



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Not Reportable

Case no: CA 27/2024

Regional Magistrates Case No: R/C62/2018

In the matter between:

BEN MOSIANE TSHWEU

APPELLANT

and

THE STATE

RESPONDENT

Coram: Hendricks JP and Petersen ADJP

Heard: 19 March 2026 (on the papers)

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 10h00 on 24 March 2026.

Summary: Criminal appeal — rape and housebreaking with intent to rape — single witness — cautionary rule satisfied — appeal against conviction dismissed — prescribed minimum sentence — s 51(1) of Criminal Law Amendment Act 105 of 1997 — appeal against sentence dismissed — pre-sentence detention to be brought to the attention of the Department of Correctional Services by completion of Form J24.

ORDER

On appeal from: Regional Court, Taung (Magistrate Bekker, sitting as court of first instance).

1. The late filing of the appeal is condoned.
2. The appeal against conviction is dismissed.
3. The appeal against sentence is dismissed.
4. It is directed that the period of approximately six years and six months spent by the appellant in custody awaiting trial shall be brought to the attention of the Department of Correctional Services through the completion and submission of Form J24, for consideration in the computation of his sentence and any future parole eligibility determinations.

JUDGMENT

Petersen ADJP (Hendricks JP concurring):

Introduction

[1] This is an appeal against both conviction and sentence. The appellant, Mr Ben Mosiane Tshweu (then 43 years old), appeared in the Regional Court, Taung, on two counts: the first being housebreaking with intent to rape and rape, and the second being rape, both arising from an incident that occurred on 27 May 2017 at Mamashokwane Village. He was legally represented throughout the trial by Ms. De Klerk of Legal Aid South Africa. On 23 November 2023, the learned magistrate, Ms Bekker, convicted him on both counts. On 11 December 2023, he was sentenced to life imprisonment, the counts having been taken together for purposes of sentence. The appeal is with

the necessary leave. The matter comes before the present panel of judges since the previous panel assigned by the Judge President regrettably failed to attend to and deliver judgment timeously.

[2] The appellant's notice of appeal, filed on 31 March 2025, raises several grounds. In respect of conviction, it is argued that the court below erred in finding that the State had proved its case beyond reasonable doubt; that it failed to find that there was consent; that it failed to apply the cautionary rule to the evidence of the complainant, who was a single witness; and that the appellant did not receive a fair trial because of the more than six-year delay in finalising the matter, due largely to the unavailability of the presiding officer. In respect of sentence, it is contended that the sentence of life imprisonment is shockingly inappropriate; that the court failed to take into account the appellant's personal circumstances as constituting substantial and compelling circumstances; and that it failed to consider the six years the appellant spent in custody awaiting trial.

[3] The respondent opposes the appeal. It submits that the State proved its case beyond a reasonable doubt; that the complainant's evidence was clear, credible, and corroborated; and that there are no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence.

Background facts

[4] The complainant, Ms. M[...] S[...] M[...], was 68 years old at the time of the incident. She resided alone in a two-roomed house in Mamashokwane Village, Taung. She knew the appellant by sight, as they stayed in the same village, but had never had any conversation with him before the incident. The complainant testified that on the evening of 26 May 2017, she followed her usual routine. She bathed, ate her meal, watched television, and at around 18h00 locked her doors and closed her curtains. She went to sleep. In the early hours of 27 May 2017, at approximately 03h00, she was awakened by a '*tsha*' sound from the kitchen window. She lit a candle and went to investigate. She saw the appellant, whom she recognised, having already entered through the broken window. A struggle ensued. The appellant throttled her, bit her on the left ear, and they fell against a bucket of water. When she was weak and struggling for air, the appellant said: '*Old lady, go to the bed, I am going to have sexual intercourse with you.*' He pushed her onto the bed. He attempted to penetrate

her but struggled due to what she described as her vagina having ‘*shrunk*’ because of her age and long period of sexual inactivity. He demanded Vaseline, which was next to her bed, applied it to her vagina, and penetrated her. He made up and down movements and ejaculated. He then lay next to her on the bed. Later that morning, he penetrated her a second time.

