IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

CASE NO: A04/2024
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO
DATE **23/01/2026**
SIGNATURE

In the matter between:

Z[...] M[...] **APPELANT**

and

THE STATE **RESPONDENT**

This judgment was handed down electronically by circulation to the parties and/ or their representatives by email. The date and time for hand-down is deemed to be 23 January 2026 at 10h00.

JUDGMENT

Venter AJ (Vukeya J concurring)

Introduction

[1] This appeal concerns the sentence imposed by the Regional Court for the Regional Division of Mpumalanga (Thulamahashe) on 1 November 2023 for the rape of a 12-year-old girl, which occurred on 30 September 2020 at her home, committed by her uncle, the biological brother of her father.

[2] The appellant was convicted in the Regional Court held in Thulamahashe (the trial court) on 5 October 2023. The conviction was for rape, in contravention of section 3 of the Sexual Offences and Related Matters Amendment Act 32 of 2007 (the Act). He was sentenced to life imprisonment read with section 51 (1) and Part I Schedule 2 of the Criminal Law Amendment Act 105 1997 (the CLAA).

[3] In terms of section 309(1) of the Criminal Procedure Act 51 of 1977 (the CPA), read with section10 and section 43(2) of the Judicial Matters Amendment Act 42 of 2013 (the JMAA), once the regional court imposes a sentence of life, the appellant is entitled to an automatic right of appeal to a full bench of the High Court.[1]

[4] In terms of an appeal from a lower court by a person convicted of a crime, section 309(1)(a) of the CPA reads:

> "Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal

[1] Section 309, Criminal Procedure Act 51 of 1977.

> without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a).”

[5] Additionally, the appellant also applies for condonation.

Condonation

[6] The appellant submitted an affidavit in support of his condonation application, in which the grounds are set as follows:

(a) he found himself in a state of disbelief and denial following his life sentence, which led to a state of depression, which extended to the first half of 2024.

(b) after then applying for Legal Aid, his application was successful, and he was told to be patient while they made enquiries into the availability of the transcripts.

(c) he received a call from Mr Kekana from Legal Aid, who said he believes there may be prospects of success on the sentence only.

(d) after his appeal was enrolled on 22 August 2025, it was removed from the roll due to non-compliance with practice directives.

(e) he says he did not have any part in delaying the prosecution of his appeal.

(f) he contends, that he will suffer immense pressure should his condonation be dismissed. The granting of condonation should be guided by the good prospects of success of his appeal

The Constitutional Court has, in the past, held a dim view of parties disregarding its rules, and generally requires that a reasonable explanation be given for a delay before it will grant condonation. In *Grootboom v National Prosecuting Authority*, the Constitutional Court held at paragraph 23:

> “It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show

sufficient cause. This requires a party to give a full explanation of the non-compliance with the rules or the court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."[2]

[7] In *Ndlovu v The State,* the court went on to state:

"However, the sufficiency of the explanation given for the delay is not wholly determinative of whether condonation should be granted. The pertinent question to consider is whether it would be in the interests of justice for condonation to be granted."[3]

[8] In *Brummer v Gorfil Brothers Investments,* the Constitutional Court explained:

"The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."[4]

[10] The appellant is about 22 months late in his application. The principles governing the considerations to be taken into account in granting an application for condonation are clear. Condonation is not a formality or simply there for the taking. Good cause must be shown why the applicant did not act timeously in prosecuting his appeal. To establish such a cause, the applicant must address the court on the following, including: reasons for late filing, period out of time, the efforts made to file as soon as possible albeit late, seriousness of the matter, interest of justice, and any prejudice suffered will be considered together with the prospects of success in the consideration of the condonation application. Even if the reasons for late filing are unsatisfactory on their own, a convincing prospect of success for granting leave to appeal could favour the granting of condonation. The court cannot blind itself to the difficult situation the incarcerated person finds themselves in, having restricted

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[2] *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) para 23. See also *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) para 20 and *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) para 22.
[3] *Ndlovu v The State* [2017] ZACC 19 para 32.
[4] *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3 para 3.

communication with family and only limited visitation interactions monthly. They have difficulty engaging with legal representatives and have limited consultation time. They are totally dependent on their lawyer to ensure compliance with the enrolment of their appeal. Obtaining transcripts often causes considerable delays. It cannot be denied that the current matter is serious in nature and has severe consequences for the appellant.

[11] Therefore, the courts often lean towards rather favouring the granting of condonation for late filing. Under the circumstances, condonation is granted.

