



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

CASE NO: CA 12/2024

REGIONAL COURT CASE NO: RC H220/13

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates: NO

Circulate to Regional Magistrates: NO

In the matter between:

A[...] B[...] P[...]

APPELLANT

And

THE STATE

RESPONDENT

CORAM: SCHOLTZ AJ et FOURIE AJ:

Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is 16 March 2026

ORDER

The following order is made:

- i. The Appeal is dismissed.
- ii. The conviction and sentence of the Trial Court are confirmed.

JUDGMENT

FOURIE AJ

INTRODUCTION

[1] This is a criminal appeal against sentence only. The Appellant was convicted by the Regional Court in GA Rankuwa, North West Province, on 29 January 2014, subsequent to a guilty plea tendered in terms of Section 112 (2) of the Criminal Procedure Act 51 of 1977, on a charge of rape on a 15-year-old girl.

[2] The charge preferred against the Accused was formulated as follows:

That the Appellant is charged with contravention of section 3 read with Section 1, 56 (1), 57, 58, 59 and 60 and 61 of Act 32 of 2007 the Sexual and Related Amendment Act, and read further with Section 256 and 261 of the Criminal Procedure Act 51 of 1977 and further read with section 51 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended, in that upon or about 20 May 2013 at or near Rabokala in the Regional Division of Audi, the said Appellant did wrongfully, unlawfully and intentionally commit an act of sexual penetration to wit

L[...] T[...] by penetrating her vagina with his penis without her consent. Provisions of Section 51 (1) of the Act 105 of 1997 apply in that the complainant, who was allegedly raped, was 15 years old at the time of the incident.

- [3] The Appellant was legally represented for the duration of his Trial and tendered a plea of guilty to the charge by submitting a statement in terms of Section 112 (2) of the Criminal Procedure Act 51 of 1977.
- [4] Pursuant to the Plea of guilty contained in the statement in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977, the Court *a quo*, having been satisfied that the Appellant is guilty of the offence to which he has pleaded guilty, convicted Appellant on a charge of rape and imposed a sentence of Life imprisonment;
- [5] The matter comes before us in terms of the provisions of section 309 (1) (a) of the Criminal procedure Act 51 of 1977, as amended by the provisions of the Judicial Matters Amendment Act 42 of 2023 entitling the Appellant to an automatic right of appeal on both his conviction and sentencing once the court *a quo* has imposed a sentence of life imprisonment, Appellant, having pleaded guilty on the preferred charge noted an Appeal against sentencing only.

THE GROUNDS OF APPEAL

- [6] The Appellant notes his appeal against sentencing on the following aspects:
 - (a) The sentence imposed is shockingly severe and inappropriate;

- (b) The Learned Magistrate erred by not imposing a shorter term of imprisonment, taking into consideration the following factors:
 - (i) The period that the appellant spent in custody awaiting the finalisation of the matter;
 - (ii) That the Appellant pleaded guilty to the charge against him.
- (c) The Court erred in overemphasizing the following factors:
 - (i) The seriousness of the offence;
 - (ii) The deterrent effect of the sentence;
 - (iii) The interest of the society.
- (d) The sentence imposed is strikingly inappropriate in that it is out of proportion to the totality of the accepted facts in mitigation.
- (e) The Court overemphasized the seriousness of the offence at the expense of the personal circumstances of the Appellant.

THE RELEVANT EVIDENCE BEFORE THE COURT *A QUO* IN RESPECT OF THE CONVICTION

- [7] The Appellant's plea of guilty, as tendered in a Statement in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977, renders the facts of the matter simple and undisputed. On 10 May 2013, the Appellant was at Rabokala in the Regional Division of Audi. He went to the toilet and found the complainant inside. He pinned her down to the floor, came

on top of her, and penetrated her vagina with his penis. He admitted that his actions were unlawful, that he had the intention of committing the said offense, and that he was never given permission by the said complainant to have sexual intercourse with her. At all material times, he knew that his actions were unlawful and punishable by law. Appellant also confirmed that he did not dispute the complainant's age of 15.