[5] When the sun rose, the complainant told the appellant she wanted to fetch water to bathe. She went outside and saw her cousin, Mr. J[...] O[...], at his nearby home. She did not go to him immediately but waited until the appellant left. She then went to Mr. O[...]’s house, knocked on the window, and reported that the appellant had broken into her house and raped her.

[6] Mr. O[...] confirmed that the complainant arrived at his house early that morning, around 06h00, and reported the incident. He contacted the police, who attended the scene and found the appellant still at the complainant’s house. The appellant was arrested.

[7] The complainant was examined at Taung Hospital by Dr. Molagi. The J88 report (Exhibit A) revealed bite marks on the left ear with dried blood, and abrasions on the right side of the jaw. Bleeding from the cervix was noted. DNA evidence (Exhibit B) linked the appellant to a cannabis ‘stompie’ found at the scene. Photographs of the crime scene (Exhibit C) depicted the broken window and the bedroom where the incident occurred.

[8] The appellant’s version was that he was in a consensual sexual relationship with the complainant, which had commenced approximately five days before the incident. He testified that he had visited her on 23, 25, and 26 May 2017. On the 26th, he arrived at 20h00, found her sitting on the stoep, and they went inside and had consensual sexual intercourse. He claimed that an argument later arose about money, during which the complainant threw a cup that broke the window. He denied breaking the window, denied throttling her, and denied biting her. He explained the injury to her ear as having occurred when she bumped against the wall while trying to grab him.

Evaluation of the evidence

[9] The approach of a court of appeal to factual findings by a trial court is well established. A court of appeal will not readily interfere with findings of fact made by a trial court, which had the advantage of observing witnesses and

assessing their demeanour. Interference is justified only where the trial court's findings are clearly wrong, or where it has misdirected itself on the facts.¹

[10] The complainant was a single witness to the events constituting the rape. Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted on the evidence of a single witness. However, our courts have long emphasised that such evidence should be approached with caution. The trial court must be satisfied that the single witness is credible and that her evidence is clear and satisfactory in every material respect.²

[11] The magistrate conducted a thorough evaluation of the complainant's evidence. She noted that the complainant was a frail, elderly woman; that she gave her evidence in a clear and chronological manner; that she was steadfast under cross-examination; that she did not contradict herself; and that she made a favourable impression on the court. The magistrate also observed the complainant's demeanour when the suggestion of a secret love affair was put to her. She was, in the magistrate's words, 'flabbergasted', displaying 'incredulity' and 'outrage' that such a young man would make such a claim about an elder.

[12] The complainant's evidence was consistent in several material respects. Firstly, she went to Mr O[...]s house at the first available opportunity and reported the incident, and Mr O[...]s evidence confirmed the timing and content of this report. A first report, while not corroborative of the truth of the allegation, is relevant to the credibility of the complainant. Secondly, the J88 report confirmed bite marks on her left ear and abrasions on her jaw, injuries that were consistent with her account of being throttled and bitten. Thirdly, the photographs (Exhibit C) depicted a broken window pane, consistent with her evidence that the appellant gained entry by breaking the window. Fourthly, the appellant's DNA was found on a cannabis 'stompie' at the scene, corroborating his presence in the house, which he admitted, but also consistent with the complainant's evidence that he had smoked during the night. Fifthly, the appellant was found at the complainant's house when the police arrived, consistent with her evidence that he remained there until morning.

[13] The appellant's version, by contrast, was fraught with difficulties. His evidence was, as the magistrate observed, 'quick', 'short', and delivered with what might be described as a 'swagger'. He was evasive in cross-examination,

¹*R v Dhlumayo* 1948 (2) SA 677 (A); *S v Hadebe* 1998 (1) SACR 422 (SCA).

²See *S v Sauls* 1981 (3) SA 172 (A); *S v Stevens* 2005 (1) SACR 394 (SCA).

frequently claiming not to understand questions that were perfectly clear. The magistrate noted that he ‘gave himself away of being a very understanding person and knows exactly what it is he is confronted with’.

