



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

Not Reportable

Case no: CA 22/2023

Regional Magistrates Case No: SOR 74/2022

In the matter between:

T[...] D[...] B[...]

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 – sentence – rape of child under 16 years by uncle in position of trust – prescribed minimum sentence of life imprisonment – whether substantial and compelling circumstances justify lesser sentence – guilty plea, remorse and rehabilitation urged – appeal dismissed.

ORDER

On appeal from: The Regional Court for the Regional Division of North West, held at Tlhabane (Bafokeng) (Moeng RM, sitting as court of first instance):

- 1 The appeal is dismissed.
 - 2 The sentence of life imprisonment imposed by the Regional Court on 13 February 2023, together with the ancillary orders made in terms of s 103(1) of the Firearms Control Act 60 of 2000, s 50 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007, and s 120 of the Children's Act 38 of 2005, are confirmed.
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JUDGMENT

PETERSEN ADJP (HENDRICKS JP concurring):

Introduction

[1] The appellant, T[...] D[...] B[...], was convicted in the Regional Court for the Regional Division of North West, held at Tlhabane (Bafokeng), on one count of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act), read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act). His conviction followed upon a plea of guilty tendered on 7 February 2023 and accepted by the regional magistrate, Mr Moeng, in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA). On 13 February 2023 the magistrate sentenced the appellant to life imprisonment. Ancillary orders were made in terms of s 103(1) of the

Firearms Control Act 60 of 2000 (declaring him unfit to possess a firearm); s 50 of the Sexual Offences Act (directing inclusion of his name in the National Register of Sexual Offenders); and s 120 of the Children's Act 38 of 2005 (declaring him undesirable to work with children).

[2] The appellant appeals against sentence only, with the leave of the magistrate. He contends that the magistrate erred in failing to find that substantial and compelling circumstances existed justifying a lesser sentence than life imprisonment, and that the sentence is so severe as to induce a sense of shock.

The facts

[3] The facts appear from the appellant's statement in terms of s 112(2) of the CPA and the record of the proceedings. On 02 February 2022 at Lethabong in the Regional Division of North West, the appellant, then 26 years of age, raped his niece, M[...] B[...], aged nine years.

[4] The appellant was lying in bed when M[...], who was accustomed to visiting and playing at the family home, entered his bedroom and asked him for R5 to buy snacks. He told her he had no money. She sat next to him on the bed and took his cellphone to play with. Whilst she played with the phone, the appellant undressed her, undressed himself to the knee, and inserted his penis into her vagina. During the commission of the act he says he came to his senses, realised what he was doing was wrong, and stopped.

[5] M[...] was examined at a hospital the same day. The medico-legal report (J88 form, admitted at sentencing as Exhibit C) recorded that the hymen was red but without fresh tears; the clinical findings were suspicious of penetration, pending forensic results; possible semen and blood staining was present on the complainant's undergarments; and the complainant was neither intoxicated nor drugged. Her height was 137 cm and weight 35 kg.

[6] The appellant has one previous conviction of theft for which he paid an admission of guilt fine of R500 in 2015. He was unemployed, relying on occasional

gardening work at approximately R150 per occasion, approximately twice monthly. He has no dependants, resides with his mother and siblings, and attained Grade 9 as his highest level of education.

The proceedings in the regional court

[7] The matter was first enrolled in the Magistrates' Court for the District of Rustenburg on 01 June 2022 and transferred to the Regional Court at Tlhabane on 05 July 2022. After several postponements to enable consultation and preparation, a formal pre-trial conference was conducted on 27 September 2022. Item 14 of the pre-trial conference minutes recorded the appellant's intended plea as 'not guilty'. The matter was set down for trial on 10 November 2022. The complainant and other state witnesses were absent on that date. They were writing examinations, and the matter was remanded to 18 January 2023 for trial.

[8] It was only on 18 January 2023, when M[...] appeared at court for the first time, that the appellant's legal representative indicated an intention to plead guilty. The matter was remanded to 07 February 2023 for that purpose. On that date the appellant pleaded guilty, his representative read the s 112(2) statement into the record, and both counsel addressed the court in mitigation and aggravation of sentence respectively. The matter was remanded to 13 February 2023 for sentence.