DISCUSSION IN RE SENTENCING

- [8] The Court *a quo* when finding the Appellant guilty on a charge of rape invoked the provisions of section 51 (1) of The Criminal Law Amendment Act, Act 105 of 1997: “ *Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life*” The specific reference under Part 1 Schedule 2 reads as follows: “*Rape as contemplated in Section 3 of the Criminal Law (Sexual offences and Related Matters) Amendment Act, 2007 (b) where the victim (i) is a person under the age of 16 years;*”
- [9] Section 51 (3) (a) of this Act provides a judicial discretion and states: “*If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exists which justifies the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence....*”
- [10] As per *S V Rabie* 1974 (4) 855 AD at 862 G, “*punishment should fit the criminal as well as the crime, be fair to the society and be blended with a measure of mercy according to the circumstances*”.
- [11] In *S v Bogaards* 2013 (1) SACR 1 (CC) at para [41], Khampepe J in the Constitutional Court held the following:

“It can only do so [i.e. interfere with the sentence imposed] where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.”

- [12] If a Trial Court exercises its judicial discretion in terms of Section 51 (3) (a) Under the Criminal Law Amendment Act, to justify imposing a lesser sentence than prescribed, the Court must be satisfied that substantial and compelling circumstances exist.

- [13] In the matter of *S v Malgas* 2001 (1) SACR 469 (SCA) at paragraphs [7] to [9], the following was stated by Marais JA in the SCA regarding sentencing and the implementation of the provisions of section 51 of the Criminal Law Amendment Act and the concomitant imposing of prescribed minimum sentences:

“...The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be “business as usual” when sentencing for the commission of the specified crimes.

In what respects was it no longer business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the

commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence, the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in Flannery v Halifax Estate Agencies Ltd by the Court of Appeal, 'a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based- than if it is not'. Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of

the many factors traditionally and rightly taken into account by courts when sentencing offenders... ”

- [14] The court *a quo*, in sentencing, had to give regard to the aggravating circumstances that were argued prior to sentencing. Of importance were the factors raised in the pre-sentencing report as follows:

“The offender raped his niece, a child who looked up to him for parental love and protection, but instead the offender violated her safety. The child does not feel safe as she was raped in the comfort of her own home by the one man who was supposed to protect her. He plead guilty thus take responsibility for the crime he committed. His choice to rape the victim when he knew he had a chronic illness which is sexually transmitted putting the child`s life in danger makes the offender`s element of remorse questionable”

- [15] Having regard to the fact that the court *a quo* followed and implemented the provisions of section 51(1) of the Criminal Law Amendment Act and sentenced the appellant as aforesaid, this Court of appeal has to determine whether the court *a quo* was correct in its finding that there were no substantial and compelling circumstances to justify imposing the minimum legislative sentence of life imprisonment.

- [16] The following factors were placed before the court *a quo* to substantiate substantive and compelling circumstances for the court *a quo* to deviate from the legislatively prescribed minimum sentences:

- (a) The Appellant was 47 years old;
- (b) He has four children, two of whom were minors;
- (c) Appellant was employed as a security official, where he

earned R2 500.00 per month;

- (d) The Appellant was in custody for a period of 9 months before the finalisation of the matter;
- (e) The Applicant pleaded guilty to the charge against him, which is indicative of remorse on his part.

[17] Having regard to the applicable legal principles as set out above, these factors cannot be considered as substantive and compelling to the effect that it would justify a deviation from the legislatively prescribed minimum sentence. In fact, the mere fact that a minor is raped is an aggravating circumstance, and it was held in *Director of Public Prosecutions v Thabethe* 2011 (2) SACR 567 (SCA) at 577 G-I that a rape ordeal of children is “*a crime which threatens the very foundation of our nascent democracy.*”

[18] I, therefore, cannot find that the Court *a quo* is shown to have misdirected itself in some respect or that the sentence imposed was disturbingly inappropriate that no reasonable court would have imposed it. The Court *a quo* clearly exercised its discretion properly.

[19] I, therefore, find that the Appeal against sentencing stands to be dismissed.

Order

[20] In the result, the following order is made

- i. The Appeal is dismissed;
- ii. The conviction and sentence of the Trial Court are confirmed.

CM FOURIE
ACTING JUDGE OF THE HIGH COURT, NORTH WEST DIVISION,
MAHIKENG

I Agree

HJ SCHOLTZ
ACTING JUDGE OF THE HIGH COURT, NORTH WEST DIVISION,
MAHIKENG

APPEARANCES

DATE OF HEARING	: 13 JUNE 2025
JUDGEMENT HANDED DOWN	: 16 MARCH 2026
FOR THE APPELLANT	: Mr. T.R. SEMINO
FOR THE RESPONDENT	: Adv B.T. CHULU