

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Not Reportable
Case no: A114/2025

In the matter between:

MASIXOLE BULAWA

APPELLANT

and

THE STATE

RESPONDENT

Coram: THULARE, J et COOKE, AJ

Heard: 31 October 2025

Delivered: 13 November 2025

ORDER

[1] The appeal is dismissed.

JUDGMENT

Cooke AJ (Thulare J concurring):

[1] This is an appeal against a conviction of rape and sexual assault. The appellant was convicted in the Mitchell's Plain Regional Court of one count of sexual assault, in contravention of section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and three counts of rape, in contravention of section 3 of the same Act, read with section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

[2] In relation to the four counts:

- a. Count 1 concerned a charge of kissing and touching the complainant's vagina without her consent;
- b. Count 2 was in respect of a charge that the appellant inserted his fingers into the complainant's vagina without her consent;
- c. Under count 3 the appellant was charged with inserting his penis into the complainant's mouth without her consent; and
- d. Count 4 was for a charge of sexual penetration by the appellant inserting his penis into the complainant's vagina without her consent.

[3] The appellant was sentenced to five years' direct imprisonment in respect of the sexual assault charge, and life imprisonment as prescribed on each of the rape charges. The sentences imposed on counts 1 - 3 were ordered to run concurrently with the sentence imposed on count 4.

[4] Leave to appeal was denied against conviction and sentence on count 1 but granted on petition on 27 February 2025. The appellant invoked his automatic right of appeal in respect of counts 2 - 4 in terms of section 309 (l)(a) of the Criminal Procedure Act 51 of 1997.

[5] It is common cause that the appellant and the complainant were, at one stage, next door neighbours in Montclair, in the Mitchell's Plain area. At the time the appellant was residing with his aunt, who lived adjacent to the complainant's family. The complainant, who was 18 years old at the time of the trial, testified that when she was about eight years old, the appellant committed various sexual offences against her. It started with a kiss, then on the next occasion it progressed to the touching of her vagina, whereafter the appellant made her perform fellatio. On a subsequent occasion he penetrated her vagina with his fingers. Then, on a further occasion, he had sexual intercourse with her on a beanbag under his aunt's carport. The complainant testified that this was painful and caused her vagina to bleed.

Thereafter, in the words of the complainant 'the abuse continued every chance he got', including further acts of penetration. The complainant also testified that from the beginning, the appellant threatened to kill her and her parents should she mention what had happened.

[6] It was only some years later that the complainant made a partial disclosure of these events to her mother. On this first occasion, the complainant only mentioned that the appellant had kissed her. She explained that she saw pain in her mother's eyes, and this inhibited her from making any further disclosure at that time. A couple of years after that first report the complainant's mother found her in the bathroom on the floor trying to slit her wrist. The complainant was then referred to a psychologist. But even then, she was afraid to talk about what happened. After being at a clinic for a few weeks, the complainant came home intoxicated and, when confronted by her mother, she burst into tears and told her mother that she had been raped by the appellant.

[7] At the trial, the appellant testified that he was not residing in the Montclair area at the time of the alleged incident. According to the appellant, during 2011-2012 he was living with an uncle in Vredendal, and then with his mother in Mfuleni. Despite the trial being postponed to allow the appellant to call his mother as a witness in support of this alibi, his mother did not give evidence. The court *a quo* rejected the alibi defence, correctly in my view, and the appellant did not seek to challenge this finding on appeal.

[8] The main ground of appeal was that the court *a quo* erred and misdirected itself in accepting the evidence of the complainant, as her evidence was that of a single child witness, and was not clear and satisfactory in every material respect.¹ This cautionary rule may be a guide to a right decision, but it does not mean that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded. The exercise of caution must not be allowed to displace the exercise of common sense.²

¹ See the cautionary rule described in *R v Mokoena* 1932 OPD 79 at 80.

² *Director of Public Prosecutions v S* 2000 (2) SA 711 (T) at 714F-I.

[9] In oral argument the appellant's counsel contended that the second report to the complainant's mother ('the impugned report') was not made freely and voluntarily as the complainant had been intoxicated at the time and this 'outburst' followed a reprimand by her mother. To my mind, the circumstances surrounding the impugned report do not detract from the evidence given by the complainant regarding the rape and sexual assault. It does not follow from the mere fact that the complainant had been drinking alcohol, that the report to her mother was not made freely and voluntarily. Furthermore, the impugned report was made after an earlier report where a partial disclosure had been made by the complainant. In addition, after the impugned report, the complainant's mother waited before taking the complainant to report the incidents to the police. According to the complainant 'I continued seeing my psychologist till I was able to tell her my full story without a set of tears'. Viewed as a whole, I consider that the complainant's conduct after the event supports her testimony. It certainly does not provide a basis to discredit her testimony.

[10] Moreover, at the trial the appellant's legal representative did not put to the complainant or her mother, that the impugned report had not been freely and voluntarily made. Nor was this point argued in the court a quo. In the result, it is not open to the appellant, for the first time on appeal, to argue that such a finding should be made.³

[11] The appellant's counsel also placed reliance upon the fact that no corroborating medical evidence relating to the complainant had been presented by the State. Reliance was placed on the case of *Ramulifho*.⁴ It is correct that where there is objective evidence provided by the medico legal examination of a complainant, such evidence will be essential to determine where the truth lies between competing versions. However, in circumstances where there is no such evidence, the mere absence of such evidence does not detract from the reliability of the complainant's evidence. This is particularly so in a case such as this, where the complainant was a young girl at the time of the incidents and she was threatened by the appellant not to report the incident. In these circumstances, the complainant

³ See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at paras 59-65.