[9] In mitigation, counsel submitted from the bar that the appellant was 26 years of age, had no dependants, was unemployed, had one previous conviction of theft unrelated to the present offence, and should be treated as a first offender for present purposes. Three factors were urged as substantial and compelling. The guilty plea; an apology tendered to the complainant's mother; a confession to a priest; and prospects of rehabilitation.

[10] The state, in aggravation, relied on the J88 report. Counsel submitted that the complainant was the appellant's nine-year-old niece; that the offence was committed at the family home where she had every reason to feel safe; that the appellant, as her uncle, occupied in our culture a father-figure position of trust which he grossly

abused; that he was in his sound and sober senses throughout; and that the prevalence of sexual offences against children in this court's jurisdiction demanded firm sentencing.

The magistrate's reasoning

[11] The magistrate delivered a thorough and careful sentencing judgment. He correctly identified the applicable framework under s 51(1) of the Minimum Sentences Act and the triad of considerations in *S v Zinn*¹: the interests of society, the personal circumstances of the accused, and the nature of the offence. He referred to the salutary caution in *S v Rabie*² that a judicial officer should approach sentencing neither in a spirit of anger nor of misplaced pity, but with humane understanding of human frailties, while never flinching from firmness where firmness is called for.

[12] On the appellant's age of 26 years, the magistrate held, with reference to *S v Matyityi*³, that age was at best a neutral factor. By 26, the appellant could not be described as immature, and no evidence had been placed before the court of any relevant immaturity or external influence upon his conduct.

[13] On remorse, the magistrate examined the appellant's conduct throughout the proceedings. He noted that at the September 2022 pre-trial conference the intended plea was recorded as not guilty and the defence had identified a witness to be called. The guilty plea was tendered only on 18 January 2023, when the complainant first appeared at court. The magistrate found, correctly, that the plea did not bespeak genuine remorse.

[14] On the apology to the complainant's mother and confession to a priest, the magistrate found these to be bare, unsubstantiated assertions. No particulars of the circumstances were furnished; the identity of the priest was undisclosed; and whether the mother accepted the apology was unknown. The magistrate also noted a significant lacuna: the prosecution had placed no victim impact statement before the

¹*S v Zinn* 1969 (2) SA 537 (A).

²*S v Rabie* 1975 (4) SA 855 (A).

³*S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA).

court, leaving the court without information about the effect of the offence on the complainant and her family.

[15] The magistrate identified the following aggravating circumstances: the complainant's age of nine years; her relationship with the appellant as his niece; the domestic setting in which the offence occurred, where she came regularly and had every reason to feel safe; the appellant's position of trust as her uncle; the fact that he was in his sound and sober senses and acted deliberately; and the absence of any provocation or intoxication. He referred extensively to *Maila v S*⁴, in which the Supreme Court of Appeal dealt with materially identical facts, an uncle raped his nine year old niece within the family home, and confirmed that life imprisonment was neither disproportionate nor unjust in such circumstances.

[16] Having weighed all mitigating factors against the aggravating ones, the magistrate found that no substantial and compelling circumstances existed justifying a departure from the prescribed minimum sentence. He imposed life imprisonment and made the ancillary orders referred to above.

The grounds of appeal

[17] The notice of appeal dated 10 March 2023 advances these grounds: (a) the sentence induces a sense of shock and is inappropriate; (b) insufficient weight was given to the guilty plea; (c) the rehabilitation element was not properly considered; (d) the mitigating factors inherent in the facts were not adequately weighed; (e) the apology to the complainant's mother was not adequately considered; and (f) the magistrate overemphasised the seriousness of the offence, the interests of society, the prevalence of the offence, and the retributive element of sentencing.

The applicable legal framework

[18] Section 51(1) of the Minimum Sentences Act provides that a Regional Court or High Court shall sentence a person convicted of an offence listed in Part 1 of Schedule 2 to imprisonment for life. Section 51(3) permits a lesser sentence where

⁴*Maila v S* (429/2022) [2023] ZASCA 3 (23 January 2023).

the court is satisfied that substantial and compelling circumstances exist; in that event, the court must enter those circumstances on the record.