Grounds of appeal

[12] The appellant contends that the court a quo erred and misdirected itself in finding that:

(a) there are no substantial and compelling circumstances which will justify a departure from the prescribed minimum sentence in section 51(1) of the CLAA;
(b) the personal circumstances of the appellant need not be extraordinary to meet the requirement, but cumulatively, they do qualify as substantial and compelling circumstances:
(c) the court misdirected itself in finding that the complainant had vaginal injuries as an aggravating fact. Such a finding was not supported by the medical report, and
(d) the complainant did not experience gratuitous violence and did not sustain injuries to her private parts, which should be considered as substantial and compelling circumstances.

[13] The respondent contends that the appeal is without merit for the following reasons:

(a) the court was compelled to impose life imprisonment as ordained by legislation because of the current set of facts:
(b) the appellant did not advance any substantial or compelling circumstances justifying a lighter sentence;

(c) there was no misdirection by the court in applying the punishment principles and the *Zinn* triad. It is a well-established principle that the personal circumstances of the appellant may be outweighed by the other elements in the equation in terms of sentencing;

(d) the unconscionable levels of abuse and sexual offences against the most vulnerable members of society need rigorous sentences to be imposed against those who grossly, without compassion, violate the dignity of the vulnerable.

(e) The premeditated circumstance under which the appellant committed the offence is serious and appalling. He sent the complainant to his room under the guise of fetching his medication, but followed her, locked the door, and then raped her;

(f) the appellant continued to threaten the victim with the infliction of harm and even threatened to kill her should she tell anyone.

(g) from the victim impact report, the child was severely traumatised and emotional, crying throughout during an interview in which she had to relive the incident;

(h) the defence's submissions to the effect that the child suffered no injuries are misplaced. She did have vaginal injuries associated with rape, as well as the evident emotional trauma. The contention of the defence that the lack of severe injuries to the child should be a substantial and compelling factor in mitigation is inappropriate;

(i) the appellant shows no remorse at all. Even after confessing and after a conviction for the offence, he still denies guilt. There are no prospects of rehabilitation, and

(j) the first offender status is not a substantial and compelling circumstance, in and of itself

[14] The central question is whether there were substantial and compelling circumstances to deviate from the prescribed sentence in terms of the CLAA. In a more focused approach, whether the lack of or minimal injuries to the victim would qualify as 'substantial and compelling circumstances' to justify a departure from the prescribed sentence of life imprisonment.

Background

[15] The salient facts are as follows. The complainant was 12 years old at the time. The appellant is the brother of her father. The appellant was 42 years old at the time. The complainant and her cousin were asleep, sharing the same bedroom. She woke up at about 4 am because she wanted to drink water and had the need to urinate. She left the room to go to another room to urinate in a bucket, whereafter she went to drink water. She noticed her uncle (the appellant) sleeping on a sofa. While she was drinking water, he got up and went to the bedroom where she was sleeping. He told her his head was painful and that she must fetch his pills from his room. He even gave her a cell phone for light to see better. She did as instructed. He followed her to his bedroom, which is an outside room, and locked the door behind him. He instructed her to climb onto the bed, which she refused. He then lifted her onto the bed. He undressed her panties and opened her gown. He pulled down his trousers and inserted his penis into her vagina and did his up and down movements. He asked her to kiss, but she said 'no.' When he finished, he told her to get dressed and that she must not tell anyone. He threatened that if she told anyone, he would kill her with his hands. She reported the incident to her brother that same morning, which the first report confirmed. Two weeks later, on 16 October 2020, she was medically examined after the clinic she first attended had sent her away because there were no personnel on duty to do the examination. The J88 examination findings indicated she was at a normal stage of development. The hymen configuration was open by between 3-4 mm, with no tears, but not intact, with erythematous. The conclusion was that 'the alleged incident could be in keeping with clinical findings suggestive of penetration occurring.'

[16] On 19 October 2020, the accused walked into the Mhala police station and introduced himself to Sergeant Chauke as a suspect wanted for rape. He informed her he wanted to make a statement. She made arrangements for a Captain from the Calcutta police station to take down his statement. Captain Ndlovu took down a confession, which was later admitted into evidence after a trial within a trial, in the Regional Court. The appellant challenged the admissibility of the confession during the trial.

Statutory framework

[17] The appeal lies only against the sentence of life imprisonment pursuant to the right to an automatic appeal in terms of section 309(1) of the CPA.

