



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

Case No: A246/2025
Khayelitsha Regional Court No: RCA57/2023

In the appeal between:

SIMPHIWE MDEKAZI

Appellant

and

THE STATE

Respondent

Heard: 13 March 2026

Judgment: 16 March 2026

Summary: Criminal appeal from the Regional Court against conviction and sentence for kidnapping and rape.

ORDER

- 1. The appeal against conviction and sentence is dismissed, with the sentences to run concurrently.**
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JUDGMENT

Handed down by email to the parties on 16 March 2026

KANTOR, AJ:

1. The appellant was charged with the rape of a nine year old girl, in contravention of section 3 of Act 32 of 2007, and her kidnapping, on or about 13 October 2022 at or near Khayelitsha. The appellant was then 44 years old.
2. The charge sheet averred that section 51(1) of Criminal Law Amendment Act 105 of 1997 (the CLA) was applicable to the charge of rape, the complainant having been a child. If found guilty, this meant that a minimum sentence of life imprisonment would follow unless the court found that there were exceptional circumstances not to impose such a sentence.
3. The charge sheet averred that section 51(2)(c) of the CLA was applicable to the charge of kidnapping, being one of the offences in Part IV of Schedule 2 to the CLA, the appellant being a first offender. If found guilty, this meant that a minimum sentence of five years would follow unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence. Part IV of Schedule 2 of the CLA applies to *“Any of the following offences, if the accused had with him or her at the time a firearm, which was intended for use as such, in the commission of such offence.”*

4. The appellant was legally represented, at the trial and in this appeal.
5. On 27 March 2025, the appellant was found guilty on both counts and sentenced to life imprisonment on the charge of rape and five years imprisonment on the charge of kidnapping, under case number RCA57/2023 in the Khayelitsha Magistrates' Court. The accused was declared unfit to possess a firearm. The accused's personal details were ordered to be entered into the sexual offences register.
6. The appellant appeals against both the conviction and the sentence.

The evidence of the complainant

7. The complainant was nine years old at the time. During the evening of 13 October 2022, she went to a shop near her home to buy chips. There she met the appellant.
8. The appellant knew where she stayed. He did not take her there. When it was put to her that he will say that he did, she say that would be a lie.
9. She did not want to go with him but he took her and put her inside a car. She did not know that he was going to take her to his house. It was put to her that the appellant took her to his home and went inside the house with her, with which she agreed. There was nobody else at the house. He locked the door and put on loud music. He undressed her and told her that if she tells anyone about this he will kill her but she did not believe him. He told her to lie on the bed, he undressed himself, he lay on top of her and inserted his penis into her vagina. She said that it hurt and she cried. He then stopped on his own. He had

been on top of her for a short time. They then went to sleep and the next morning he took her home at about 06h00.

10. It was put to her that the appellant will say that he did not put his penis in her vagina. She responded that he was lying.
11. It was put to her that the appellant took her to her home “*around after 6 in the morning*” with which she agreed.

The evidence of the L[...], V[...], N[...], (‘Ms N[...])

12. She has been the foster mother of the complainant since she was three years old.
13. She has known the appellant for a long time. He used to walk past her house.
14. On the night of 13 October 2022, the complainant went out at about 18h00. When she did not come back, they started searching for her and even went to the police station to report her being missing. She locked the house and she and others, including her older children, searched for the complainant. While they were out the gate was locked and the appellant could not enter the property because the gate is very high. They “... *left at six and it was seven, eight and at nine o’clock we all came back.*”
15. She testified that when the complainant was brought home early in the morning of 14 October 2022, “... *the child at that stage was narrating telling me that Simphiwe took her and locked her in his house. I then took her to the police station.*” She added that the complainant told her that “*When they got to his*

house, switched on the music and gave her the chicken and he got on top of the bed together with her.”

16. Since the night of 13 October 2022, the complainant has been affected: “... *the child’s behaviour has taken a drastic change because she is even a fighter at school and she has turned into a tomboy as well ... There is a lot that has happened to her because even at school, she is playing rugby at church, they tried to give her some counselling sessions and when I go to church, she changes the dress code and start to wear pants.*”

The evidence of Dr Letoya Pepper

17. Dr Pepper is a clinical forensic examiner who performs medical legal examinations, including on victims of sexual offences.
18. At 13h45 on 14 October 2022, she examined the complainant at Khayelitsha District Hospital. The complainant had “... *redness and tenderness of her labia minora, the stibial and paraurethral ... [indistinct]. There was a sexual assault evidence collection kit that was used of which the seal number is 20D7AD588. ... Clinical findings may be suggestive of blunt genital trauma.*” She said that a penis is an example of a blunt object which can cause blunt genital trauma. A finger or any other blunt object could also have caused this.
19. She said that there was no significant swelling and she noted it to be more minor injuries. She testified that the complainant told her that the person who did this to her “... *was Simphiwe, a male, plus minus 30 or 40 years of age.*”