[19] The rape of a child below the age of 16 years falls within Part 1 of Schedule 2. M[...] was nine years old. The prescribed minimum sentence of life imprisonment accordingly applied, and the magistrate was obliged to impose it unless satisfied that substantial and compelling circumstances existed.

[20] The proper approach to substantial and compelling circumstances is settled. A court must consider all relevant mitigating and aggravating factors and ask whether, on a balanced assessment, the cumulative mitigating factors are such as to render the prescribed sentence unjust in the particular circumstances.⁵

[21] The mere presence of mitigating factors does not constitute substantial and compelling circumstances. Those factors must be truly substantial in the sense of rendering the prescribed sentence unjust.⁶ Courts must not lightly deviate from the minimum sentence.⁷ Parliament has spoken; courts are obliged to impose the minimum sentence unless there are truly convincing reasons for departure, and predictable, principled outcomes are foundational to the rule of law.⁸

Analysis

The guilty plea

[22] A plea of guilty carries mitigatory weight. It spares the complainant the ordeal of testifying and confronting her abuser in court, and it reflects co-operation with the criminal justice system. In cases involving young and vulnerable complainants these considerations are of particular significance.

[23] The weight to be accorded to a plea of guilty must, however, be assessed in its particular context. At the September 2022 pre-trial conference the intended plea was

⁵*S v Malgas* [2001] ZASCA 13; 2001 (2) SA 1222 (SCA); *S v Vilakazi* [2008] ZASCA 87; 2012 (6) SA 353 (SCA).

⁶Matyityi fn 3 above para 23.

⁷*Malgas* fn 5 above para 25.

⁸Matyityi fn 3 above para 23.

not guilty; the defence had identified a witness to be called. On 10 November 2022, when the matter was set down for trial, there was no intimation of an intention to plead guilty. The complainant was absent that day. On 18 January 2023, when M[...] appeared at court, the appellant, for the first time, indicated through his representative an intention to plead guilty. The magistrate found, correctly, that this change of plea was prompted by the realisation that the witnesses were present and would testify.

[24] In *Matyityi*⁹ para 13 the Supreme Court of Appeal said:

‘There is moreover a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not, without more, translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another; thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether an offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for remorse to be a valid consideration the penitence must be sincere and the accused must take the court fully into his or her confidence.’

[25] The appellant’s s 112(2) statement was sparse. Beyond admitting the elements of the offence, he provided no account of what caused or motivated him to commit the act, no explanation of what M[...] did or said while being undressed, and no account of how he came to stop. He said nothing about the effect of the offence on the complainant or her family. Assessed against the standard in *Matyityi*¹⁰, he did not take the court fully into his confidence. The guilty plea carries minimal mitigatory weight. The magistrate was correct so to find.

Remorse, the apology and the confession to a priest

[26] The assertion that the appellant had apologised to the complainant’s mother and had confessed to a priest was advanced from the bar without any corroboration. The identity of the priest was not disclosed. The circumstances of the apology were unexplained. Whether the mother accepted or rejected the apology was unstated. No

⁹Matyityi fn 3 above para 13.

¹⁰Ibid.

victim impact statement was tendered. Bare, unsubstantiated assertions of remorse, apology and confession cannot constitute substantial and compelling circumstances. The magistrate was correct so to hold.

Prospects of rehabilitation

[27] Rehabilitation is a recognised objective of sentencing. Its weight is inextricably linked to the moral blameworthiness of the offender and the evidence before the court. No positive evidence of any rehabilitative capacity was placed before the court beyond the submission from the bar. The appellant has a prior conviction. His conduct throughout the proceedings, maintaining a not guilty plea, identifying a fictitious defence witness, and changing his plea only when the witnesses arrived, did not attest to a person who had engaged meaningfully with the gravity of what he had done.

[28] Where the crime is as grave as the deliberate rape of a nine-year-old child by a person in a position of familial trust, the objectives of deterrence and retribution assume particular prominence. They do not extinguish rehabilitation as a consideration, but they cannot be subordinated to it in the absence of any cogent evidence of genuine rehabilitative capacity.

