



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case no: 128/2025

In the matter between:

TEBOGO PHOLOSİ

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Pholosi v The State* (Case no 128/2025) [2026] ZASCA 49 (14 April 2026)

Coram: MAKGOKA, HUGHES and KOEN JJA and MABESELE and BASSON AJJA

Heard: 26 February 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 14 April 2026 at 11h00.

Summary: Criminal Procedure – appeal – Regional Court refusing leave to appeal – petition to High Court for leave to appeal against conviction dismissed – whether appellant has reasonable prospects of success on appeal.

ORDER

On appeal from: Refusal of petition by the North-West Division of the High Court, Mahikeng (Hendricks JP and Mfenyana J):

- 1 The appeal is upheld.
- 2 The order of the North-West Division of the High Court, Mahikeng is set aside and substituted with the following:
‘The applicant is granted leave to appeal against his conviction to a full bench of the North-West Division of the High Court, Mahikeng.’

JUDGMENT

Koen JA (Makgoka and Hughes JJA and Mabesele and Basson AJJA concurring):

Introduction

[1] This is an appeal against an order of the North-West Division of the High Court, Mahikeng (the High Court) which dismissed the appellant’s petition for leave to appeal his conviction by a Regional Court (the trial court).

Background

[2] The appellant, Mr Tebogo Pholosi, was charged in the trial court with having contravened s 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 (the Act). It was alleged that he had penetrated the vagina of a fourteen-year-old female (the complainant) with his penis. He was convicted and sentenced to 16 years’ imprisonment. Following an unsuccessful application for

leave to appeal before the trial court, he petitioned the High Court in terms of s 309C(2) of the Criminal Procedure Act 51 of 1977 (the CPA) for leave to appeal his conviction and sentence. The High Court, per Hendricks JP and Mfenyana J, dismissed the petition against conviction. The appeal lies against that order with the special leave of this Court.

The legal position

[3] A petition for leave to appeal to a High Court under s 309C(2) of the CPA is an appeal against the refusal of leave by the court of first instance.¹ The order of the two judges of the High Court refusing the petition constitutes a ‘judgment or order’ or ‘ruling’ and is appealable to this Court.² Such an appeal places before this Court only the correctness of the High Court’s refusal of leave to appeal, not the correctness of the underlying conviction.³ Whether the appellant was correctly convicted is to be determined by a full bench of the High Court, should leave to appeal be granted.

[4] The test before this Court is whether the appellant has reasonable prospects of success in the envisaged appeal.⁴ The enquiry postulates a dispassionate decision, based on the facts and the law, whether a court of appeal could reasonably arrive at a conclusion different to that of the trial court.⁵

[5] This judgment concludes that there are a number of grounds on which a court of appeal could reasonably conclude differently to the trial court. They are

¹ *S v Khoasasa* [2002] ZASCA 113; 2003 (1) SACR 123 (SCA); [2002] 4 All SA 635 (SCA) para 14.

² *S v Matshona* [2008] ZASCA 58; [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA) paras 6-7.

³ *S v Tonkin* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA) para 3; *S v De Almeida v S* [2019] ZASCA 84; 2019 JDR 0987 (SCA) para 5.

⁴ *S v de Sousa* [2011] ZASCA 215; 2011 JDR 1635 (SCA).

⁵ *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 para 10.

considered below. The reasons expressed in respect of these grounds are for the purposes of this judgment. They are not prescriptive nor dispositive of any issues relevant to the merits of the appeal on conviction, which the full bench will be required to decide.⁶

The evidence

[6] The complainant testified that on 26 May 2017, her mother was absent from their home overnight. Her mother had given permission that she could sleep over at the parental home of a friend, Nonnie. The complainant, however, disobeyed her mother's restriction and decided to sleep over at the home of a person ten years older than her, Loyanda, whom she had just met for the first time. The complainant conceded that she knew that her mother would not have allowed her to sleep over at Loyanda's place. She said during her evidence in chief that she went to her parental home to fetch the clothing she would require for her overnight stay. During her cross-examination she however stated that she already had the clothing needed to stay over for the night. She was unable to explain this discrepancy when it was pointed out to her.

[7] The complainant met with Nonnie and another friend, Maseko, and they were subsequently joined by Loyanda and Loyanda's husband at a taxi rank, at around 18h00. Although she was not yet of an age which would permit her to do so, she decided to experiment with consuming alcohol. She and the others in her group proceeded to Lefty's Place, where they purchased liquor. They were all drinking.