20. The injuries to be expected from penetration of the complainant by an adult male would depend on the force that was used. These “... *injuries are in keeping with an irritation or frictional force that was ... [indistinct] of this child’s genital injury. So, for example, me rubbing my hands together is creating a frictional or rubbing force.*” Just touching, however, would not have caused the injuries.
21. The hymen itself had no injuries but that does not mean that the complainant was not penetrated. As she explained when it was suggested to her “... *that the J88 does not stipulate that the victim was sexually penetrated?*”: “No, I disagree with that because the child has internal injuries. So, when we talk about penetration, the thought years ago was that penetration of the genital region refers to penetration of the hymen but that is not it. Once you penetrate the labia, that is then penetration.”
22. She asked the complainant and her foster mother whether the former had had any complaints regarding her private parts and she was answered in the negative. For example, in the case of an infection, one would have been able to see other signs of the infection. She testified that “... *if there was an infection pre-dating this alleged incident, then at least one would be seeing a discharge on the child and this child presented with no genital discharge.*”
23. She testified that there were no pre-existing issues: “... *the patient did not have any symptoms or any findings on examination to suggest that she had any pre-existing issue with her genital ... [indistinct].*” She also testified: “Okay, basically it may be suggestive of a blunt object having caused these genital injuries. Of course, like I had mentioned there are other causes for example if

the child had had an infection or if the child had had any other complaints, for example if they had an allergic reaction to the underwear that they were wearing or the hygiene products that they were using but that was excluded.”

24. She explained further: *“The redness and tenderness that was noted of the child’s genital injury, is not specific to blunt force penetration. There are other things that can cause redness and tenderness of a genital region. However, based on the examination findings and the history obtained from the child and the parents those other causes were then excluded.”*

The evidence of the appellant

25. He knows the complainant and Ms N[...] and they live in the same neighbourhood as him, *“She does not stay far from where I stay. Very, very much close.”*
26. On 13 October 2022 he had been drinking brandy and vodka with his cousins from approximately 18h00 to 21h00. He then went home and saw that there was no electricity. As he *“... was coming out of the house [the complainant] was by the shop.”* He said that this *“... was around to 22:00 because it was after 21:00 or past 21:00 when I left my place.”* He noticed that she was crying. She told him that her place was closed or locked and she cannot get inside and that she does not know what to do.
27. He then took her to her home but the big gate and the small gate were closed.
28. She got tired and he put her on his shoulders. When they got to his house he met a police officer called Yanga who stays across the street. Yanga asked him

why he did not take the complainant home. He said that he “... *did go to her place and even now I am going to walk past there or I am going to via there.*”

He then went to the complainant's home again and things had not changed.

29. He did not know that the complainant was a girl.
30. He gave her something to eat, let her watch television and she slept in the bed while he slept on the couch.
31. He was the only one in the complainant's presence at his home throughout the night.
32. He woke the next morning and took the complainant home at about 06h00. He says that he told N[...] that he had tried to bring her home the previous night but the place was locked. N[...] said she was very grateful for that and he then left.
33. He attended the same Apostolic church as N[...], in which men and women, boys and girls, sit separately. The church also has a very strict dress code for boys and girls. He claimed that he has not known the complainant for a long time and he only knows N[...]’s other children and has known N[...] for a long time. He also said that N[...] did not go to church with the children.
34. He said that N[...] blames him for the death of her son. He does not have a problem with her.

Evaluation

35. The complainant left home at approximately 18h00. This was not contested.

36. The appellant was drinking until 21h00 with his cousins and then went home. None of the cousins were identified or called as witnesses.
37. He then went home, saw there was no electricity and went to the shop where he saw the complainant. This, according to him, “... *was around to 22:00 because it was after 21:00 or past 21:00 when I left my place.*” He claims that he then went to the complainant’s home, but the gate was locked.
38. He saw Yanga at about 22h00 and claims that he said to him that he was going to take the complainant to her house again, which he did, but it was still locked.
39. V[...] got home from looking for the complainant at about 21h00.
40. The appellant’s version starts to fall apart on the basic facts:
- 40.1. First, with the complainant having not been challenged on leaving her house at 18h00 to go to the shops, this meant that his version depends on the complainant having been out for four hours. His version therefore does not tie up with the complainant leaving her house at 18h00, but the complainant was not challenged on this
- 40.2. Second, it would be very strange for a nine-year old girl to be going to the shops at 22h00.
- 40.3. Third, the appellant’s version that he took the complainant back to her home at 22h00 after seeing Yanga, is not compatible with N[...]’s unchallenged testimony that she got back from looking for the complainant at about 21h00.
41. There are numerous other problems with the appellant’s version.

