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

Reportable/Not Reportable

Case no: A262/2025

In the matter between:

D[...] M[...] D[...] V[...]

Appellant

And

THE STATE

Respondent

Neutral citation: *D[...] M[...] D[...] V[...] v The State*

Coram: **MANGCU-LOCKWOOD J et HOLDERNESS J**

Heard: 13 February 2026

Delivered: 13 February 2026

ORDER

1. In all the circumstances, the appeal against the conviction and sentence is dismissed.
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JUDGMENT

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The harrowing series of tragedies presented by the facts of this case is inexpressible. The complainant was 8 years old when the appellant, then 60 years old and her mother's live-in life-partner, started raping her. This took the form of repeated vaginal and anal sex, oral sex and sexualized touch of the breasts and vagina. Undeterred by his discovery of the commencement of her menstrual period, he continued to rape her until she fell pregnant at 10.

[2] When people in the street and children at school started calling her names and making comments that she was pregnant, the complainant did not understand what pregnancy meant, though she was vomiting three to four times a day. It was not until a neighbour attended at her school to report their suspicions that there was some intervention, and the school called in her mother and directed her to take her to a Day Hospital. By then her pregnant stomach was already visible. And by then the appellant had surreptitiously taken her, on a few occasions, to visit what the complainant described as 'a lady with Rasta

hair who lived in a brown building’, who inserted some tablets inside her vagina and in her mouth, after which the appellant told her not to tell her mother. The tablets only served to make her drowsy.

[3] Once the pregnancy was detected, the complainant was taken away from her home, to what would turn out to be three consecutive places of safety. It was at the last place of safety that she discovered she was HIV positive, and in the most cruel way, because another girl recognized her medication and told her what it was for. Even during the trial, the social worker testified that the complainant still did not understand the full significance of the disease.

[4] Labour came much earlier than expected and, upon arrival at the hospital, it was too late to deliver the complainant’s baby *via* caesarean section and it had to be delivered naturally, without the administration of any pain medication, and without the presence and guidance of her mother who could not be located for a while after losing her accommodation with the appellant. The complainant described giving pain as the worst part of her 10-year-old life. A closed adoption was arranged for the baby who was taken immediately at birth, and not unnaturally, the complainant continues to have a profound sense of loss of her child. She also misses living with her mother.

[5] In the series of the tragedies of this case, the complainant was too traumatized to give oral evidence. As a result, the above evidence was relayed to the trial court by the social worker, Captain A Lakey of the Delft FSC Unit who gave evidence with the aide of three, successive victim impact reports that she authored after interviewing and assessing the complainant. She must be commended for providing the Court with a comprehensive voice to the hapless complainant.

[6] This is an automatic appeal against conviction and sentence in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (“CPA”). The appellant was found

guilty of rape, specifically the contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with section 51(1) Part 1 of Schedule 2 of Act 51 of 1997, and was sentenced to life imprisonment by the Parow Regional Court.

[7] The specific offence preferred against the appellant was that between 2022 and 2023, in Delft, he unlawfully and intentionally committed an act of sexual penetration with the complainant, who was nine years old and accordingly not of the age to give consent, by penetrating her vagina with his penis on more than one occasion.

[8] The appellant was 60 years old at the time, and lived together with the complainant and her mother, who was his life partner. As a result of the rape, the complainant became pregnant at 10 years old, had a child and contracted HIV.

[9] The trial was attenuated by agreement between the State and the defence to admit the following documentary evidence without objection: (a) the birth certificate of the complainant, which showed her date of birth to be 15 December 2012; (b) an affidavit in terms of section 212 of the CPA from a forensic analyst who analyzed DNA samples collected from the complainant, her unborn foetus and the appellant, and concluded that the probability of paternity by the appellant was 99.99%; (c) the supporting DNA tissue collection kits from the placenta, the complainant and the appellant.

[10] The only witness who was called to give oral evidence on behalf of the State was Dr. Alvaro Neville Felix who examined the complainant at Karl Bremmer Hospital on 30 May 2023. He also completed a medico-legal examination report, referred to as a J88 form, and it was admitted as part of the evidence. He concluded that the complainant, who was 10 years old at the time of the examination, was 29 weeks and 3 days pregnant; and that the gestational age of the foetus was in keeping with sexual abuse inflicted in around December

2022. His evidence was further that the complainant tested positive for HIV. None of his evidence was challenged.

[11] The appellant was the only witness to testify in support of his case, and his evidence consisted of much irrelevant rambling. The effect of his evidence was that the complainant and her mother conspired to seduce him by their repeated inappropriate behaviour. Eventually, he found himself on top of the complainant who was lying on a bed naked, and in his words, he “*f**ked the child*”. He later tried to retract this evidence by stating that he did not ejaculate on the child but only on the sheets of the bed, whilst at the same time stating that his sperm came out while he was on top of her, not inside her.

