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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Not Reportable

Case no: A190/2024

In the matter between:

LEFA ISAAC RAMAKAU

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Ramakau v The State* (A190/2024) [2025] ZAFSHC 339 (28 October 2025)

Coram: MBHELE AJP *et* BENADE AJ

Heard: 5 May 2025

Delivered: 28 October 2025

Summary: Criminal appeal against conviction and sentence – differentiation between conviction founded on s 51(1) and s 51(2) of the Criminal Law Amendment Act 105 of 1997.

ORDER

- 1 The appeal against the conviction and sentence is upheld.
- 2 The order of the Regional Court is set aside and replaced with the following:
'2.1 The accused is convicted of rape in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997.
2.2 The accused is sentenced to 12 years' imprisonment for rape.'

JUDGMENT

Mbhele AJP (Benade AJ concurring)

[1] This is an appeal against the conviction and sentence of the appellant imposed by the Regional Court, Bloemfontein. The appellant was convicted on 13 September 2024 of having raped a 17-year-old complainant. He was sentenced to life imprisonment on 27 September 2024 on the basis that the complainant was below the age of 18 at the time of the offence. The appellant exercised his automatic right to appeal. The appellant's attack on the conviction returned by the learned regional magistrate in the trial court is premised upon the following main contentions: (a) that the trial court erred in accepting the State's evidence and rejecting the appellant's version which, in his view, was reasonably possibly true; (b) that the court erred in finding that the complainant was below the age of 18 resulting in the appellant being sentenced in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act).

[2] On 31 December 2022, the complainant was at Sunset Tavern in company of her boyfriend S[...] N[...] (S[...]), Bongi, Thuto and Blade. In the early hours of 1 January 2023, they all decided to move from Sunset to Maxola's Tavern (the tavern). On their way to the tavern, the complainant realised that she was heavily intoxicated and would not make it to their intended destination. She told her boyfriend (S[...]) who asked the appellant, who stayed closer to the tavern, to allow the complainant to sleep at his place while the rest of them proceeded to the tavern. They left her sleeping in the appellant's sink house. While still in bed, she woke up to the appellant who was on top of her with his penis inserted in her vagina and having sexual intercourse with her. She rose up in fright and asked the appellant where her boyfriend was. He responded that her

boyfriend went to another tavern. She jumped out of bed and the appellant tried to push her back into bed but she wrestled with him and managed to escape. She ran to the tavern where she reported to S[...] that the appellant raped her. S[...] confronted the appellant who apologised for his actions. She denied that she consented to sexual intercourse with the appellant.

[3] The complainant was taken to National Hospital where she was examined by a forensic nurse, Ramahlele. She observed abrasions on the complainant's chest which injuries are, in her view, consistent with the history given by the complainant that she wrestled with her assailant during the incident. She had fresh tears in her genitals at 4 o' clock, 5 o' clock, 6 o' clock and 7 o' clock. In her view, the tears are consistent with forceful vaginal penetration. She concluded that the sexual intercourse was non-consensual.

[4] The next witness was S[...]. He, corroborated the complainant's testimony and, further, added that, on their arrival at the tavern, they joined a group of people who were standing outside. He went inside to buy alcohol and, upon his return, the appellant had disappeared. He observed scratches on the complainant's chest and neck when she arrived. The next witness was the complainant's grandmother who testified that the complainant arrived at home crying alleging that she was raped. She also observed scratches on the complainant's chest.

[5] The appellant denied having raped the complainant. He repeated his plea explanation that he had a consensual sexual intercourse with the complainant. His version is that he went to the tavern with S[...] after they left the complainant in his shack sleeping. Upon arrival at the tavern, S[...] disappeared on him and he decided to go back home because he was exhausted. Upon his arrival at his shack, he requested the complainant to leave as he wanted to sleep in his bed but the complainant, instead of leaving, invited him to join her under the bed cover, which invitation he rejected. While he was sitting next to the bed, the complainant grabbed him, pulled him towards her and started kissing him. After some resistance he succumbed and kissed her back. The kissing led to the two of them indulging in sexual intercourse.

