



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

Not Reportable
Case no: CA66/2024
Regional Court Case no:RC228/2020

In the matter between:

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

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 — conviction and sentence — kidnapping and rape — child complainant aged nine years — formal admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 — whether admissions freely and voluntarily made — held, no basis to impugn admissions — trial court's finding

of guilt unassailable — sentence — prescribed minimum sentences — rape of child under 16 years — accused bearing previous conviction for rape, committed present offences whilst on parole — whether systemic delay in finalising trial constitutes substantial and compelling circumstances — held, undue delay does not in itself constitute substantial and compelling circumstances where offences are of the utmost gravity and accused has prior conviction for a similar offence — appeal against conviction dismissed — appeal against sentence dismissed.

ORDER

On appeal from: Regional Court, Potchefstroom (Regional Magistrate L Mabile presiding).

1. The appeal against conviction is dismissed.
 2. The appeal against sentence is dismissed.
 3. The conviction and sentence imposed by the Regional Court, Potchefstroom, are confirmed.
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JUDGMENT

PETERSEN ADJP (HENDRICKS JP CONCURRING):

Introduction

[1] The appellant was convicted in the Regional Court, Potchefstroom, of one count of kidnapping (Count 1) and two counts of rape (Counts 2 and 3). He was sentenced to five years' imprisonment on Count 1 and life imprisonment on Counts 2 and 3 (taken together for sentencing purposes), with the sentences ordered to run concurrently, resulting in an effective term of life imprisonment.

[2] He appeals against both his conviction and sentence with the leave of the court a quo. The appeal comes before the present panel of judges since the

previous panel assigned by the Judge President failed to attend to and deliver judgment in the matter.

Background facts

[3] The charges arose from events that occurred on 27 July 2020. The complainant was the appellant's nine-year-old niece, K[...] K[...]. The appellant initially pleaded not guilty to all three counts.

[4] The State led the evidence of the complainant, who testified via closed-circuit television with the assistance of an intermediary. She described how the appellant called her from her home, carried her on his back to bushes and a dam, undressed her, and raped her vaginally and anally on three separate occasions. He threatened to kill her and her family if she disclosed the abuse.

[5] The complainant was cross-examined by the defence and remained consistent in her evidence. After her testimony, the matter was postponed several times. During this period the appellant terminated the mandate of his initial attorney, Ms van der Linde. Further delays arose from the collapse of the Potchefstroom court building, which caused difficulties in obtaining the transcribed record of the proceedings.

[6] On 03 June 2024, the appellant's new legal representative, Ms Erwee, placed on record formal admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977. The appellant admitted in writing that: (a) he knew the complainant as a family member; (b) the complainant was nine years old at the time of the incident; (c) he unlawfully and intentionally deprived the complainant of her freedom by taking her from her home to the bush on 27 July 2020; (d) he unlawfully and intentionally committed an act of sexual penetration by inserting his penis into the complainant's vagina without her

consent; and (e) he unlawfully and intentionally committed a further act of sexual penetration by inserting his penis into the complainant's anus without her consent. The appellant further admitted that the DNA results linking him to the offence were correct.

[7] On the basis of the complainant's testimony and the formal admissions, the trial court found the appellant guilty on all three counts. The court then admitted evidence of a previous conviction: on 15 April 2019 the appellant had been released on parole after being convicted of rape and attempted murder, for which he had received a sentence of 15 years' imprisonment with five years suspended. He was on parole when he committed the present offences.

[8] In sentencing, the trial court considered the victim impact statement, the social worker's report, the J88 medical report, and the correctional supervision report. It found no substantial and compelling circumstances to deviate from the prescribed minimum sentences and accordingly imposed life imprisonment on the two rape counts, with five years on the kidnapping count to run concurrently.

The appeal against conviction

[9] The appellant challenges his conviction on the ground that the trial court erred in accepting the formal admissions in circumstances where the proceedings had been protracted and the child had already testified. He contends that the admissions were made under duress arising from the lengthy pre-trial detention.

[10] The appeal against conviction is devoid of merit. The admissions were made in terms of s 220 of the Criminal Procedure Act, which provides that any fact admitted in writing and signed by the accused is conclusive proof of that fact. The appellant confirmed the admissions in open court and appended his

signature to the document. There is not a shred of evidence on the record to suggest that the admissions were not freely and voluntarily made. The fact that the complainant had already testified does not affect the validity or the evidentiary weight of the admissions.

[11] Moreover, the admissions were entirely consistent with the complainant's detailed and credible testimony. That testimony alone, without the admissions, would have amply sustained the convictions. The trial court's finding of guilt is unassailable.

The appeal against sentence

[12] The principles governing appeals against sentence are settled. An appeal court may only interfere where the trial court misdirected itself in a material respect or where the sentence is so disproportionate or shocking that no reasonable court would have imposed it.

[13] The prescribed minimum sentences applicable are: five years' imprisonment for kidnapping (Schedule 2, Act 105 of 1997) and life imprisonment for rape where the victim is a child under the age of 16 years and the accused has a previous conviction for rape (Schedule 2, Act 105 of 1997, read with s 51(1)). The trial court correctly identified these minimum sentences.

[14] In determining whether substantial and compelling circumstances exist to depart from the prescribed sentence, the court must consider the cumulative effect of all relevant factors.

