



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

Not reportable / Reportable

Case no: A50/2025

In the matter between

KABELO NTAHANE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Ntahane v S* (A50/2025) [2026] ZAFSHC 103 (20 March 2026)

Coram: NAIDOO J *et van* ASWEGEN AJ

Heard: 17 November 2025

Delivered This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 20 March 2026.

Summary: Appeal against sentence – whether there are substantial and compelling circumstances justifying a lesser sentence than life imprisonment – no material misdirection by sentencing court – no cause to interfere with the sentence imposed.

ORDER

- 1 Condonation is granted for the late filing of the notice of appeal.
 - 2 The appeal is dismissed
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JUDGMENT

Van Aswegen AJ (Naidoo J concurring)

[1] The appellant was convicted on one count of rape in the regional court at Botshabelo (the court or the court a quo). The complainant was six years old. The Criminal Law Amendment Act 105 of 1997 (the Criminal Law Amendment Act) demanded the imposition of a minimum sentence of life imprisonment unless the court was satisfied that substantial and compelling circumstances existed that justified a lesser sentence. The court found that no such circumstances existed and sentenced the appellant to life imprisonment.

[2] The appellant enjoys an automatic right of appeal in terms of s 309(1)(a) of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act) and approached us in terms of that automatic right. He now appeals against that sentence. The notice of appeal was filed well outside the prescribed time period and the explanation tendered for the delay was sparse. Notwithstanding the paucity of reasons advanced, condonation was granted, as the application was not opposed by the respondent and we were of the view that it was in the interests of justice to do so

[3] In his notice of appeal, the appellant advances four grounds of appeal:

- (a) that the sentence imposed is 'shockingly inappropriate';
- (b) that the court over-emphasised the interests of the community and the seriousness of the offence at the expense of the appellant's personal circumstances;
- (c) that the sentence was imposed 'in a spirit of anger'; and

(d) that the court erred in finding no substantial and compelling circumstances warranting a deviation from the prescribed sentence of life imprisonment.

[4] The grounds of appeal were more coherently distilled in the heads of argument filed on behalf of the appellant. At the fulcrum of these submissions lies the contention that there are substantial and compelling circumstances to depart from the prescribed minimum sentence. It is argued that the court a quo, rather than assessing the relevant considerations cumulatively, engaged in a compartmentalised analysis. Properly viewed in combination – so the argument runs – the following factors ought to have been found to amount to substantial and compelling circumstances warranting deviation from the prescribed life term:

- (a) the appellant had consumed liquor, which affected his moral blameworthiness;
- (b) the appellant pleaded guilty, thus sparing the young complainant from the trauma of having to testify and relive the ordeal; and
- (c) the appellant expressed remorse and entreated the trial court for mercy. It was submitted that this was genuine and there is no basis to find that the appellant had ‘no choice’ but to plead guilty.

[5] I address the contentions as they were developed in argument. To the extent that the grounds of appeal encapsulated in the notice of appeal extend beyond those raised in argument, or differ in emphasis from the notice of appeal, all such grounds are dealt with in substance in the analysis that follows.

[6] The material facts on record underlying the offence are of a narrow compass. They are encapsulated in the appellant’s statement in terms of s 112(2) of the Criminal Procedure Act. On the night of 29 April 2023, the appellant went to the home of the six-year-old complainant, who was alone watching television. Under the false pretext that the complainant’s uncle was calling her, he lured her out of the house. The appellant then led the complainant to a nearby open field (a veld near a petrol station), where he made her lie down on a piece of cardboard and proceeded to rape her. At the time of this incident, it later emerged during the sentencing proceedings that the appellant was on parole for a previous offence of rape.

[7] In determining an appropriate sentence, a court must have regard to the established triad articulated in *S v Zinn*:¹ the crime, the offender and the interests of society. These factors are not discrete silos to be ticked off mechanistically. They require a judicious synthesis – a careful balancing to ensure that none of these elements is unduly accentuated at the expense of the others.