[6] The trial court evaluated the evidence and came to the conclusion that the State witnesses were truthful and rejected the version of the appellant as improbable. It is trite that factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. In the absence of any misdirection the trial court's conclusions and acceptance of oral evidence is presumed to be correct.¹ A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong.²

[7] The complainant's evidence finds corroboration in the evidence of the forensic nurse whose examination revealed that the complainant sustained injuries which are consistent with traumatic vaginal penetration. The complainant's grandmother, S[...] and the nurse observed abrasions on the complainant's chest and neck which corroborate her version that she sustained abrasions on her chest during a scuffle between her and the appellant. I am, therefore, unable to find fault in the conclusion by the trial court that the appellant had sexual intercourse with the complainant without her consent.

[8] The next issue to consider is whether the state managed to prove all the elements of rape referred to in Part I Schedule 2 to justify a conviction under s 51 (1) of the Act. The appellant submitted that the State failed to prove the age of the complainant nor that it proved that the appellant knew that she was below the age of 18 at the time of the offence. He contended, further, that the complainant's age remains hearsay evidence until confirmed by someone who has personal knowledge of the complainant's date of birth. The age of the complainant is an essential element of the offence of rape that the appellant was convicted of. Section 51(1) prescribes a minimum sentence of imprisonment for life where the victim of rape is under the age of 18.

[9] The State contended that the J88 and the complainant's testimony that she was 19 years old when she testified and 17 years old at the time of rape, were not objected to and, further, that they constituted sufficient proof that the complainant was below the age of 18 at the time of the offence. The State has a duty to adduce evidence to prove all the elements of the offence before a conviction can follow. In *R v C*,³ the full court

¹ *S v Francis and Another* 1991 (2) All SA 9 (C).

² *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705-706.

³ *R v C* 1955 (1) SA 380 (C) at 382-383.

made the following remarks where the accused had pleaded guilty to rape despite the state failing to adduce reliable evidence proving the age of the victim:

'In the present case there was no express admission by the accused of the plaintiff's age. It is argued on behalf of the Crown that, when regard is had to the above-cited terms of the charge sheet, the plea of guilty, coupled with the failure to dispute the complainant's testimony that she had been born on the 13th October, 1937, must be regarded as a tacit admission by the accused of the complainant's age as averred by the Crown in the charge sheet and as deposed to by her in evidence. I am unable to agree. Complainant's evidence as to her age was, as I have already pointed out, hearsay. It was not, in my opinion, incumbent upon the accused to challenge this.'

[10] I align myself with the above comment. The complainant's testimony that she was 17 years of age at the time of rape remains hearsay. The admission of hearsay evidence is not automatic, the State had to apply for its admission and the trial court had to rule on its admissibility as provided for in s 3(1) of the Law of Evidence Amendment Act 45 of 1988.⁴ It was not obligatory on the appellant to challenge the admissibility of hearsay evidence as presented by the appellant and contained in the J88.

[11] In *S v Kappa*,⁵ the Constitutional Court made the following remarks about hearsay evidence and the circumstances under which such evidence may be admitted: 'Hearsay evidence is inadmissible, unless the court is of the opinion that it is in the interests of justice for it to be admitted, taking into account the factors referred to in section 3(1)(c)(i)-(vii). The Supreme Court of Appeal in *Ndhlovu* held that s 3(1)(c)'s criteria - which must be "interpreted in accordance with the values of the Constitution and the norms of the objective

⁴ 'Section 3(1) hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.'

⁵ *S v Kapa* [2023] ZACC 1; 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) para 32.

value system it embodies” – protect against the unregulated admission of hearsay evidence and thereby sufficiently guard the rights of accused.’