⁶ The full bench deciding the appeal will apply a different test to that which applies in this appeal.

[8] They thereafter proceeded to Jemma's Tavern. The complainant was already under the influence of liquor and could not say at what time they arrived there. The last she recalled was that they were drinking in a car at the taxi rank where they had met earlier.

[9] She later woke up in a vehicle and requested to be taken home, but the driver of the vehicle refused to do so. She described herself as 'moderately' drunk but 'not much drunk'. They later left in the vehicle. Her friends also boarded the vehicle, but she could not remember how. The appellant was the driver of the vehicle. Along the way the friends 'removed' themselves from the vehicle 'while it was still in motion' on the N12.

[10] She had a black out in the car and subsequently woke up in a house that was unknown to her. She did not know how she got into the house. When she woke up, the appellant was laying on top of her and he was trying to penetrate her. She noticed that she was naked from the waist down. She tried unsuccessfully to cover her genitals with her hands, in an effort to prevent the appellant from penetrating her. The appellant covered her mouth with his hands as she attempted to scream. In an effort to deter him from raping her she told him that she was a virgin, but he did not listen. He continued raping her and when he was done, he told her to get dressed. She noticed blood on her hands as she was getting dressed and saw that blood was coming from her vagina as well. The appellant proceeded to drop her off at Jemma's Tavern.

[11] After being dropped, she went to Nonnie's father, Mantsu, who is a security guard at the South African Social Security Agency (SASSA), close by. She found Mantsu at the SASSA offices. He asked where she had been because people had

been looking for her. There is no evidence whether she provided an explanation. Mantsu made a call reporting that the complainant was with him and she was then fetched by the persons who had made enquiries concerning her whereabouts earlier. These persons included Mr Gathatsi, seemingly Nonnie's father and Rebecca Mtuane (Ms Mtuane).

[12] The complainant did not report that she had been raped. Asked about the role played by Ms Mtuane, the complainant testified that when she arrived at home that evening, Ms Mtuane asked her what had happened. Ms Mtuane was then told by others to leave the complainant so she could sleep.

[13] The next morning the complainant was confronted with questions and certain 'issues were raised', such as what if she had contracted a disease or was pregnant. She 'informed Mr Gathatsi and Rebecca' that the appellant had forcefully had sexual intercourse with her. They said she must change the clothing she was wearing and put them in a plastic bag, that she must not take a bath, and that they must go to the local clinic.

[14] The State thereafter adduced the evidence of Dr Gloria Mphela (Dr Mphela), a medical practitioner who medically examined the complainant. She found: a 1 cm laceration next to the vagina; minimal bleeding; disfigurement of the hymen at the 9 o'clock and 12 o'clock positions; and some seminal fluid inside the vagina. Dr Mphela recorded clinical evidence of drugs or alcohol. She concluded that 'sexual assault' was highly suspected.

[15] The State did not adduce the evidence of any other witnesses. Specifically, it did not call any of the other persons mentioned above to give evidence.

[16] The appellant's version differed materially from that of the complainant. He said he could not penetrate the complainant. Further, that penetration would, in any event, have been consensual.

[17] He testified that on the day in question, he was in the company of five friends at his brother's house. They were all consuming alcoholic beverages. They later, between 22h00 and 23h00, moved to Jemma's Tavern. He met the complainant outside the pub, had a conversation and they decided to leave together.

[18] The complainant said that she needed to find out from her friends (Loyanda, Nonnie, and Maseko) whether they were also willing to leave with the appellant and his friends. They ended up all leaving together. The complainant's friends left them when they got to his brother's house. The complainant and the appellant were now alone.

[19] They started kissing and went to the bedroom and got undressed. He was unsuccessful in penetrating the complainant and lost his erection. They started kissing again and he regained his erection but again failed to penetrate her. He said that he could not penetrate the complainant as her vagina was too small. The complainant then asked him to stop and he obliged. They got dressed and left his brother's house.

[20] The appellant called his friends to find out where they were. They were at Mofato's Tavern. He and the complainant proceeded there to fetch his friends. The friends included Mojalefa Pharedi (Mr Pharedi). They all drove back to the town to drop off the complainant, as she indicated that she lived in town.