[8] Rape of a minor under the age of 16 falls under Part I of Schedule 2 to the Criminal Law Amendment Act, which ordains a sentence of life imprisonment for such an offence, absent compelling circumstances that justify a deviation from imposing the prescribed minimum sentence. This statutory injunction is not to be departed from lightly or for flimsy reasons.²

[9] It is trite that the imposition of sentence is pre-eminently within the discretion of the trial court.³ An appellate court may not interfere with a sentence imposed simply because it may have imposed a different sentence had it been seized with the matter. Marais JA articulated the principle thus in *S v Malgas*:⁴

'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.'⁵

[10] It is well established that, barring a material irregularity giving rise to a failure of justice, an appellate court's power to interfere with the sentence imposed by a lower court is confined to two instances. The first is where the sentencing court has committed a material misdirection – whether in identifying the relevant facts or in weighing them. The second is where the sentence, when viewed against what the appellate court itself would have considered appropriate, is so disproportionate that it induces a sense of shock or may properly be described as 'startlingly or disturbingly inappropriate.'⁶

¹ *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

² *S v PB* [2012] ZASCA 154; 2013 (2) SACR 533 SCA para 20.

³ *S v Rabie* 1975 (4) SA 855 (A) at 857D-F;

⁴ *S v Malgas* 2001 (1) SACR 469 (SCA).

⁵ *Ibid* para 12.

⁶ *S v Motloutong* [2016] ZASCA 96; 2016 (2) SACR 243 (SCA) paras 6-7.

[11] The majority judgment by the Full Bench of the Western Cape High Court in *M. T v S*⁷ provides a carefully reasoned and comprehensive reaffirmation of the proper approach to be followed by appellate courts in matters involving prescribed minimum sentences. The majority held that an appellate court can only intervene once it is demonstrated that the sentencing court misdirected itself in some material respect, or that the absence (or presence) of substantial and compelling factors was a conclusion so unreasonable that it results in an unjust sentence. Only in those circumstances is the appellate court entitled to step in. Absent such a misdirection, the trial court's decision to impose the prescribed minimum must stand.

[12] In reaching this conclusion, the majority disagreed with the approach taken in two earlier cases in the same division – *S v GK*⁸ and *CC v S*⁹ – which had advocated a more expansive appellate role. In *S v GK*, Rogers J concluded that an appellate court may examine all the circumstances and make its own value judgment as to whether there were substantial and compelling circumstances present and, if it differed from the sentencing court in this regard, to interfere and to substitute the sentence imposed with its own. The majority in *M. T v S* disagreed and found that '... the reasoning and approach which was adopted in both *CC* and *GK* is not consistent with the ratio in *Malgas* (as confirmed in *Dodo*), on prescribed minimum sentences and should accordingly not be followed'.¹⁰

[13] Whether the trial court should have found that substantial and compelling circumstances exist, is first and foremost a factual enquiry.¹¹ In *S v Van Der Merwe and Others*¹² this Division, relying on *S v Jansen*,¹³ articulated the permissible scope of the factual matrix in which the sentence should be considered and imposed:

'[30] It has been held that, where an accused pleads guilty and hands in a written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, detailing the facts on which his plea is premised, and the prosecution accepts the plea, the plea so explained and accepted constitutes the essential factual matrix on the strength of which sentence should be considered and imposed - *S v JANSEN*, *supra* at 370g – 371g. Such an essential factual matrix cannot be extended or varied in a manner that adversely impacts on the measure of punishment as regards the offender.

⁷ *M. T v S* [2025] ZAWCHC 307.

⁸ *GK v S* [2013] ZAWCHC 76; 2013 (2) SACR 505 (WCC).

⁹ *CC v S* [2015] ZAWCHC 69.

¹⁰ Footnote 7 para 53.

¹¹ *Director of Public Prosecutions, Gauteng Division, Pretoria v D M S and AOL* [2023] ZASCA 65 para 19.

¹² *S v Van der Merwe* [2011] ZAFSHC 88; 2011 (2) SACR (FB) 509 para 30.

¹³ *S v Jansen* 1999 (2) SACR 368 (C).

The plea, once accepted, defines the *lis* between the prosecution and the defence. Once the parameters of the playing fields are so demarcated, it become foul play to canvass issues beyond. The rules of fair play have to be strictly enforced. In this instance it was not.'

[14] The sequential approach to be followed that I distil from the judgment in *M.T v S* is this:

- (a) The appellate court must first determine whether the sentencing court properly and correctly identified all relevant factors and circumstances that a court is ordinarily required to consider in sentencing. This involves an assessment of the evidence placed before the sentencing court.
- (b) Having done so, the appellate court must then evaluate whether the sentencing court properly weighed those factors in deciding whether substantial and compelling circumstances were present. This includes assessing whether any relevant factors were ignored, misapplied, or given undue emphasis - whether by overemphasising mitigating circumstances, or underplaying aggravating ones.
- (c) If it appears from this evaluation that the sentencing court materially misdirected itself - whether by failing to consider relevant factors, by misapplying them, or by attributing disproportionate weight to any of them - the appellate court is entitled, and indeed obliged, to interfere.
- (d) At that point, the appellate court must conduct its own value judgment of the cumulative effect of the relevant circumstances and factors. It must then apply the test formulated in *S v Malgas*, namely: whether, viewed collectively, the circumstances amount to substantial and compelling reasons justifying a departure from the prescribed minimum sentence.