[12] The default position is that hearsay evidence is inadmissible in criminal and civil trials unless it meets the requirements set out in s 3 (1)(a), (b) and (c)(i) – (vii). There was no application by the state for the trial court to admit the hearsay evidence. In *Godfrey Alfred Ntuli v The State*,⁶ the Supreme Court of Appeal had the following to say on the admissibility of hearsay evidence:

‘Where the state seeks the admission of hearsay evidence, the trial court must be asked clearly and timeously to consider and rule on the admissibility of the hearsay evidence. If the hearsay evidence is presented during the state case, the trial court must rule on whether the hearsay evidence should be admitted before the state closes its case. A ruling at that stage will enable the accused to appreciate the full evidentiary ambit he or she faces. In other words, the accused must know before he or she testifies, whether he or she must also deal with the hearsay evidence in his or her own evidence. The trial court cannot be asked for the first time at the end of the trial to admit hearsay evidence. In *S v Ramavhale* the hearsay evidence was admitted by the trial court only in the judgment when the accused was found guilty on a piece of hearsay evidence by a State witness as to what the deceased had said. This Court described the admission of hearsay at that stage “a particularly serious irregularity, which had the effect, I regret to say, that the appellant had a less than fair trial”. In *S v Ndhlovu* and others it was held that a request for the admission of hearsay evidence cannot be made on appeal.’

[13] The State failed to prove that the complainant was under the age of 18 at the time of the offence. There is also no evidence adduced to show that the appellant knew the age of the complainant before having sexual intercourse with her. The State failed to prove an essential element justifying a conviction under s 51(1) and the trial court erred when it found the appellant guilty of rape in terms of s 51(1). The appellant met the complainant at a tavern in company of her boyfriend. They drank together for the whole night until the complainant was completely sloshed. He came back and penetrated her vaginally while she was sleeping. There is no evidence showing that the complainant had an opportunity to inform the appellant about her age. It is also not farfetched that the appellant could have assumed that she was above the age of 18 owing to the

⁶ *Godfrey Alfred Ntuli v S* [2025] ZASCA 53; 2025 (2) SACR 157 (SCA) para 47.

circumstances that prevailed prior to the incident. The appellant ought to have been convicted of rape falling under s 51(2) of the Act.

[14] I have considered the appellant's personal circumstances, the offence he was convicted of and the interest of society. I have to balance the triad as set out in *S v Zinn*.⁷ The appellant was 26 years of age at the time of sentencing, he has two children who stay with their mothers, he was employed at Makro, earning R5 500 per month and he made extra income as a DJ where he earned R500 per booking. He owns a dwelling structure where the offence took place. He was a first offender.

[15] The appellant was convicted of a very serious offence which is prevalent in this country. He raped the complainant while sleeping and when she woke up trying to escape, he physically wrestled with the complainant resulting in her sustaining injuries on her chest. He took advantage of the complainant's state of sobriety and forced himself on her. This constitutes an aggravating factor.

[16] A victim impact statement was submitted to the court *a quo*, as evident from p. 140, to p.143 of the record. It is evident from the complainant's statement that this offence had a life altering and devastating emotional and psychological impact on her. She continues to suffer long after the incident. It isolated her from her family and friends, she lives in fear and carries the humiliation of being violated with her everywhere she goes. She stopped seeing a psychologist because consultations with a psychologist took her back to the scene of crime. It felt like she was reliving that moment.

[17] Having considered all relevant facts, the appellant's personal circumstances in mitigation, the offence and interest of society, I am of the view that a prison term of 12 years will serve the purpose of punishment in the circumstances of this matter. The appeal ought to succeed.

[18] In the circumstances, I make the following order:

- 1 The appeal against the conviction and sentence is upheld.
- 2 The order of the Regional Court is set aside and replaced with the following:

⁷ *S v Zinn* 1969 (2) SA 537 (A).

‘2.1 The accused is convicted of rape in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997.

2.2 The accused is sentenced to 12 years’ imprisonment for rape.’

N M MBHELE

ACTING JUDGE PRESIDENT OF THE HIGH COURT

I concur

H J BENADE

ACTING JUDGE OF THE HIGH COURT

Appearances

For the applicants: Ms S Kruger

Instructed by: Legal Aid South Africa, Bloemfontein

For the respondent: Adv M Teki

Instructed by: National Director of Public Prosecutions, Bloemfontein.