[21] Apart from the appellant's evidence, the defence adduced the expert evidence of Dr Adriaan Johan Steyn (Dr Steyn) who has some 20 years' experience in the public health sector of matters of this nature. He had not examined the complainant, but interpreted what was recorded in the J88, which was completed by Dr Mphela. He emphasised that: the complainant had been found to be physiologically a fully developed female; the small laceration next to her vagina could in his opinion have been caused by the tip of the appellant's penis; he would have expected the laceration to be bigger and bleeding more, coupled with other injuries on the other side as well as towards the bottom of the vagina, had the penetration been forceful; he would have expected also bruising and swelling on the hymen, which was absent on the J88; the injuries to the hymen could also have been caused by other means; there was no other indication that pointed to fresh trauma; and the seminal fluid could be pre-ejaculate fluid not as a result of ejaculation. He opined that the contents of the J88 were consistent with the appellant's version.

[22] The defence also adduced the evidence of Mr Pharedi. He corroborated the appellant's version without material contradiction.

Discussion

Did the State discharge the onus?

[23] To determine whether the appellant will have a reasonable prospect of success on appeal, it is necessary to engage, to a limited extent, with the merits of the conviction and whether another court could reasonably arrive at a different conclusion. There are a number of areas of concern in the judgment of the trial court. They can be referenced under the following broad categories: the medical evidence and whether penetration was established beyond a reasonable doubt; the complainant

as a single witness, the application of the cautionary rule and whether the complainant's evidence was clear and satisfactory in every material respect; the absence of evidence of a first report; the unreliability of the complainant's evidence having regard to the improbability of aspects of her evidence and contradictions in her evidence; and the failure of the State to call certain witnesses and whether an adverse inference should be drawn from such failure. These categories are not self-contained, they overlap and must be assessed collectively. The list is also not exhaustive of the issues of concern.

The complainant as a single witness

[24] The complainant was a single witness, specifically as to the alleged sexual penetration and lack of consent. It is competent, in terms of s 208 of the CPA, for a court to convict on the evidence of a single witness. However, the evidence of a single witness must be clear and satisfactory in every material respect.⁷ Although this does not mean that the evidence must be flawless and beyond criticism, it must be evaluated holistically, taking into account the totality of all the evidence, and must be approached with caution.

[25] The complainant's evidence also had to be approached with caution as she was still a child.⁸ The State conceded that the trial court applied the wrong cautionary test. Caution need not be applied because the offence is sexual in nature.⁹ The cautionary rule concerning child witnesses however requires a presiding officer to appreciate fully the potential dangers inherent in accepting such evidence. Where

⁷ *S v Phogole* [2025] ZASCA 54; 2025 JDR 2014 (SCA) para 13.

⁸ *Ibid*. See also *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028B-D.

⁹ Section 60 of the Act prevents the use of caution in evaluating the evidence of a complainant because the offence is sexual in nature.

the evidence of a child is uncorroborated, it must be approached with greater care and caution.¹⁰

[26] The decisive consideration is whether the single child's evidence is trustworthy when viewed as a whole. 'Satisfactory in all respects' does not mean the evidence line-by-line should be coherent, but whether, in the overall scheme, her evidence could be relied upon to conclude that the guilt of the appellant was established beyond a reasonable doubt.

[27] The trial court concluded, having made specific credibility findings based mainly on demeanour, that the complainant was an honest and reliable witness. Her evidence was however, not complete and satisfactory. She was argumentative, asking the defence attorney 'why . . . he [did] not think before he asks such a long question . . .'. On her own admission, she was 'drunk', had 'blacked out' at stages and could not remember everything. At one stage, she agreed that she did not know what had happened. This was because she was drunk. She could not recall whether she had communicated with the appellant outside Jemma's Tavern. She also could not remember whether she had hugged the appellant, because, as she explained, she had consumed alcohol.

[28] The complainant conceded in response to an enquiry from the magistrate that she actually did not remember what happened on the day in question. She could not remember that after they got dressed, the appellant phoned his friends who were at Fatta's pub, that she and the appellant drove there, and that his friends boarded the vehicle. Insofar as the conviction rests primarily on her testimony without

¹⁰ *R v Manda* 1951 (3) SA 158 (A) at 162H.

corroboration, there is a reasonable prospect that another court would find ‘reasonable doubt’.