[15] Did the court a quo correctly identify all the relevant factors and circumstances ordinarily taken into account when determining sentence? In my view it did. In summary, the court took the following into account: the appellant was 53 years old. He was unmarried and father to a child already older than 18 years. The court considered that his previous convictions were older than ten years as well as the fact that he was employed as a cattle herder before incarceration; he had a limited formal education and sporadic employment. He claimed to be under the influence of alcohol when he committed the rape and pleaded guilty, ostensibly to spare the complainant further trauma, and apologised for his actions – conduct which he argued evinced genuine remorse. These

factors were advanced as reasons to deviate from the prescribed life term. On the aggravating side, the court considered the seriousness of the offence, the fact that the complainant was only six years old at the time of the offence and the fact that the appellant was on parole at the time of this offence for rape.

[16] I now turn to what, in my view, constitutes the real fulcrum of this appeal – and that is whether the court, having identified the relevant factors and circumstances, properly weighed them in arriving at the conclusion that there were no substantial and compelling circumstances to depart from the prescribed minimum sentence. In this context, I deal with those specific factors which the appellant argues ought to have been found to constitute substantial and compelling circumstances.

[17] The first is the appellant's consumption of alcohol and its alleged effect on his moral blameworthiness. In *Director of Public Prosecutions, Grahamstown v Mzukisi Peli*¹⁴ the Supreme Court of Appeal (SCA) held:

'It is trite, that for intoxication to be considered as a substantial and compelling circumstance in mitigation, it must be shown that the consumption of alcohol had impaired or affected the respondent's mental faculties or judgment and thereby diminished the respondent's moral blameworthiness: see *S v Cele* 1990 (1) SACR 251 (A) at 254*h-i* & 255*b-c*; *S v Makie* 1991 (2) SACR 139 (A) at 143*c-d* and *S v Eadie* 2002 (1) SACR 663 at 673*j-674f* together with the cases mentioned therein. That the respondent appreciated the wrongfulness of his conduct and was accordingly able to distinguish right from wrong, but nevertheless proceeded to rape the complainant, cannot on the facts of this case serve to diminish his moral blameworthiness to the extent that it may be regarded as a substantial and compelling circumstance.'¹⁵

[18] That reasoning applies with equal force here. The mere fact that the appellant had consumed alcohol prior to the commission of the offence does not, without more, constitute a substantial and compelling circumstance. There is no evidence that the consumption of alcohol had impaired or affected the appellant's mental faculties or judgment. To the contrary, by his own account, after consuming alcohol, the appellant still appreciated the nature of his actions. In weighing this factor, the court a quo correctly

¹⁴ *Director of Public Prosecutions, Grahamstown v Mzukisi Peli* [2018] ZASCA 40; 2018 92) SACR 1 (SCA).

¹⁵ *Ibid* para 9.

concluded, in my view, that the appellant's consumption of alcohol played no meaningful role.

[19] The second factor relied upon by the appellant is his plea of guilty. It is argued that the court had found, relying on *S v Barnard*,¹⁶ that because it was an 'open and shut case' the appellant 'had no choice but to plead guilty'. The court's weighing of the guilty plea is, however, considerably more nuanced than that. While the court a quo did reference the principle that a plea of guilty tendered in the face of overwhelming evidence is a neutral factor,¹⁷ and further noted the important distinction between mere regret and genuine remorse,¹⁸ it did not conclude that the appellant's plea fell within that category.

[20] On the contrary, the court expressly accepted the plea as a mitigating factor, recording: 'The Court finds one mitigating factor: that you have pleaded guilty.' However, and this is material, that was immediately followed by the court's finding that aggravating circumstances were present and then proceeded to consider the aggravating circumstances. Among the aggravating circumstances considered by the court a quo was the youth of the complainant, who was only six years old at the time of the offence. The rape of a child of such tender years is a crime of profound gravity and peculiar horror. The appellant, a mature adult, violated the complainant's bodily integrity and human dignity in the most egregious manner imaginable.