[12] However, the scientific evidence showed conclusively that he was the father of the child that the complainant was to bear. As the prosecutor correctly asked him during cross examination: “*If you did not penetrate her, how did she fall pregnant?*” He could not provide an answer. The Magistrate correctly found the appellant’s version was not reasonably possibly true. She also correctly found that the State had established its case beyond reasonable doubt that the appellant had unlawful sexual intercourse with a nine-year old, who could not in law give consent to sexual intercourse. I do not understand the appellant to take issue with the conviction finding, since no specific ground of appeal is raised in that regard.

[13] As for the sentence, s 51(1), read with Part 1 of Schedule 2 of Act 105 of 1997, provides that the offence of rape of a minor attracts a minimum sentence of life imprisonment, unless substantial and compelling circumstances are present. The Magistrate found that there were no substantial and compelling circumstances to justify a deviation from the minimum sentence of life imprisonment.

[14] As stated in *S v Malgas*¹:

‘A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is, of course, entitled to consider the question of sentence afresh.’

[15] It is accordingly trite that an appellate court will not easily interfere with a sentence and will only do so if the sentence is vitiated by irregularity, misdirection or is disturbingly inappropriate or induces a sense of shock.² Or, if it appears that the trial court has exercised its discretion in an improper or unreasonable manner.³

[16] It is also settled law that the prescribed minimum sentences should not be departed from lightly and for flimsy reasons, and that in the absence of weighty justification, they should be imposed for the crimes specified by the legislature.⁴ Both the Constitutional Court⁵ and the Supreme Court of Appeal (SCA)⁶ have endorsed the view that the particular factors, whether aggravating or mitigating, should not be taken individually or in isolation as substantial or compelling circumstances, but that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is proportionate to the particular offence.

[17] It is argued on behalf of the appellant that the following should have been considered cumulatively as substantial and compelling factors to justify deviation from the minimum

¹ *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

² *S v Moosajee* [1999] 2 All SA 353 (A), para 8.

³ *S v Gerber* [1998] 4 All SA 315 (NC).

⁴ *S v Malgas* 2001 (2) SA 1222 (SCA) para 25.

⁵ See *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382; 2001 (1) SACR 594 (CC) para 25.

⁶ *S v Vilakazi* 2012 (6) SA 353; 2009 (1) SACR 552 (SCA) para 15.

sentence: (a) the age of the appellant who was 63 at the time of sentencing; (b) that the appellant fathered two children who are now adults; (c) the appellant is a first offender with no previous convictions; (d) he was a law-abiding person until he was charged with this offence; (e) he was in custody awaiting trial for a period of more than two years until sentencing.

[18] It is important to first emphasize that the court was not required to consider the appellant's personal circumstances in isolation but was required to balance them against the seriousness of the crime and the interests of the society, in what has become known as the *Zinn* triad.⁷

[19] The seriousness of the crime committed by the appellant cannot be gainsaid.⁸ He preyed upon a vulnerable minor child in what should have been her place of safety, the sanctity of her home. He took advantage of the special position he held in her life. According to the victim impact assessment reports, she referred to him as her stepfather who bought her nice things, including ice cream and fish and chips. He was in a position of care and trust in her life, which included taking her to school.

[20] They watched television together, which is how what may be described as grooming started. He caused her to watch what she described as 'sex movies', and halfway, would have penetrative sex with her. Sometimes the sexual acts took place with her mother sleeping in the same bed, and sometimes more than once a day. All of this occurred on numerous occasions before she fell pregnant. The reason she did not report the matter was because she feared that she and her mother would be rendered homeless, because her mother was unemployed.

⁷ See *S v Zinn* 1969(2) SA 537 (A) at 540G.

⁸ See *S v C* 1996 (2) SACR 181 (CPD); *S v Chapman* [1997] ZASCA 45; 1997 (2) SACR 3 (SCA) at 5 B-E; *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48 (11 December 2019); *S v Tshabalala and another* 2020 (2) SACR 38 (CC) para 63; *Maila v The State* [2023] ZASCA 3 (23 January 2023) para 57.