[14] The appellant’s version that he was in a consensual sexual relationship with the complainant was inherently improbable for several reasons. The age disparity between them, with the complainant being 68 and the appellant 43, rendered the relationship improbable. The complainant was old enough to be his mother, and while age disparity alone does not negate the possibility of a relationship, when coupled with her emphatic denial and her demeanour, it rendered his version highly improbable. Furthermore, the appellant claimed the relationship was to be kept secret because of the complainant’s age, yet if the relationship was consensual, there was no explanation for why the complainant would immediately report the incident to Mr O[...]. This is not the conduct of someone in a secret love affair. Regarding the broken window, on the appellant’s version, it was broken accidentally by the complainant throwing a cup, yet he claimed he left at 21h00 on the 26th, and the complainant only reported the matter the following morning. It was highly improbable, as the magistrate correctly found, that she would not have repaired or at least secured the window if she had caused the damage herself. The appellant was also initially vague and contradictory about the dates on which he allegedly visited the complainant, mentioning 23, 24, 25 and 26 May with little consistency, which reflected poorly on the reliability of his evidence.

[15] The magistrate, in her comprehensive judgment, applied the correct legal principles. She considered the cautionary rule applicable to single witnesses. She evaluated the credibility of both the complainant and the appellant. She weighed the probabilities. She considered the totality of the evidence, including the corroborative features. She concluded that the State had proved its case beyond reasonable doubt, and that the appellant’s version was not reasonably possibly true.

[16] In my view, there is no basis to interfere with these findings. The magistrate’s evaluation of the evidence was thorough and balanced. Her credibility findings are supported by the record. The complainant’s evidence was clear, consistent, and corroborated. The appellant’s version was inherently improbable and rightly rejected.

The right to a fair trial and delay

[17] The appellant contends that he did not receive a fair trial because the proceedings were delayed for more than six years, due largely to the unavailability of the presiding officer. It is submitted that this violates his right to have his trial begin and conclude without unreasonable delay, as guaranteed by s 35(3)(d) of the Constitution.

[18] The record reveals a troubling history of delays. The appellant was arrested on 27 May 2017. His trial commenced on 25 July 2018. The matter was finalised on 11 December 2023, a period of approximately six years and six months from arrest to sentence. The record reflects that the matter was postponed on multiple occasions for various reasons, including transcription of records due to the complainant's age, unavailability of the presiding officer on numerous occasions, unavailability of the prosecutor, unavailability of the defence attorney, the COVID-19 pandemic and related lockdowns, load shedding, and court congestion.

[19] Section 35(3)(d) of the Constitution guarantees every accused person the right to have their trial begin and conclude without unreasonable delay. What constitutes an unreasonable delay depends on the circumstances of each case, including the complexity of the matter, the conduct of the parties, and the systemic challenges faced by the courts.³

[20] While the delay in this matter is regrettable, and while the record reflects an unacceptable number of postponements due to the unavailability of the presiding officer, it cannot be said that the appellant did not receive a fair trial. The trial itself, when it proceeded, was conducted fairly. The appellant was legally represented throughout. He had the opportunity to challenge the State's evidence and to present his own version. The delays, while extensive, did not render the trial unfair. They are, however, a factor to be considered in the appeal against sentence, to which I now turn.

Appeal against sentence

[21] The approach of a court of appeal to sentence is well established. Interference is justified only where the trial court has misdirected itself, or

³*S v Zitha* [2017] ZAGPJHC 238; *S v Mofokeng* 2016 (2) SACR 12 (SCA).

where the sentence is so disproportionate or shocking that no reasonable court could have imposed it.⁴

[22] The appellant was sentenced to life imprisonment. This sentence was imposed in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997, read with Part I of Schedule 2, on the basis that the complainant was raped more than once. The magistrate correctly took Counts 1 and 2 together for purposes of sentence, as the State had invoked s 51(1) on the basis of multiple rapes.

