

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED: YES/NO

16 April 2026

DATE

SIGNATURE

Case No: A312/2024

In the matter between:

MARRAKUNA JOSEPH THEMBA

APPELLANT

and

THE STATE

RESPONDENT

CRIMINAL APPEAL JUDGMENT

FRANCIS-SUBBIAH J:

[1] This is an appeal against sentence on a charge of rape read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997. The appellant pleaded guilty to the charges of rape and was convicted. He was sentenced on 1st October 2019 to Life Imprisonment. The appellant has an automatic right of appeal in terms of section 309 of the Criminal Procedure Act 51 of 1977 read with section 10 and 43(2) of the Judicial Matters Amendment Act 42 of 2013. The appellant was legally represented in the court *a quo*.

[2] The crime in question occurred on 24th September 2018 at Mamelodi when the appellant unlawfully and intentionally inserted his penis into the anus of the complainant, a five-year-old girl-child. The child's mother and the appellant were involved in a romantic relationship at the time of the incident.

[3] The offence of rape falls within the ambit of Section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Sentencing Amendment Act 105 of 1997 as a result of the grievous bodily harm inflicted on the complainant. The prescribed minimum sentence of life imprisonment is ordained, unless substantial and compelling circumstances were present justifying a deviation from the prescribed minimum sentence.

[4] The appellant's complaint is that the trial court misdirected itself in failing to afford appropriate weight to the appellant's guilty plea, finding that such was a neutral

factor. The court failed to consider the submission that the appellant consumed liquor at the time of the commission of the offence. That he was a first offender at age 44, is remorseful, spent a year in custody awaiting trial and that the victim suffered no injuries. The prospects of rehabilitation were not considered and the reference to DNA by the Magistrate in his sentencing is a misdirection where no DNA report was submitted to the Magistrate.

[5] The complaint of the appellant is that the Magistrate found that the appellant failed to prove the existence of substantial and compelling circumstances required for the imposition of a lesser sentence than the prescribed term of life imprisonment.

The Appropriate Sentence

[6] The power of the Court of Appeal to interfere with a sentence is constrained. In **S v Rabie** 1975 (4) SA 855 (A) the court held that the imposition of a sentence is solely within the discretion of the trial court and that a court of appeal will not interfere with that discretion unless it is satisfied that the trial court exercised its discretion unreasonably. In an evaluation of judicial discretion an appeal court may not interfere with a sentence merely because it would have imposed a different sentence than the one imposed by the trial court in **S v Skenjana** 1985 (3) SA 51 (A) at 55. Nevertheless, a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court remains an element for interfering with the trial court's sentencing discretion as it was held in **Director of Public Prosecution KZN v P** 2006 (1) SACR 243 SCA. Additionally, the power of the appeal court to interfere with

court to interfere with a sentence extends to a finding of irregularity and misdirection of sentencing powers.

[7] In **S v Pillay** 1977 (4) SA 531 (A) at 535E-F, the court held that:

“...mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably....”

[8] In determining an appropriate sentence the ideal outcome is to achieve a proper balance between this triad as it was entrenched in **S v Zinn** 1969 (2) SA 537 (A), namely: the nature of the crime, the personal circumstances of the appellant and the interests of society. The court a quo did consider all relevant factors properly. It was incumbent upon the appellant to satisfy the court that there are compelling and substantial circumstances to deviate from the prescribed minimum sentence.

[9] It remains a question in this matter whether to deviate from the minimum sentences prescribed by the legislator for crimes against children who remain vulnerable members of society. Parliament has made it clear that minimum sentences for specific offences such as rape are to be imposed. Courts are therefore obliged to impose these sentences unless there are truly convincing reasons for departing from them.

[10] The offence is serious as the legislature prescribes that life sentence be ordinarily imposed for the commission of rape of a child. In ***S v Malgas 2001 (1) SACR 469 (SCA)*** at para 8, the Supreme Court of Appeal held:

“... 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 are 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.”

[11] The appellant was 44 years old when he committed the offence and is a first offender. He did grade 6 at school and is self employed as a mechanic. He came to South Africa from Mozambique with his father. He has two children aged 9 and 4 years who reside in Mozambique. The appellant was under the influence of alcohol when he committed the offence. However, no submissions were made relating to the correlation and impact of alcohol on the commission of the offence.