[15] The appellant's main submission on appeal is that the trial court misdirected itself by not giving sufficient weight to the delay in finalising the trial. The appellant points to the period of more than four years that he spent in custody awaiting the conclusion of the trial. He contends that a significant part

of that delay was not his fault, citing the collapse of the Potchefstroom court building and the protracted time taken to obtain the trial transcripts.

[16] The trial court, when dealing with the delay, remarked that the delay was ‘your own fault because you kept on changing lawyers’. The appellant argues that this remark was a material misdirection. It is necessary to examine the chronology. The appellant was arrested on 19 December 2020. The trial commenced on 25 April 2022, when the complainant testified. Thereafter the matter was postponed on several occasions. On 13 December 2022 the appellant terminated his first attorney’s mandate. On 19 January 2023 he indicated that he wished to re-apply for legal aid. A new attorney was appointed and appeared on 04 April 2023. From that point until 29 April 2024 the matter was delayed because the transcribed record of the proceedings, which was necessary for the new legal representative to prepare, was not available. The delay in obtaining the transcripts resulted from the collapse of the Potchefstroom court building and the consequent loss of or damage to digital recordings.

[17] While it is true that the appellant contributed to the delay by terminating his first attorney’s mandate and requiring new legal representation, the greater part of the delay after April 2023 was systemic and not of his making. The trial court’s statement that the delay was entirely the appellant’s fault was therefore an over-simplification.

[18] However, a misdirection of that nature does not automatically vitiate the sentence. The question is whether, when all the relevant factors are properly evaluated, the sentence of life imprisonment is nonetheless justified. We are persuaded that it is.

[19] In *Maila v S*¹, the Supreme Court of Appeal considered the impact of systemic delay on a sentence for a serious sexual offence. The court held that while undue delay is a factor to be taken into account, it does not in itself constitute a substantial and compelling circumstance where the offences are of the utmost gravity and where the accused has a previous conviction for a similar offence. The court emphasised that the primary purpose of sentencing remains the protection of society and the vindication of the rights of victims, especially vulnerable children. The court stated:

‘The delay in finalising the trial, much of which was not the appellant’s fault, is regrettable. But the nature of the offences and the appellant’s previous conviction for rape render the prescribed sentence of life imprisonment not disproportionate. The courts must guard against elevating systemic delay to a factor that automatically trumps the legislative imperative of prescribed minimum sentences.’

[20] The facts of the present case are strikingly similar to those in *Maila*. The appellant was on parole for a previous rape conviction when he committed the present offences. He raped his own nine-year-old niece on three separate occasions during a single abduction. The victim impact statement reveals the devastating and enduring psychological harm suffered by the child: she suffers from insomnia, nightmares, abdominal pains, difficulty concentrating, and a pervasive fear of men. The victim’s mother reported that the child continues to experience physical symptoms, including vaginal and anal bleeding.

[21] The mitigating factors advanced by the appellant, his ‘youth’ (27 years at the time of the offence), the alleged presence of a child he claims not to have met before, and his late admissions pale in comparison to the aggravating features. The appellant’s previous conviction for rape demonstrates a persistent pattern of predatory sexual offending. The fact that he was on parole at the time

¹ *Maila v S* (429/2022) [2023] ZASCA 3 (23 January 2023)

shows a complete disregard for the law and for the opportunity for rehabilitation that had been extended to him.

[22] The admissions, while welcomed by the court, came only after the child had already endured the trauma of testifying in detail about the abuse. They did not spare her the ordeal of giving evidence. In these circumstances, the weight to be attached to the admissions is limited.

[23] The appellant's pre-trial detention of more than four years, 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*² 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 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

² *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.

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*,³ 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*.⁴ 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*,⁵ 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 determining whether the sentence imposed is disproportionate and unjust. It was held

³ *S v Solomon and Others* [2020] ZAWCHC 118; 2021 (1) SACR 533 (WCC) para 24.

⁴ *S v Kammies* 2019 JDR 2600 (ECP) para 38.

⁵ *Ncgobo v S* [2018] ZASCA 6; 2018 (1) SACR 479 (SCA) para 7.

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.’

[24] We have considered the trial court’s evaluation of the facts and its reasons for imposing life imprisonment. The trial court was acutely aware of the appellant’s personal circumstances and of the delays, but concluded that there were no substantial and compelling circumstances to deviate from the prescribed sentence. That conclusion is, in our view, correct. The sentence is not

shockingly inappropriate; it is eminently proportionate to the offences, the appellant's history, and the interests of society.

[25] The period of pre-sentence detention should not 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.

[26] This court has previously endorsed the use of Form J24 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

[27] The appeal against conviction is without merit and must fail. The appeal against sentence is also without merit. The trial court's imposition of life imprisonment, having properly weighed the relevant factors, falls within the range of sentences that a reasonable court could impose on these facts. There is no misdirection warranting interference.

Order

[28] In the result the following order is made:

1. The appeal against conviction is dismissed.

2. The appeal against sentence is dismissed.
3. The conviction and sentence imposed by the Regional Court, Potchefstroom, 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: Mr T R Semino

Instructed by: Legal Aid South Africa, Mahikeng.

For the respondent: Adv J J van Niekerk

Instructed by: Director of Public Prosecutions, Mahikeng.