[23] The appellant's personal circumstances, as placed before the court below, are as follows. He was 49 years old at the time of sentence. He is the father of two children, aged 16 and 9 years, from different mothers, both of whom are unemployed and rely on social grants for the children. He is unmarried. He never attended school and is illiterate. Before his arrest, he was employed as a general worker on a farm, earning R1 800 per month plus groceries. He contributed R250 per month to each child's upbringing. He has one previous conviction from 1999 for use of a motor vehicle without the owner's consent, which the magistrate correctly treated as having lapsed for purposes of sentence, rendering him a first offender for the purposes of these offences. He spent approximately six years and six months in custody awaiting trial.

[24] The magistrate considered these circumstances but concluded that they did not constitute substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. She referred to the principles enunciated in *S v Malgas*⁵ and *S v Vilakazi*⁶, and held that the personal circumstances of the offender recede into the background when the crime is serious.

[25] The question for this court is whether the magistrate misdirected herself in reaching that conclusion. In *S v Malgas*, the Supreme Court of Appeal emphasised that the prescribed minimum sentences should not be departed from lightly or for flimsy reasons. The court also recognised that a departure is justified only if the prescribed sentence would be unjust or disproportionate to the offence and the offender, and that the enquiry is whether there are 'truly convincing reasons' for a different response.⁷

⁴See *S v Malgas* 2001 (1) SACR 469 (SCA); *S v Kgosimore* 1999 (2) SACR 238 (SCA).

⁵*S v Malgas* 2001 (1) SACR 469 (SCA).

⁶*S v Vilakazi* 2009 (1) SACR 552 (SCA).

⁷*S v Malgas* above fn 4 para 25.

[26] The appellant's personal circumstances, while worthy of consideration, are not uncommon in cases of this nature. Many offenders who appear before our courts are unemployed, have limited education, and have children who depend on them. As the court in *S v Vilakazi* observed, 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 children, whether or not he is employed, are in themselves largely immaterial to what that period should be.⁸ These are precisely the kind of flimsy grounds that *Malgas* warned against.

[27] The period of pre-sentence detention requires more careful consideration. The appellant spent approximately six years and six months in custody awaiting trial. The appellant's pre-trial detention, while substantial, is not so disproportionate as to render a life sentence unjust. A lengthy period of pre-sentence detention, even where not attributable to the accused, does not necessarily constitute a substantial and compelling circumstance when balanced against the gravity of the offence and the interests of society. The purpose of the minimum sentencing legislation is to ensure that serious crimes are met with severe sentences, and the fact that an accused has been in custody for a long period awaiting trial does not automatically undermine that purpose. In *Loyiso Ludidi and Others v S*⁹ this very question engaged the Supreme Court of Appeal which identified the question and answer thereto, succinctly as follows:

‘[1] Does the time an accused person has spent as an ‘awaiting trial prisoner’ constitute substantial and compelling circumstances when a statutorily ordained sentence of life imprisonment has been imposed? That is the question to be answered in this appeal. The Western Cape Division of the High Court (the high court) found that it did not, but granted leave to appeal to this Court.

...

[7] When sentencing finally took place, the accused had been in custody for a period of five years and eight months...

...

[11] Courts have considered whether the length of time spent in custody as an ‘awaiting trial’ prisoner is a substantial and compelling circumstance warranting the

⁸*S v Vilakazi* above fn 6 para 58.

⁹ *Loyiso Ludidi and Others v S* (983/2022; 056/2024) [2024] ZASCA 162; 2025 (1) SACR 225 (SCA) (29 November 2024); *S v Brophy and Another* 2007 (2) SACR 56 (W) paras 16-19. *Radebe and Another v S* [2013] ZASCA 31; 2013 (2) SACR 165 (SCA) paras 13-14; *Director of Public Prosecutions North Gauteng: Pretoria v Gwala and Others* [2014] ZASCA 44; 2014 (2) SACR 337 (SCA) paras 26-30.

imposition of a lesser sentence. In 2007 the full court of the Gauteng Division of the High Court, Johannesburg in *S v Brophy and Another*, reduced finite sentences on the basis that the time spent in custody while awaiting trial was a substantial and compelling circumstance. Following a Canadian decision of *Gravino* (70/71) 13 Crim LQ 434 (Quebec Court of Appeal), the full court held that the period spent in custody pre-sentencing was equivalent to a sentence twice that length. This was because of the harsh conditions that awaiting trial prisoners were subjected to, in comparison to convicted prisoners. The court then reduced the sentences by subtracting the time spent in prison awaiting trial by each appellant and multiplying it by two.

