLAA.
- [3] In terms of s 309 of the Criminal Procedure Act 51 of 1977 (“the Act”), as amended by ss 10 and 11 of the Judicial Matters Amendment Act 42 of 2013, the appellant has an automatic right of appeal to the Full Bench of this Court

against his sentence of life imprisonment. Leave to appeal against his life imprisonment is on this basis.

- [4] According to the plea explanation, the appellant admitted that on 13 June 2021 at Platfontein he intentionally and unlawfully committed an act of sexual penetration with the 8 year old complainant (MB) by inserting his penis into her vagina and penetrating her without her consent. He explained that he was in a relationship with MD's mother, and was living with her, MB and her siblings. He played the role of MD's stepfather and had authority over her. On the day in question, MB's mother left the residence to go to work. MB was sleeping on the floor and he told her to come and sleep on the bed with him. The appellant removed her pants and panty and he inserted his penis into her vagina, penetrating her until he ejaculated. He was still lying next to MB when her mother unexpectedly returned home, took the blanket off and found MB naked.
- [5] MB was examined by Dr E Olivier. On the J88, handed in by consent, she recorded that the appellant and MB's mother is HIV positive.
- [6] MB's mother testified about the incident and confirmed that she and the appellant are HIV positive, but that MB received immediate treatment after the rape; and that she is HIV negative. According to her observation of MB, she is "scared", but the incident has not negatively impacted on her schooling.

#### **Condonation:**

- [7] The appellant filed an application for condonation with the Kimberley Magistrate's Court on 06 August 2024. The appellant's notice of appeal was, however, only filed on 10 March 2025. In his application for condonation, he explains the reasons for not timeously filing the notice of appeal as: (a) He is a sentenced prisoner; (b) He does not access to legal aid; (c) He did not get assistance to draft appeal papers; and (d) He was not feeling well.
- [8] Rule 67(5A)(a)(i) of the rules of the Magistrates' Court Act 32 of 1944 states that a person who wishes to appeal against his conviction or sentence, shall

do so in writing to the registrar or the clerk of the court within 10 days after the passing of sentence and also send a copy of the notice of appeal to the director of public prosecutions.

- [9] It is trite that a party seeking condonation must make out a case entitling it to the Court's indulgence. For it to succeed, it must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or the Court's directions. It is also of great significance that the explanation must be reasonable enough to excuse that default.<sup>1</sup>
- [10] When considering an application for condonation, a court has to exercise a judicial discretion upon a consideration of all relevant factors. Factors such as the degree of non-compliance, the explanation for the delay, the prospects of success, the importance of the case, the nature of the relief, the interests in finality, the convenience of the Court, the avoidance of unnecessary delays in the administration of justice and the degree of negligence of the persons responsible for non-compliance are considered. These factors are interrelated, for example, good prospects of success on appeal may compensate for a bad explanation for the delay.<sup>2</sup>
- [11] The respondent did not oppose the application for condonation. Mr. Fourie, on behalf of the appellant, submitted that it would be in the interests of justice if condonation is granted as it would bring finality to the judgment; the appeal could be argued, and the Court can give judgment.
- [12] Having considered all the relevant factors, I am of the opinion that the appellant has furnished sufficient reasons for the delay in lodging this appeal; that the respondent is not prejudiced, nor is this Court inconvenienced. The application for condonation is therefore granted.

### **The grounds of appeal:-**

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<sup>1</sup> *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at para 23.

<sup>2</sup> *S v van der Westhuizen* 2009 (2) SACR 350 (SCA) at para 4.

- [13] The appeal lies against the sentence of life imprisonment imposed. It was contended, in broad terms, that the trial court misdirected herself in not finding substantial and compelling circumstances, which justified a departure from the imposition of life imprisonment; and that the sentence is disproportional to the seriousness of the offence, the nature thereof, the interest of society and the appellant's moral blameworthiness.

### **Discussion:**

- [14] The conviction *in casu* attracts a sentence of life imprisonment in that s 51(1) of the CLAA stipulates that a high court or regional court must impose a sentence of life imprisonment if it has convicted a person of rape where the victim is a person under the age of 18 years, unless substantial and compelling circumstances exist, which justify the imposition of a lesser sentence.
- [15] Sentencing is primarily in the discretion of the trial court. The question to be answered is not whether the sentences were right or wrong, but whether the trial court used its discretion in a reasonable manner. Only when there is an irregularity or where the trial court made a grave error or where the sentence is shocking and inappropriate, will a court of appeal intervene.<sup>3</sup> Where, as here, the trial court imposed the sentence prescribed by the CLAA, the approach on appeal is whether the facts that were considered by the sentencing court are indeed substantial and compelling circumstances. Bosielo JA, in the matter of *S v PB*,<sup>4</sup> reaffirmed the correct approach by a court on appeal against a minimum sentence, as follows:-

'...Can the appellate court interfere with such a sentence imposed by the trial court exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so

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<sup>3</sup> *S v Pillay* 1977 (4) SA 531 (A) at 535 E-F; *S v Pieters* 1987 (3) SA 717 (A) at 728 B – C.

<sup>4</sup> 2013 (2) SACR 533 at para 20.

because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.'