[18] After reading the papers, we have concurred that the issues to be resolved in this appeal are succinctly set out. The court has therefore resolved to act within the scope of its powers provided for in section 19 (a) of the Superior Courts Act 10 of 2013[5] by disposing of the appeal without hearing oral argument.

[20] In Part I of Schedule 2 of the CLAA, rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is defined as;

> "(a) …
> (b) where the victim—
> (i) is a person under the age of 18 years;
> (iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);
> (ii) is a person with a disability who, due to his or her disability, is rendered vulnerable;
> (iii) s a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

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[5] "19. Powers of the court on the hearing of appeals —
(1) The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law—
(a) dispose of an appeal without the hearing of oral argument;
(b) receive further evidence;
(c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or
(d) confirm, amend, or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require."

(iv) is or was in a *domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998*…" (Emphases added)

[21] It is thus trite that rape of a minor under the age of 18 years old falls within the ambit of Part I schedule 2 offences, which invokes the provisions of section 51(1) of the CLAA.

[22] Section 51(1) of the CLAA reads as follows:

"s 51(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life."

[23] Section 51(3)(a) reads, further, that:

"If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist that justify imposing a lesser sentence than the sentence prescribed in those subsections, it shall record those circumstances in the proceedings and must thereupon impose such a lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to in Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years."

(aA) When imposing a sentence in respect of the offence of rape the following *shall not constitute substantial and compelling circumstances* justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;

(ii) an apparent lack of physical injury to the complainant;

(iii) an accused person's cultural or religious beliefs about rape; or

(iv) any relationship between the accused person and the complainant prior to the offence being committed." (Emphasis added)

[24] It is further trite that sentencing is pre-eminently a matter of the discretion of the trial court. An appeal court cannot, in the absence of a misdirection by the trial

court, interfere with this discretion merely because it would have imposed a different sentence. To do so would be to usurp the sentencing discretion of the trial court.

[25] Holmes JA in *S v Rabie* [6]: stated:

> "In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -
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> (a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court': and
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> (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".[7]

[26] The approach adopted to an appeal against sentence has been endorsed by the Constitutional Court in *S v Bogaards* where the following is stated:

> "Ordinarily, sentence is within the discretion of the trial court. An appellate court's power to interfere with sentence imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice: the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."[8]

[27] The starting point in consideration of every sentence which falls within the ambit of minimum sentence parameters is the CLAA. In terms of Section 51(3)(a) of CLAA, the court is to impose this prescribed sentence unless there are substantial and compelling circumstances which would justify the imposition of a lesser sentence. The legislature in subsection (3) (Aa) enacts that 'an apparent lack of

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[6] *S v Rabie 1975* (4) SA 855 (A) at 857D - F
[7] *Supra.*
[8] *S v Bogaards* 2013 (1) SACR 1 (CC) para 41.

physical injury to the complainant' shall not constitute 'substantial or compelling' circumstances.

[28] In *S v Malgas* Marais JA, in discussing the meaning of the phrase 'substantial and compelling circumstances', said:

> "The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once the court reaches the point where unease has hardened into a conviction that an injustice will be done, that will only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust, or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence."[9]

[29] The learned Regional Magistrate dealt with the punishment principles, the triad as well as victim impact in considering a suitable sentence, whilst being astutely aware of the fact that the presence of substantial and compelling circumstances may warrant a deviation from the prescribed life imprisonment as a suitable sentence. The court a quo balanced the mitigation against the aggravation factors as well as the best interests of the children affected by the appellant's incarceration. The court considered the emotional traumatic impact the crime had on the victim. The trial court did not overemphasise the interests of the community and was not dismissive of the personal circumstances of the appellant. The court concluded that the appellant showed no remorse and did does not accept responsibility. The court found no substantial and compelling circumstances to exist to justify a departure from the prescribed minimum sentence. The court reminded herself that the imposing of a mandatory minimum sentence should not be departed from for flimsy reasons.[10]

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[9] *S v Malgas* 2001(2) SA 1222 (SCA) para 22.
[10] *S v Malgas* 2001(2) SA 1222 (SCA) para 25.

[30] In *S v Malgas,* the court summarised the jurisprudence at hand and determined that, in short:

> "B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
>
> C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised, and consistent response from the courts.
>
> D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded."[11]

[31] The defence submitted as a key ground of appeal that the *court a quo* had misdirected itself in finding that the complainant had vaginal injuries as an aggravating fact, even though such a finding was not supported by the medical report. The complainant did not experience gratuitous violence and did not sustain injuries to her private parts, which should be considered as substantial and compelling circumstances.