[21] The court also considered the fact that the appellant committed this rape while on parole for a previous rape crime. This signals a deeply entrenched criminal disposition and a frightening lack of remorse or rehabilitative progress stemming from his prior conviction. The appellant's guilty plea recedes into relative limited weight against the horrendous nature of the crime and the interests of society in shielding children from such brutality. Even if not expressed in precisely those terms, the court's reasoning effectively amounted to a conclusion that the mitigating effect of the guilty plea was eclipsed by the aggravating factors. That conclusion cannot be faulted.

¹⁶ *S v Barnard* [2003] ZASCA 63; 2004(1) SACR 191 (SCA) 197

¹⁷ *Ibid.*

¹⁸ See *S v Mokoena* [2009] ZASCA 14; 2009 (2) SACR 309 (SCA) and *S v Martins* 1996 (2) SACR (W)

[22] The third factor relied on by the appellant is that the Victim Impact Statement did not show that any lasting effect had been exerted on the complainant. Under this rubric, reference is made to *Rammoko v Director of Public Prosecutions*¹⁹ where the SCA referred to its earlier observation in *S v Abrahams*²⁰ that '*some rapes are worse than others*.'²¹

[23] I accept, as one must, that there exist instances of rape so grotesque, so depraved, that they may eclipse others in sheer brutality. But I do not think that the court a quo erred by not descending into a calculus of horror. The court a quo considered the full gravity of the offence before it. It recognised the dreadful nature of what occurred and approached the sentence in that light.

[24] The question is not whether this was the most heinous rape ever committed, but whether the offence, on its own facts, warrants the imposition of the prescribed sentence. It does. On this point, in *S v Vilakazi*²² Nugent JA held:

'I should not be understood to mean that the absence of any one or more of the various aggravating features specified in the Act necessarily justifies a departure from the prescribed sentence for that would suggest that the maximum sentence is reserved for only extreme cases. That was not so prior to the Act and is not the case now. There comes a stage at which the maximum sentence is appropriate to an offence and the fact that the same sentence will be attracted by an even greater horror means only that the law can offer nothing more. Whether, and if so to what extent, the absence of other aggravating circumstances might diminish the offender's culpability will naturally depend upon the particular circumstances.'²³

[25] So it is here. I do not agree that the court a quo compartmentalised the factors to be considered. That each was considered discretely does not warrant the conclusion that they were not ultimately weighed cumulatively. Indeed, it is difficult to conceive how a meaningful cumulative assessment could occur without first engaging the individual considerations on their own terms. Read fairly and as a whole, the court's reasoning reflects precisely such a process: engagement with each material factor, followed by a

¹⁹ *Rammoko v Director of Public Prosecutions* [2002 ZASCA 138; 2003 (1) SACR 200 SCA.

²⁰ 2002(1) SACR 116(SCA) at para [29]

²¹ Footnote 19 para 12.

²² *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA).

²³ *Ibid* para 54.

clear finding that, taking all the factors into account, there are no compelling and substantial circumstances to deviate from the imposition of the prescribed sentence.

[26] Finally, I turn to consider whether the sentence of life imprisonment is so disproportionate or shocking in this case that this Court should intervene. A life sentence for the rape of a young child by a repeat offender is a paradigmatic example of a proportionate punishment. Our courts have repeatedly emphasised that rape of a young child is an outrage and that the Legislature, reflecting society's abhorrence, ordained life imprisonment as the benchmark sentence for this category of rape. As recently as 2023, in *Maila v S*²⁴ the SCA entreated courts, given the onslaught of rape on children, not to 'shy away' or 'retreat' from imposing the ultimate sentence of life imprisonment in appropriate cases.

[27] The prescribed sentence aligns with the appalling nature of the crime and the appellant's profile; it upholds society's justified demand for retribution and deterrence in cases of this kind. Far from being disturbingly inappropriate or shocking, the sentence of life imprisonment is grimly apt. In conclusion, I find no cause to interfere with the sentence imposed.

[28] In the result, I propose that the following order be made:

- 1 Condonation is granted for the late filing of the notice of appeal.
- 2 The appeal is dismissed


W A VAN ASWEGEN
ACTING JUDGE OF THE HIGH COURT

I concur and it is so ordered.

²⁴ *Maila v S* [2023] ZASCA 3 paras 43, 46 and 56.

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S NAIDOO

JUDGE OF THE HIGH COURT

Appearances

For the Appellant:

Adv JD Reyneke

Instructed by:

Legal Aid South Africa

For the Respondent:

Adv T S Nyakama

Instructed by:

National Director of Public Prosecutions