- 41.1. When asked why he did not check with the neighbours whether he could leave the complainant with them, he said: *"It never crossed my mind ... That did not cross my mind. I did not, I did not think of that."* When pressed in cross-examination that this was not credible, he said *"I still maintain that did not cross my mind."* That is simply not credible for someone at night trying to drop a young child off.
- 41.2. He also did not take the complainant to the police station or leave her with the policeman, Yanga, he met and knows. His explanation for not giving the child to Yanga, the police officer who he knows and trusts, is that *"Yanga was sitting there with his friends, chilling. I did not want to burden Yanga with a child that I personally picked up."*
- 41.3. The complainant's home was close-by on the appellant's version (*"Very, very much close"*), but he does not try again after his alleged second attempt.
- 41.4. When Yanga asked him why he did not take the complainant home he said that he *"... did go to her place and even now I am going to walk past there or I am going to via there."* Plainly this is what he or any caring and reasonable person would have done. On his version, he did so but things were still the same and no-one was there. Yanga was not called as a witness. The appellant's legal representative said that he could not get hold of Yanga. No request was made for a postponement or explanation given of what the appellant had done to locate him (he lived across the street) or if he had even made any attempt at all.

- 41.5. Further, had he gone to the complainant's house again, as he alleged, by then it would have been 22h30 at the earliest. Ms N[...] had been home a long time by then.
- 41.6. His version that he was not even aware that she was a girl is not credible.
- 41.7. Keeping a nine year old girl overnight in his home without the knowledge of her parents is a very strange thing to do.
42. On a general level the complainant's evidence was consistent and appeared satisfactory.
43. Her evidence as to the conduct complained of against the appellant was detailed. It was also consistent.
44. In my view, the complainant's evidence was detailed and cogent.
45. It was supported by the evidence of Dr Pepper, considered in detail above, to the effect that she had blunt object trauma (which could be caused by a penis) in her genital area and that any other cause, such as infection, could be excluded. There was no basis in the evidence for any other object having been the cause of the blunt object trauma in her genital area.
46. In terms of section 208 of the CPA "*... an accused may be convicted on the single evidence of any competent witness.*"
47. This is subject to the cautionary rule in respects of a single witness. In this regard it was held as follows in S v Sauls and Others 1981 (3) SA 172 (A) at 180EG (cited with approval on numerous occasions, the most recent by the

Supreme Court of Appeal of which I am aware being Nkomo and Others v S (130/2022) [2024] ZASCA 61 (26 April 2024) at paragraphs 17 and 19):

“There is no rule of thumb test of formula to apply when it comes to a consideration of the credibility of the single witness ... The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The 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’s evidence were well founded”... It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.” [underling added]

48. I am satisfied that the complainant was a reliable witness and that the truth has been told by her. In my view, her evidence is not affected by the fact that she was a single witness as to the acts and conduct complained of. I am therefore of the view that the cautionary rule in this regard has no material impact on this matter.
49. In addition, I do not consider the appellant to have been a credible witness for the reasons set out above.

Conclusion on conviction

50. I am satisfied that the complainant was a reliable witness whose evidence is to be accepted. I am also satisfied that the appellant’s version is not reasonably possibly true for the reasons set out above.
51. Principles of Criminal Law 5ed by Johnathan Burchell defines kidnapping as follows at 659: “*Kidnapping consists in unlawfully and intentionally depriving a person of the liberty of movement and/or his or her custodians of their control.*”

This definition is effectively the same as what was proposed for child stealing by Professor Hunt in the 1967 South African Law Journal at page 275 (cited with approval in S v Blanche 1969 (2) SA 359 (W) at 360D): “*child stealing consists in unlawfully and intentionally depriving a person of liberty of movement and/or his custodians of control.*” I am of the view that the facts of the instant satisfy both of these alternatives (i.e. *depriving a person of liberty of movement and/or his or her custodians of control*). Further in regard to children in particular, see Burchell at 660 and PMA Hunt South African Criminal Law and Procedure vol II: Common Law Crimes 3ed by J Milton (1996) Ch 28 IIIA.