[29] As she had allegedly blacked out at times, her recollection of events was selective. The facts surrounding some material events could not be probed during her evidence because she said she had blacked out. Yet, she was clear as to events relevant to the rape. Reviewing her evidence in totality, as a court should, she was unable, due to her intoxication, whether such inability was genuine or not, to provide a satisfactory, reliable, coherent account of all the events of that evening. Her incomplete account, interspersed with blank episodes, casts doubt on whether her evidence can be said to be satisfactory, clear, and reliable.

The medical evidence and whether penetration was established

[30] The defence attorney remarked during the cross examination of Dr Mphela that penetration was not disputed. That admission, if it properly was one, was not confirmed independently with the appellant to be recorded as a formal admission in terms of s 220 of the CPA. Whether penetration occurred can be a problematic issue. It is clear from the appellant’s denial, during his evidence, that penetration occurred, that he has a different view, compared to that of his attorney, as to what constitutes penetration. The trial court seemingly did not place reliance on penetration being an admitted fact, and correctly so.

[31] Whether penetration occurred can, depending on the circumstances, as demonstrated in this case, sometimes be difficult to determine. The complainant’s *ipse dixit* (mere say so) was that she was penetrated. She was, however, still an inexperienced young woman. The trial court relied on the evidence of Dr Mphela as corroboration for the conclusion that she was indeed penetrated. The trial court

reasoned, because there were injuries observed by Dr Mphela, that penetration had necessarily occurred. Whether what the appellant described, and which Dr Steyn viewed as not inconsistent with the observations recorded on the J88 by Dr Mphela, did not establish penetration, was not analysed in much, if any, detail by the trial court.

[32] The trial court preferred the evidence of Dr Mphela, mainly because she had examined the complainant physically, whereas Dr Steyn had not had that opportunity. Dr Steyn however commented on what Dr Mphela recorded as her observations and findings, accepting those as correct. His evidence, for example, included that the hymen could have been deformed for a variety of reasons, other than penetration by the appellant.

[33] Dr Mphela's conclusion recorded on the J88 was also equivocal, stating that 'sexual assault' was highly suspected. It is not clear whether she was alive to the difference in law between a sexual penetration constituting rape, and a sexual assault. Sexual penetration, being the offence with which the appellant was charged, is dealt with in s 3 of the Act.¹¹ Sexual assault is criminalised by s 5 of the Act.¹² The difference between the two offences was unfortunately not explored with Dr Mphela. Testifying as an expert in a criminal court one might expect her to be alive to the distinction between rape/sexual penetration and sexual assault. Her choice of words in her written report would be deliberate, and she could qualify what she had recorded on the J88, if incorrect.

¹¹ Section 3 of the Act provides that any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.

¹² Section 5 of the Act provides that any person ('A') who unlawfully and intentionally sexually violates a complainant ('B'), without the consent of B, is guilty of the offence of sexual assault.

[34] Although Dr Steyn did not physically examine the complainant, there is no reason not to consider his expert evidence as to the conclusions which can be drawn from the facts recorded in the J88. Having regard to the appellant's evidence, especially when properly weighed against the other considerations alluded to in this judgment, there could reasonably be said to be doubt as to whether the guilt of the appellant was established.

The absence of evidence of a first report

[35] Assuming that sexual penetration was established, the issue shifts to whether it was by consent. The trial proceeded on the basis that the appellant could validly consent to sexual intercourse.¹³ The enquiry became whether she did not consent.

[36] An important consideration where a lack of consent is maintained in sexual offences, is whether the complainant reported the rape at the first or reasonable opportunity to a person or persons one could reasonably expect her to have reported to. The absence of such a first report is not necessarily conclusive, but it is important to rebut any suggestion of subsequent fabrication.

[37] The complainant had several opportunities when she could have reported that she had been penetrated against her will. These included to: the appellant's friends in the car, or if she felt uncomfortable with that; the security guard at SASSA who

¹³ If the complainant was under the age of 16, and that was established by acceptable evidence, then even if there was consent, the appellant, although he was not alerted to this or charged in the alternative with such offence, could have been convicted of contravening s 15 of the Act. Section 15 of the Act provides that any person ('A') who commits an act of sexual penetration with a child ('B') who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, subject to certain exceptions. In terms of s 261(1)(g) of the CPA, a conviction of that provision is a competent verdict to the charge with which the appellant was charged. The age of the complainant was however never properly investigated, save for reliance on an uncertified copy of her birth certificate. A further consideration would have been whether the complainant could have validly consented given the state of her inebriation. This aspect was also not investigated.