[32] Section 51(3)(aA) of the CLAA specifically prohibits the lack of injuries to the rape victim from constituting substantial and compelling circumstances. This court does not agree with the defence when they argue that vaginal injuries were absent and this is not 'the worst kind of rape'. The medical evidence concluded that the hymen was 'not intact with a 3mm superior opening, which was in keeping with a

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[11] *Supra.*

clinical finding suggestive of penetration'. The fact that the 12-year-old rape victim was not subjected to gratuitous violence cannot, in any sense, serve as a mitigating factor favourable to the appellant. The suggestion that the rape of a 12-year-old was committed with a measure of compassion, merely because the appellant exercised restraint in not inflicting further physical injuries, is both untenable and morally repugnant. Such reasoning offends the very notion of humanity and cannot be countenanced by this court.

[33] Rape is a serious, cruel, and heinous offence. It is degrading, humiliating and a brutal invasion of a person's most intimate privacy.[12] Losing the innocence of her virginity in such a way leaves profoundly distressing emotional scars. The heart remembers what the mind is trying to suppress. The appellant took advantage of the age and vulnerability of the victim. He was in an authoritative position over her as her uncle. He abused the trust the complainant had in him as an adult. Sending her to his room, then following her was a premeditated setup. His conduct was reprehensible, calling for a strong sentence reflecting the court's disapproval and hopefully acting as a deterrent to other like-minded people who prey on helpless children and cannot control their sexual urges.

[34] I turn to the personal circumstances of the appellant. It was submitted that he is a first offender, 42 years old, and he has two minor children who live with their respective mothers, who are unemployed. He has a grade 11 scholastic qualification. He is not a problem in his community; he acted out of character in the spur of the moment in a time of darkness. It is questionable whether he will re-offend. He is on medication for an undisclosed medical condition.

[35] Weighed against the fact that he did not testify in mitigation to take the court into his confidence. During the sentence phase, he still maintained his innocence even after making a confession and a conviction followed. He showed no remorse or penitence and took no responsibility for his actions.

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[12] Mahomed CJ in *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at 344J.

[36] There is nothing exceptional about the appellant's personal circumstances. The personal circumstances of the appellant weighed against the seriousness of the offence and competing aggravating factors, fade away and recede into the background. 'The brutality of the offences committed by the appellant in this matter cannot be outweighed by his insubstantial personal circumstances.'[13]

[37] The court aligns itself with *S v Maila*[14] in which the court took note of the emergent paradigm:

> "Taking into account *Jansen, Malgas, Matyityi, Vilakazi* and a plethora of judgments which follow thereafter as well as regional and international protocols which bind South Africa to respond effectively to gender-based violence, courts should not shy away from imposing the ultimate sentence in appropriate circumstances, such as in this case. With the onslaught of rape on children, destroying their lives forever, it cannot be 'business as usual'. Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. Reasons such as lack of physical injury, the inability of the perpetrator to control his sexual urges, the complainant (a child) was spared some of the horrors associated with oral rape, which amount to the acceptance of the real rape myth, the accused was drunk and fell asleep after the rape, the complainant accepted gifts (in this case, sweets) are an affront to what the victims of gender-based violence, in particular rape, endure short and long term. And perpetuate the abuse of women and children by courts. When the Legislature dealt some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-based violence against women and children and promote what Thomas Stoddard calls a 'culture-shifting change.'"[15]

[38] The trial court correctly applied its mind to all the usual sentencing considerations, as well as the existence or non-existence of substantial and

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[13] *S v Moloto* 2025 JDR 4801 (SCA) para 16.
[14] *S v Maila* 2023 JDR 0130 (SCA) para 59.
[15] Thomas B Stoddard '*Bleeding heart: Reflections on using the law to make social change'* (1997) 72 New York University LR 967 at 971.

compelling circumstances, as guided by the *Malgas* principles. There is no reason to conclude that the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. The discretion of the court a quo has been 'judicially and properly exercised'.

Order

[39] In the result, the following order is made:

(1) Condonation for the late noting of the appeal is granted.

(2) The appeal against the sentence is dismissed.

P VENTER
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

L VUKEYA
JUDGE OF THE HIGH COURT

Appearances:

For the Appellant	Mr M.V Kekana
Instructed by:	Legal aid South Africa, Mbombela
For the Respondent:	Advocate Zindela

Instructed by:	Office of the Director of Public Prosecutions, Mbombela
Date of Hearing:	24 October 2025
Date of Judgment:	23 January 2026