[12] In ***S v Vilakazi 2009 (1) SACR 552 (SCA)***, it was held that in cases of serious crime, the personal circumstances of the offender, by themselves would 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 two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to be kind of flimsy grounds that *Malgas* said should be avoided.

[13] Even at this stage, the appellant advances his guilty plea as a mitigating factor to sway this appeal court to deviate from the prescribed sentence. Accordingly, he pleaded guilty as a sign of remorse and did not waste the court's time. He acknowledged his acts and requested the court for mercy. In the matter of *Malgas* the court cautioned that a plea of guilty does not automatically result in a deviation from the prescribed minimum sentence. A sentencing court is not to "deviate from a prescribed sentence lightly and for flimsy reason which could not withstand scrutiny." A sentencing court must look to the ultimate cumulative impact of all these factors in order to determine whether a departure from the prescribed minimum sentence is justified.

[14] Further, it was contended that the Magistrate took into account DNA evidence despite the fact that no such evidence had formally been submitted before the court. On that basis, it was argued that the Magistrate committed a material misdirection. However, counsel for the appellant conceded that, although no DNA report had been formally admitted as evidence before the Magistrate, the appellant had, in his statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, admitted the contents of the DNA report in paragraph 5 thereof. In the circumstances, and when the matter is considered in its proper context, it cannot be said that the Magistrate misdirected himself on this aspect.

[15] The appellant occupied a position of trust in relation to the child by virtue of his romantic relationship with her mother. In terms of section 28 of the Constitution of the Republic of South Africa, 1996, the rights of children must be protected, including their right to be safeguarded from abuse, maltreatment, and degradation. As an adult and a father to two children of his own, the appellant bore a responsibility to act in a manner that protected and promoted the well-being of this child.

[16] Instead of fulfilling this responsibility, the appellant abused the position of trust afforded to him. He committed an opportunistic offence against the child, taking advantage of his close proximity to her, which arose from his relationship with her mother. In doing so, he not only violated the child's dignity and security but also betrayed both the child's trust and the trust that her mother had placed in him.

[16] It is submitted that a life sentence imposed will not aid the appellant's rehabilitation. It was argued that the Magistrate failed to take cognizance of the effect which long term imprisonment would have on the appellant. On the contrary, correctional supervision during imprisonment is designed to support the appellant in his rehabilitation, irrespective of the period of sentence being one of life or a lesser one. It is within the appellant's power to choose to rehabilitate if he desires. Education and skills development are available to the appellant during his incarceration. The imprisonment of the appellant should sufficiently rehabilitate him if he chooses to participate in the rehabilitation programs.

[17] It follows that the Magistrate in exercising his sentencing discretion took into account the factors necessary to impose an appropriate sentence and there was no misdirection in his sentencing powers. Life imprisonment is appropriate. In the circumstances the statutory minimum sentence imposed by the Magistrate is confirmed. This sentence would restore the community's faith in the Courts to deal harshly with people who commit offences like this. It effectively serves the purpose of the punishment and has the necessary rehabilitative, redistributive, deterrent and preventative objectives.

[18] In the result:

18.1 The appeal is dismissed.

18.2 The sentence of life imprisonment imposed by the court *a quo* on the appellant is hereby confirmed.




R FRANCIS-SUBBIAH
JUDGE OF THE HIGH COURT,
PRETORIA

I agree,



L M MOLOPA-SETHOSA, J
JUDGE OF THE HIGH COURT,
PRETORIA

APPEARANCES:

COUNSEL FOR THE APPELLANT: ADV. JL KGOKANE

INSTRUCTED BY : LEGAL AID SOUTH AFRICA, PRETORIA

COUNSEL FOR THE RESPONDENT: ADV. K T RANCHO

INSTRUCTED BY : DPP, PRETORIA

HEARD ON : 10 MARCH 2026

JUDGMENT DELIVERED ON : 16 APRIL 2026

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties.

The deemed date and time for the delivery is 16h00 on 16 April 2026.