was not a stranger to her; her friends who had got her into drinking that afternoon and evening and who she was to spend the night with; Ms Mtuané specifically; the police officers and those who accompanied her after she was collected from SASSA; and Loyanda. Yet, she did not do so until the next morning. She said she ‘informed Mr Gathatsi and Rebecca’. This was after concerns were raised that she could possibly have contracted some disease, presumably a sexually transmitted disease, or possibly have been impregnated, which could result in an unwanted pregnancy. A number of reasons had by then arisen why consensual intercourse might become disputed. This required even more caution to be applied. Mr Gathatsi and Ms Mtuané were not called to corroborate her evidence.

[38] The complainant sought to explain that she did not inform anyone that she had been raped because they could see her and could smell her and see the blood on the left arm of her jersey and on her head. This conflicts with the evidence above. That others could smell her and see the blood, would be very important evidence, if true. But this evidence was not corroborated by evidence from these other persons.

The improbability of some aspects of the complainant’s evidence and contradictions in her evidence

[39] A number of improbabilities and contradictions appear in the record which will impact on the reliability of the complainant’s evidence. I list a few examples. Reference has already been made to the improbable evidence that while they were travelling, her friends apparently disembarked from the vehicle ‘while it was still in motion’.

[40] Further, she stated in cross-examination that she had the clothing required to stay over for the night in her possession. However, in chief she had testified that she

went to Parreng, and thereafter to her parental home to fetch the clothing. She had no explanation for this contradiction. She also testified that when she asked the appellant to stop having intercourse with her, he stopped immediately. That conflicted with her evidence given the day before.

The failure of the State to call certain witnesses and whether an adverse inference should be drawn from such failure

[41] None of the complainant's friends or Ms Mtuane or Mr Gathatsi was called to testify. No reasons were advanced as to why these witnesses were not called to testify as to her condition and mental state, or as to what transpired, although they were, according to the evidence of the complainant, witnesses to material events. There was no explanation that they were not available to testify. If they were not available, their non-availability and the reasons for it should have been placed on record. It could not be expected of the defence to call these witnesses. Their testimony was part of the State's case.

[42] The State bears the onus to prove the guilt of the appellant beyond a reasonable doubt. An adverse inference could be drawn from the failure to call these witnesses, that they would not have supported the version of the complainant. This is particularly so in regard to the complainant's evidence that after she and her friends left Jemma's pub with the appellant, the friends removed themselves from the vehicle 'while it was still in motion'. That would impact on her mendacity and also whether her evidence was clear and satisfactory.

[43] An adverse inference drawn against the State would impact on whether the conviction was correctly granted. There is a need in this matter for a court of appeal

to consider what inference is to be drawn from the failure to have called these material witnesses.

Further general observations regarding the reliability of the complainant's evidence

[44] The complainant's evidence must not be viewed in isolation. She had disobeyed her mother's restriction. She did not have consent to sleep over at Loyanda's place. Further, having disobeyed her mother, she decided to experiment with alcohol. There was an element of deception as to how she achieved her disobedience to her mother's wishes. Having disobeyed her mother, she would now have to account to her mother for her actions. It would include having to explain any disease she might contract, or an unwanted pregnancy. Whether she might have consented to intercourse, or whether it was without her consent, potentially assumes much significance, which needs to be considered on appeal.

Conclusion

[45] Another court could reasonably conclude: that the appellant's version corroborated by Mr Pharedi, could be reasonably possibly true; and that the State has not proved the guilt of the appellant beyond a reasonable doubt. Accordingly, there are reasonable prospects of success on appeal.

The order

[46] The following order is granted:

- 1 The appeal is upheld.
- 2 The order of the North-West Division of the High Court, Mahikeng is set aside and substituted with the following:

‘The applicant is granted leave to appeal against his conviction to a full bench of the North-West Division of the High Court, Mahikeng.’

P A KOEN
JUDGE OF APPEAL

Appearances:

For appellant: J Potgieter

Instructed by: Schoeman Steyn Inc, Bloemhof
Jacobs Fourie Attorneys, Bloemfontein

For respondent: T N Koloti

Instructed by: Director of Public Prosecutions, Mmabatho
Director of Public Prosecutions, Bloemfontein.