[12] This approach was rejected by this Court in *Radebe and Another v S* which criticised the application of any mechanical formula. Rather, the time spent in custody awaiting trial is one of the factors to consider when determining whether there is justification for a lesser sentence than the prescribed minimum sentence. The circumstances of each case should be assessed on its own merits. Similarly in *Director of Public Prosecutions North Gauteng: Pretoria v Gcwala and Others*, this Court held that the trial court misdirected itself by applying the formulas and increased the sentences of imprisonment accordingly.

[13] It is now trite law that in respect of finite sentences there is no hard and fast rule as to the weight to be afforded to pre-sentencing incarceration. It is but one of the factors to take into consideration when determining the existence of substantial and compelling circumstances. In addition, a sentencing court should take into account the reasons for the prolonged period of detention prior to sentencing.

[14] In *S v Solomon and Others*,¹⁰ commenting on the effect of lengthy pre-sentencing incarcerations on life imprisonment, Rogers J endorsed the view of Goosen J, as he was then, in *S v Kammies*.¹¹ The conceptual difficulty with a sentence that has no determinate maximum period was acknowledged. A court cannot approach a life sentence as anything other than a sentence which is imposed for the rest of that person's life. It cannot be 'reduced' by the period spent in custody awaiting trial and it would be improper for a court to take into the account the possibility of parole. Goosen J

suggested that the most appropriate course of conduct would be to antedate the sentence. In *Solomon*, the court held that life imprisonment means a sentence which extends for as long as that person is alive. Absent the prospect of parole, a person 'would not have been released sooner on the hypothesis of no interval between arrest and sentencing'.

[15] This Court, in dealing with a sentence of life imprisonment in *Ncgobo v S*¹², confirmed that the period spent in custody before conviction and sentencing is not, on its own, a substantial and compelling circumstance. It is merely a factor in

¹⁰ *S v Solomon and Others* [2020] ZAWCHC 118; 2021 (1) SACR 533 (WCC) para 24.

¹¹ *S v Kammies* 2019 JDR 2600 (ECP) para 38.

¹² *Ncgobo v S* [2018] ZASCA 6; 2018 (1) SACR 479 (SCA) para 7.

determining whether the sentence imposed is disproportionate and unjust. It was held that the two years spent in custody would make a minimal impact on a sentence of life imprisonment and did not render the sentence shockingly disproportionate.

[16] Here, the period spent in custody of five years and eight months was indeed a long one. There were inordinate delays. The high court requested the parties to address the reason for the delay at the commencement of the sentencing procedures. The high court concluded that the delays were largely attributable to the appellants and their legal representatives. Initially the appellants launched a protracted and unsuccessful bail appeal with a result that the first pre-trial conference in the high court was more than two years after their arrest. The pre-trial procedures were unduly delayed due to 'serial non-attendances' by the legal representative who represented Mr Ludidi and Mr Chwayi. When the matter had been in pre-trial management for two years in the high court, the judge case-managing the trial refused to certify it ready for trial until the legal representative made an appearance at court. It was then set down for trial six months later on 3 August 2021. Thereafter, it seemed that apart from the disruptions due to COVID, the trial ran relatively smoothly until completion on 22 February 2022. A lengthy and comprehensive judgment was delivered on 18-19 May 2022. It appears that had they wished to do so, the appellants and their legal representatives could have considerably shortened the period they spent awaiting trial.