52. It has been held that in certain circumstances kidnapping will not be established even though a rape is, such as when the victim was with the perpetrator of her own free will until the point when he raped her. The act of rape itself is then not an act of kidnapping. See S v Egglestone (482/07) [2008] ZASCA 77; [2008] 4 All SA 207 (SCA); 2009 (1) SACR 244 (SCA) (30 May 2008) at paragraph 18:

“[18] It is also clear that the trial court also misdirected itself when it accepted L.’s evidence that she had been kept at the Stables against her will. In arriving at this conclusion the trial court ignored common cause evidence to the effect that L. had come to the Stables voluntarily and had at no stage requested and/or demanded to be taken home. There is also uncontested evidence that L. had a number of opportunities to escape or simply walk away if she was so inclined but she did not. Clearly the State had failed to prove beyond reasonable doubt that L. was kept at the Stables against her will and was deprived of her freedom throughout her stay there. The kidnapping conviction can therefore not stand.”

53. This does not apply on the facts of this matter: the kidnapping is established because the version of the complainant has been accepted and on her version she was taken by the appellant against her will and locked up in his home. The kidnapping conviction therefore stands.

54. On the factual findings set out above, the offence of rape was established and the conviction thereon should stand.
55. I am therefore of the view that the appeal against conviction should be dismissed.

SENTENCE

56. In S v Malgas [2001] 3 All SA 220 (A); 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA) at paragraph 12 it was held that, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”. This standard has been articulated differently in several cases, including the standard of whether the sentence “creates a sense of shock”. Ultimately, the question is whether the court could reasonably have imposed the sentence that it did (see for example S v Sadler 2000 (1) SACR 331 (SCA) at para 8, and S v Bolus and Another 1966 (4) SA 575 (A) at 581E-G).
57. To reach an appropriate sentence, a court is duty-bound to consider the nature and the seriousness of the offence that the accused has been found guilty of, the personal circumstances of the accused as well as the interests of society – what is often referred to as the triad of considerations (S v Zinn 1969 (2) SA 537 (A) at 540G).

58. Each case must be adjudicated on its own facts. It is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances whether the sentence is proportionate to the particular offence (S v Vilakazi [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2009 (1) SACR 552 (SCA) at paragraph 15, Opperman v S [2010] 4 All SA 267 (SCA) at 278). Punishment imposed by a court should fit the criminal, as well as the crime and be fair to society and blended with the measure of mercy (S v RO and Another 2000 (2) SACR 248 (SCA) at paragraph 30).
59. A court is also enjoined to take into consideration the main purposes of punishment, namely retribution, deterrence, prevention and rehabilitation. All these must be accorded due weight in any sentence. As the SCA held in S v RO at paragraph 30:
- “Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions.”
60. The complainant was a young child of nine years of age.
61. The complainant's evidence and Ms N[...]’s evidence shows that the complainant has been very negatively affected by this experience in her childhood.
62. The appellant has expressed no remorse.

63. The main aspects raised by the appellant in mitigation are an absence of previous convictions, his age, employment, good health and that he helps out his family financially.
64. In terms of section 51(1) and Schedule 1, Part 1, of the CLA, the rape of a child attracts a minimum sentence of life imprisonment, unless there are substantial and compelling circumstances that such a sentence is unjust.
65. In my view substantial and compelling circumstances as contemplated by section 51(1) of the CLA were not established. Aspects raised by the appellant are standard in relation to sentencing. The facts of this matter do not constitute exceptional examples of those standard aspects nor are the standard aspects established to an exceptional degree.
66. Aggravating factors include the scourge of rape in our society, the effect on the complainant indicated in her changed behaviour addressed in the evidence and the age of the complainant.
67. The sentence in respect of the rape therefore does not fall to be adjusted on appeal.
68. In regard to the kidnapping, as mentioned, Part IV of Schedule 2 of the CLA applies to *“Any of the following offences, if the accused had with him or her at the time a firearm, which was intended for use as such, in the commission of such offence.”* This does not apply in the instant matter because no firearm was used, or intended to be used, in the commission of the offence.

69. Be that as it may, I do not believe that a sentence of five years for kidnapping a child in the circumstances of this matter induces a sense of shock or is inappropriate.
70. In my view, both of the sentences are appropriate and they do not induce a sense of shock.
71. The Court *a quo* did not indicate whether the sentences would run concurrently or cumulatively. Nor did it indicate the sequence in which they were to run, as provided for in section 278(2) of the CPA. The default position in terms of section 278 of the CPA is that they run cumulatively. I am of the view, however, that the sentences should run concurrently and this will be reflected in the order of this court.
72. I am therefore of the view that the appeal against the sentence should be dismissed, with the sentences to run concurrently.

Order

73. In my view, the following order should be granted in this appeal:

73.1. The appeal against conviction and sentence is dismissed, with the sentences to run concurrently.

A Kantor
Acting Judge of the High Court

I agree and it is so ordered:

C Fortuin
Judge of the High Court

Appearances

For the Appellant : **Adv IM Sebueng**
Instructed by **Legal-Aid SA**

For the Respondent

:

M Koti

Instructed by

Director of Public Prosecutions

Western Cape