⁴ *S v Ramulifho* 2013 (1) SACR 388 (SCA) para 11.

cannot be criticised for not having reported the incidents immediately, nor for not having sought a contemporaneous medical assessment.

[12] The appellant also submitted that the court *a quo* misdirected itself in respect of the conviction for count 3 in that the complainant had not testified that the appellant 'instructed' her to suck his penis, yet, according to the appellant, this was the factual conclusion reached in the judgment. Having regard to the age of the complainant at the time, issues of consent are irrelevant. In any event, the word used in the judgment of the court *a quo* was 'asked' not 'instructed'. Furthermore, the evidence of the complainant showed that the accused had shoved her head towards his penis, and he had told her to open her mouth. In the circumstances, I do not think the court *a quo* made a material error in finding that the appellant had 'asked' the complainant to suck his penis. Even if the appellant had not made an express request, his conduct certainly made it clear that he was requiring, or at least requesting, the complainant to perform fellatio.

[13] In all the circumstances I do not think that the court *a quo* erred and misdirected itself in accepting the evidence of the complainant as admissible and reliable.

[14] In my view it is also relevant that the complainant gave a false alibi. Where there is direct evidence of the commission of an offence, as is the case in this matter, the giving of the false alibi tends to strengthen the direct evidence, since there is no testimony to gainsay it, and therefore less occasion or material for doubting it.⁵

[15] As regards the sentence, the appellant submitted that the sentence of life imprisonment was shockingly disproportionate in respect of counts 2 and 3. According to the appellant the court *a quo* overemphasised the seriousness of the offences and overlooked the important element of mercy during sentencing.

[16] The appellant emphasised the following factors:

⁵ *S v Nkombani and Another* 1963 (4) SA 877 (A) at 8930.

- (a) he was only 19 years of age at the time of the alleged offences;
- (b) he is a first offender and can be rehabilitated;
- (c) there was no physical injury suffered by the complainant;
- (d) the appellant spent three years awaiting finalisation of his trial;
- (e) he was employed and had odd jobs at a carwash;
- (f) he had a difficult childhood and no proper support structure; and
- (g) he abused substances during this period of his life.

[17] As to the absence of physical injury, the complainant did testify that the first rape caused her pain and vaginal bleeding. In any event, it was apparent from her testimony that the offences caused her to suffer serious psychological and emotional harm. The whole experience also damaged the relationship between the complainant and her parents. She explained how her father had been her best friend and hero, but now she was very angry with him as, in her mind, he failed to protect her. In her Victim Impact Statement, the complainant stated that she lives in fear of men. She has also suffered from depression and anxiety. She hated herself and tried to take her life a couple of times. She was embarrassed and disgusted with herself. In addition, she said that her childhood was stripped from her, and she was never the same. The complainant will carry this trauma for the rest of her life.

[18] I do not consider that the factors relied upon by the appellant are so exceptional as to amount to a substantial and compelling reason to depart from the prescribed sentences.

[19] A court of appeal will not easily interfere with the sentence. The test is whether the sentence is vitiated by irregularity, misdirection or is disturbingly

inappropriate.⁶ In my view, the court *a quo* did not commit any irregularity or misdirection, nor was the sentence disturbingly inappropriate. Minimum sentences should not be departed from lightly or for flimsy reasons. These are the sentences that ordinarily, and in the absence of weighty justification, should be imposed for the specified crimes, unless there are truly convincing reasons for a different response.⁷ I do not consider that the appellant has provided 'weighty justification' or 'truly convincing reasons' for a departure from the prescribed sentences, and I therefore find that there is no basis to interfere with the sentence imposed by the court *a quo*.

[20] It is not without relevance that the appellant did not express any remorse for his conduct. To the contrary he sought to mislead the court *a quo* by concocting a false alibi.

[21] In *Masiya*⁸ the Constitutional Court observed that rape is less about sex and more about the expression of power through degradation and concurrent • violation of the victim's dignity, bodily integrity and privacy. In this matter the appellant repeatedly abused the physical and social power that he held over the complainant, as well as the respect she had for him. The appellant committed heinous offences against a vulnerable child over an extended period. I agree with the respondent's counsel that his conduct was 'predatory and escalated in severity'. The appellant's exploitation of the most intimate parts of the complainant's body constituted an abhorrent and grotesque violation of the complainant's human dignity. The sentence given by the court *a quo* is, in my view, fitting.

[22] For all these reasons the appeal should be dismissed.

D COOKE
Acting Judge of the High Court

⁶ *Manyaka v S* (434/2020) [2022] ZASCA 21; 2022 (1) SACR 447 (SCA) (23 February 2022) para 57.

⁷ *S v Malgas* 2001 (2) SA 1222 (SCA) at para 25. See also *S v Matyityi* 2010 ZASCA 127; 2011 (I) SACR 40 (SCA); [2010] 2 All SA 424 (SCA) at para 23.

⁸ *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied legal Studies and Another, Amici Curiae)* 2007 (5) SA 30 (CC) para 78.

I agree

D THULARE
Judge of the High Court

Appearances

For appellant: P Andrews
Instructed by: Legal Aid South Africa- Cape Town

For first respondent: H van As
Instructed by: Director of Public Prosecutions - Cape Town