[17] If one turns to the offences for which the appellants were convicted, these were heinous. They were hired assassins willing to murder whoever was identified if they were paid for the deed. There is nothing disproportionate about their sentences of life imprisonment. Regarding the period in custody as awaiting trial prisoners, unless this is an exceptionally long period of time to which the conduct of the accused persons has not materially contributed, this in my view, can never in and of itself, be a substantial and compelling circumstance where life imprisonment is imposed. The role of courts is to ensure that any sentence passed is a fair one having regard to the crime committed and the individual circumstances of the accused.

[18] The high court did not misdirect itself when it found that the lengthy pre-sentencing incarceration period did not amount to substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment.'

[28] However, the weight to be attached to pre-sentence detention must be assessed in the context of the particular case. In matters where the prescribed minimum sentence is life imprisonment, the question is whether the period of pre-sentence detention, considered together with other factors, renders the prescribed sentence unjust or disproportionate. The appellant's six year period of detention is substantial, but it must be measured against the gravity of the offences for which he was convicted.

[29] The offences committed by the appellant were of the most serious kind. He broke into the home of a 68-year-old woman in the dead of night. He assaulted her, throttled her, bit her on the ear, and raped her not once but twice. The complainant was entitled to feel safe in her own home, a place of sanctuary and security. The appellant violated that sanctuary in the most profound and degrading manner. The injuries she sustained, both physical and psychological, were significant. The fact that the complainant has since passed away, as noted by the prosecutor during sentencing proceedings, adds a further dimension of tragedy to this matter, as she did not live to see the finalisation of the case.

[30] In these circumstances, the period of pre-sentence detention, while substantial, does not render the sentence of life imprisonment unjust or disproportionate. The magistrate was correct in her assessment that the appellant's personal circumstances, including the time spent in custody awaiting trial, do not constitute substantial and compelling circumstances justifying a departure from the prescribed minimum sentence. The sentence of life imprisonment is a fitting response to the grave crimes committed by the appellant.

[31] This does not mean that the period of pre-sentence detention should be disregarded. On the contrary, it is a factor that must be taken into account in the administration of the sentence. The Department of Correctional Services has administrative mechanisms to ensure that time spent in custody awaiting trial is considered in the computation of sentences and in determining parole eligibility. Form J24 is the prescribed instrument for bringing such periods to the attention of the Department. It is appropriate that this court direct that the appellant's lengthy period of pre-sentence detention be brought to the attention of the Department of Correctional Services through the completion and submission of Form J24, so that it may be given due consideration in accordance with the applicable policies and regulations.

[32] Form J24 is ordinarily used to ensure that periods of pre-sentence detention are properly recorded and considered by the correctional authorities. It is a mechanism that gives practical effect to the principle that time spent in custody awaiting trial is relevant to the overall period of incarceration that an offender will serve. While it does not affect the lawfulness or appropriateness of the sentence imposed, it ensures that the administrative authorities are fully

informed of all relevant facts when making decisions regarding the implementation of the sentence.

Conclusion

[33] The conviction is sound and must stand. The State proved its case beyond reasonable doubt, and the magistrate's evaluation of the evidence was thorough and correct. The sentence of life imprisonment, while severe, is neither disproportionate nor shocking. It is the sentence prescribed by law for the serious offences committed by the appellant, and there are no substantial and compelling circumstances justifying a departure from that prescribed sentence.

[34] The lengthy period of pre-sentence detention, while not justifying interference with the sentence, must be brought to the attention of the Department of Correctional Services for consideration in the administration of the sentence. An appropriate direction to this effect is included in the order below.

Order

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

1. The late filing of the appeal is condoned.
2. The appeal against conviction is dismissed.
3. The appeal against sentence is dismissed.
4. It is directed that the period of approximately six years and six months spent by the appellant in custody awaiting trial shall be brought to the attention of the Department of Correctional Services through the completion and submission of Form J24, for consideration in the computation of his sentence and any future parole eligibility determinations.

A H PETERSEN

**ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION
MAHIKENG**

I agree.

**R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION
MAHIKENG**

Appearances

For the appellant: Mr R K Thuwe
Instructed by: Legal Aid South Africa,
Mahikeng Local Office

For the respondent: Adv N S Mabale
Instructed by: The Director of Public Prosecutions,
North West Province