[21] Thus, the appellant's plea for his advanced age to be considered as a substantial and compelling factor must be considered in the light of this special position that he held in the complainant's life. In those circumstances, his age serves as an aggravating factor rather than mitigation of his moral blameworthiness. Instead of acting as a protector of the vulnerable child in his care, he acted as a predator who even told her not to tell anyone about the abuse, and when she refused to grant him his sexual requests, he said he would no longer buy her nice things.

[22] By contrast, the complainant's childhood was destroyed by the appellant's conduct. Her family unit was also torn apart because, once her pregnancy was discovered, she was separated from her mother, and was taken away to three successive places of safety. By the time of sentencing she had moved to four different schools. The overwhelming consequences brought about by the conduct of the appellant are detailed in the victim impact assessment report, and they include depression, a series of losses, despair, low self-esteem, fear, trauma, disassociation, guilt, confusion shame, stigmatization, entrapment, stomach and lower back pain. She struggles with insomnia as well as back and hip pain caused by the fact that she had to give birth in her undeveloped body. Not to mention the double loss of her mother's care and the permanent loss of her baby.

[23] The fact that the appellant is a first-time offender is overshadowed by the revelation that the appellant had repeatedly raped the minor, though admittedly, that issue did not receive much attention until the sentencing stage. It was then that the gruesome detail of the history of the sexual abuse was revealed during the evidence of the social worker, as contained in the victim assessment report. Thus, the fact that the appellant has a clean official record does not mean he had not committed similar offences previously.

[24] In any event, being a first-time offender does not affect the application of the minimum sentence provisions in the circumstances of this case. There is nothing compelling

or substantial about the fact that the appellant did not have a previous criminal record. It is his duty as a citizen or resident of this country to obey the law.

[25] As for the fact that the appellant has two adult children, it is not disclosed why this is said to amount to a substantial and compelling factor given that the two children are adults who no longer live with him, and that the appellant is accordingly not their primary caregiver. As the SCA stated in *S v Vilakazi*⁹-

'In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment.'

[26] It is also argued on behalf of the appellant that he is a candidate for rehabilitation. However, no basis is laid for this argument. I have already dealt with the fact that his age was an aggravating factor, and does not amount to signal for rehabilitation. Instead, the repeated nature of the offence shows a propensity to continue in his conduct.

[27] What is more, there was no sign of remorse evinced by the appellant. Not once did he show a proper appreciation of the consequences of his actions or have a change of heart. Instead, his evidence involved a conspiracy theory involving seduction by, amongst others, an 8-year-old. And, as the Magistrate correctly observed, despite the fact that the State presented DNA evidence showing that the appellant is the biological father of the complainant's baby, he pleaded not guilty.

⁹ *Vilakazi v The State* (576/07) [2008] ZASCA 87 (2 September 2008) para 58.

[28] In *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo and Others*¹⁰ the Supreme Court of Appeal observed as follows regarding rehabilitation:

'Traditional objectives of sentencing include retribution, deterrence and rehabilitation. It does not necessarily follow that a shorter sentence will always have a greater rehabilitative effect. Furthermore, the rehabilitation of the offender is but one of the considerations when sentence is being imposed. Surely, the nature of the offence related to the personality of the offender, the justifiable expectations of the community and the effect of a sentence on both the offender and society are all part of the equation? Pre and post Malgas the essential question is whether the sentence imposed is in all the circumstances, just.'

[29] As regards the period of imprisonment spent by the appellant before sentencing, it has been stated that there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial.¹¹ Instead, said the SCA in *Radebe v S* -

*'A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, ...whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 ... the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.'*¹²

[30] I am accordingly of the view that the Magistrate correctly took into account and the personal circumstances of the appellant, and assessed them cumulatively against other considerations as she was required to do. I have found no reasons to interfere with her conclusion that there are no substantial and compelling circumstances justifying deviation from the prescribed sentence.

¹⁰ *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo and Others* 2009 (2) SACR 361 (SCA) para 22.

¹¹ See *S v Seboko* 2009 (2) SACR 573 (NCK) para 22; *Radebe v S* [2013] ZASCA 31, para 13.

¹² At para 14.

[31] In all the circumstances, the appeal against the conviction and sentence is dismissed.

N. MANGCU-LOCKWOOD
Judge of the High Court

I agree

M. HOLDERNESS
Judge of the High Court

Appearances:

For appellant: Mr. M. Strauss – Legal-Aid South Africa

For respondents: Mr. H. van As – Office of the Director of Public Prosecutions