The nature of the offence, the interests of society and the Minimum Sentences Act

[29] The appellant contends that the magistrate overemphasised the seriousness of the offence and the interests of society. This contention cannot be sustained. The magistrate's assessment of these factors was both appropriate and legally sound.

[30] M[...] was nine years old. The appellant was her uncle. In our cultural context, an uncle stands in the position of a father figure. M[...] had no reason to fear visiting the family home or entering the appellant's bedroom – it was part of her regular childhood experience. She came to ask for money for snacks. Whilst she sat next to him playing with his phone, he deliberately undressed her and penetrated her. He was sober and in full possession of his faculties. There was no provocation.

[31] In *Maila v S*¹¹ para 60, decided three weeks before the sentencing in this matter, Mocumie JA said:

‘For an uncle who is in the position of trust just as a father to rape his own niece is unquestionable and deserves no other censure than that imposed by the trial court – life imprisonment. The sentence is not disproportionate to the serious offence that the appellant committed on a nine-year-old child, his niece, and the sentence is thus justified in the circumstances.’

[32] The facts in *Maila* were materially identical to those before us: an uncle had raped his nine-year-old niece within the family home. That judgment is binding and directly applicable.

[33] The magistrate’s references to *S v MM*¹², *S v Abrahams*¹³, *Bailey v S*¹⁴, and the judgment of this court in *Diniso v S*¹⁵ which dealt with an uncle who raped his nine-year-old niece in this very division, demonstrate a correct and thorough application of binding and persuasive authority. Together with *Matyityi*¹⁶ these authorities make plain that Parliament has ordained life imprisonment for this category of offence and that courts must not deviate from it except for truly compelling reasons. None exist here.

[34] The magistrate was also alert to the caution in *Maila*¹⁷ and *Matyityi*¹⁸ that the interests of society do not mean the gratification of a demand for revenge, but the perspective of the informed, reasonable member of the community who seeks a just sentence. His weighing of these interests was dispassionate and correct.

Conclusion

¹¹Maila fn 4 above para 60.

¹²*S v MM* [2012] ZASCA 155; 2013 (2) SACR 292 (SCA).

¹³*S v Abrahams* 2002 (1) SACR 116 (SCA).

¹⁴*Bailey v S* (454/11) [2012] ZASCA 154 (1 October 2012).

¹⁵*Diniso v S* (CA 14/2022) (North West Division of the High Court, 7 February 2023, Petersen J and Reddy AJ).

¹⁶*Matyityi* fn 3 above.

¹⁷Maila fn 4 above.

¹⁸*Matyityi* fn 3 above.

[35] Having considered the full record, the magistrate's sentencing judgment, and the grounds of appeal, I am satisfied that the magistrate approached sentencing with the care and circumspection commensurate with the gravity of the offence. He correctly identified and applied the applicable legal framework. He considered each mitigating factor advanced on behalf of the appellant and gave cogent, adequate reasons for rejecting them as substantial and compelling circumstances. His assessment of the aggravating factors is unassailable.

[36] I am not persuaded that the sentence of life imprisonment induces a sense of shock in the facts and circumstances of this case. A 26-year-old man who, in his sound and sober senses, deliberately undresses his nine-year-old niece and rapes her in the supposed sanctuary of her own family home, in gross breach of the trust that an uncle occupies in our cultural context, and who maintained a not guilty plea until the complainant appeared at court, is – as the magistrate correctly found – a dangerous person. Life imprisonment is the sentence Parliament has prescribed for his offence. The mitigating factors advanced fall far short of constituting substantial and compelling circumstances. The appeal falls to be dismissed.

Order

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

- 1 The appeal is dismissed.
- 2 The sentence of life imprisonment imposed by the Regional Court on 13 February 2023, together with the ancillary orders made in terms of s 103(1) of the Firearms Control Act 60 of 2000, s 50 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007, and s 120 of the Children's Act 38 of 2005, are confirmed.

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: Adv C Britz
Instructed by: Legal Aid South Africa,
Mahikeng

For the respondent: No appearance