[16] The appellant advanced the following personal circumstances in mitigation:-

16.1 He was 51 years old and unmarried. He lived with MB and her mother since she was four years old. He and MB's mother were in a cohabiting relationship and have one minor child, a boy of six years. He was considered as MB's stepfather. He has seven other children who have attained the age of majority;

16.2 He was employed as a general worker at the Department of Environmental Affairs and earned R2 500 per month, which he spent on the household;

16.3 He is HIV positive and suffers from diabetes and hypertension for which he receives treatment in prison;

16.4 He was incarcerated for approximately seven months awaiting trial;

16.5 He pleaded guilty and did not traumatise the MB further by subjecting her to a trial; and

16.6 He is participating in a rehabilitation program in prison.

[17] The appellant's legal representative in the trial also placed it on record that the appellant was discharged from his employment as he was found guilty of slaughtering wild animals, and sentenced to three years' imprisonment, despite the fact that these activities fell within the course and scope of his employment.

[18] The appellant has 10 previous convictions of which the following three are relevant for the purpose of this appeal:

18.1 He was found guilty of sodomy on 04 February 1991 and sentenced to corporal punishment;

18.2 He was found guilty of indecent assault on 21 April 2000 and sentenced to seven years' imprisonment; and

18.3 He was found guilty of two counts of sexual assault on 20 February 2006 and sentenced to 10 years' imprisonment on each count.

[19] Mr. Fourie conceded that the trial court considered all the mitigating and aggravating circumstances and exercised her discretion judicially. He, however, urged us to deviate from the prescribed minimum sentence on the basis that MB's physical injuries were not of a serious nature. He added that the offences on which the appellant had been found guilty occurred very long ago, the latest of which approximately 19 years ago. Mr. Steyn, on behalf of the State, submitted that even though the injuries were not serious, the J88 reflects that MB's genitalia was tender to touch, the hymen was swollen to the extent that it could not be examined.

[20] Mr. TT Brown, a probation officer employed by the Department of Social Development, compiled a report in terms of s 170 of the Act concerning the ability of MB to testify in open court. Apparent from this report is that MB was traumatised by the incident to the extent that: (a) She is afraid to be in the company of older men; (b) She had difficulty sleeping the bedroom where the incident occurred; (c) She never wants to see the appellant and (d) She wished that he should never be released from prison.

## **Evaluation:**

[21] In *S v Vilakazi*,<sup>5</sup> the Supreme Court of Appeal confirmed that the personal circumstances of an offender, in cases of serious crime, will necessarily recede into the background when sentencing is considered. The lack of physical injuries is a factor to be considered along with other relevant factors to conclude whether there are substantial and compelling circumstances. An apparent lack of physical injury to the complainant, without more, would not suffice.<sup>6</sup>

[22] In *S v Matyityi*,<sup>7</sup> Ponnann JA, with regard to the appellant's personal circumstances, concluded:-

'...Instead, the trial court emphasised the personal interests of the individual respondent above all else. In doing so it failed to strike the appropriate balance. It thus imposed a sentence that was disproportionate to the crime and the interests of society. In my view there were no substantial and compelling circumstances present that warranted a departure from the prescribed statutory norm. It follows that the contrary conclusion reached by the high court cannot stand. Having regard to all of the circumstances encountered here the minimum sentence is a manifestly fair and just one. To my mind this is precisely the type of matter that the legislature had in mind when it enacted the minimum sentencing legislation.'

[23] The trial court, in her detailed judgment on sentence, considered all the relevant factors which come into play when deciding upon an appropriate sentence - the serious nature of the offence, which had been committed on a 8 year old, its high prevalence, which is shocking and causes outrage, and the impact it had on MB; the interests of the community; the purpose of sentencing; and the personal circumstances of the appellant, including his previous convictions, which the trial court found to be proof of the fact that the appellant has a propensity to commit sexually related offences. The trial court also considered that the appellant committed the offence being aware of his HIV status. It also found that the appellant showed no genuine remorse as an

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<sup>5</sup> 2009 (1) SACR 552 (SCA) at para 58.

<sup>6</sup> *Director of Public Prosecutions, Free State v Mokati* 2022 (2) SACR 1 (SCA) para 40.

<sup>7</sup> 2011 (1) SACR 40 (SCA) at para 24.

apology was only expressed from the bar by his legal representative; and that he pleaded guilty because he was caught red-handed.

[24] In my view, not one of these factors was over-emphasised at the expense of another.

[25] I find that the trial court weighed both the mitigating factors and the aggravating factors and correctly found that no substantial and compelling circumstances exist to deviate from the prescribed minimum sentence of life imprisonment. The trial court exercised its discretion in a reasonable manner and the sentence is not shockingly inappropriate. There is accordingly no basis on which this Court can interfere with the sentence.

[26] Wherefore the following order is made:

1. Condonation is granted for the late filing of the appeal.
2. The appeal against the sentence is dismissed.

STANTON J  
JUDGE OF THE HIGH COURT  
NORTHERN CAPE DIVISION

I concur

TYUTHUZA AJ  
ACTING JUDGE OF THE HIGH COURT  
NORTHERN CAPE DIVISION

Appearances

On behalf of the appellant:

Adv. P Fourie

On instructions of:

Legal Aid SA

On behalf of the respondent:

Adv. R Steyn

On instructions of:

The NDPP