



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION: MAKHANDA**

(1) REPORTABLE: YES/NO

**(2) OF INTEREST TO OTHER JUDGES:
YES**

DATE: 10 APRIL 2026

SIGNATURE:

Case no: CA &R 141/2024

In the matter between:

YONWABA MARADE

Appellant

and

THE STATE

Respondent

Summary: Appeal – rape-conviction - sentence-shocking - Sexual Offences and Related Matters Amendment Act 51 -2007, Criminal Law Amendment Act 105 of 1997, Criminal Procedure Act 51 of 1977, consent, non-consensual sexual intercourse. Appeal dismissed.

JUDGMENT

NTLAMA-MAKHANYA AJ (Jolwana J concurring)

[1] The appellant was convicted and sentenced to life imprisonment by the Regional Magistrate Court in Humansdorp on 16 November 2022. He was found guilty of contravening section 3 of the Criminal Law (Sexual Offences Criminal Law) Amendment Act of 2007 (SORMA) read with section 51(1) Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. Thereafter, he was sentenced to undergoing life imprisonment on 28 June 2023. There was no order made in terms of section 103(1) of the Firearms Control Act 60 of 2022.

[2] The appeal is against both conviction and sentence.

BACKGROUND

[3] The appellant was sentenced to life imprisonment following his conviction for the crime of rape. He was charged for the rape of a 14-year-old girl child. At the time of the commission of the offence, he was 24 years old and he was 26 years old at the time of sentencing. They met on the street on the evening of the 16th of December 2020 at around 10pm. The complainant left her home with the approval of her mother under the pretext of going to look for her friends. Instead, she went to the tavern without her mother's knowledge. At the tavern, she drank alcohol (Savanah and tots of brandy) with her friends. Thus, the tavern closed at about 10pm and whilst she was on her way home and feeling dizzy and staggering, she met the appellant and told him he was looking for

her friends. He offered to accompany her home but said that they must go to his place of residence to fetch his jersey. She did not resist and on arrival at the appellant's place, she sat on the bed and fell asleep for about 30 minutes. She woke up with her pants and underwear on her knees and had blood on her thighs. The appellant was sitting next to her, and she asked him what he did to her and he responded that he would not tell her because her mother would lay a charge against him. After that, the appellant accompanied her home and was still drunk. On her arrival home, her mother was waiting for her and asked her where she was from and wanted to beat her up with a belt. She voluntarily told her mother that she was raped by Percy (appellant) and her mother then called the police. Thereafter, she was taken to Humansdorp Hospital for examination.

ISSUES

[4] The primary issue in this case is broadly to determine whether:

- (i) *The appeal is merited in both the conviction and sentence.*
- (ii) *Mitigating factors were properly considered by the Court a quo; and*
- (iii) *It misdirected itself in finding the appellant guilty and sentencing him to life imprisonment.*

ANALYSIS

[5] The appellant was warned by the Court *a quo* of the seriousness and implications of the crime of rape which could attract a sentence of life imprisonment in terms of section 51(1) of Criminal Amendment Act 105 of 1997 if found guilty. Following an application by the state, the proceedings were held in camera because of the age of the complainant. The appellant pleaded not guilty and provided a plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 (the CPA) the essence of which was that he did have sexual intercourse with the complainant with her consent. He also made an

admission in terms of section 220 that the complainant was 14 years of age at the time of commission of the offence.

- [6] The primary issue and the gist of this appeal in respect of conviction is the interpretation of the principle of consent.
- [7] There is a golden thread of judicial precedent that provides clear and unambiguous insights relating to the interpretation of non-consensual sexual intercourse and its horrible impact in society. Courts go through the legal exercise of assessing the impact of rape before dealing with the merits of the principle of consent itself to highlight this societal albatross. Mathopo AJ in *Tshabalala v S; Ntuli v S*¹ dismissed any “tiptoeing” approach around the commission of the crime of rape as a “mere offence” and held that:

‘Th[e] scourge [of rape] has reached alarming proportions in our country. Joint efforts by the courts, society and law enforcement agencies are required to curb this pandemic. This Court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African Judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender-based violence in order to safeguard the constitutional values of equality, human dignity and safety and security. One such way in which we can do this is to dispose of the misguided and misinformed view that rape is a crime purely about sex. Continuing this misguided trajectory would implicate this Court and courts around this country in the perpetuation of patriarchy and rape culture.’²

- [8] Similarly, Petse DP in *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko*³ overturned and dismissed the judgment in *Coko v S*⁴ and echoed the same sentiments about the impact of rape and held that:

¹Tshabalala v S; Ntuli v S 2020 (3) BCLR 307 (CC).

² *Ibid* para 63.

³ Director of Public Prosecutions, Eastern Cape v Coko [2024] 3 All SA 674 SCA.

⁴ Coko v S [2021] 4 All SA 768 (ECG).

*'Rape is an utterly despicable, selfish and horrendous crime. It gains nothing for the perpetrator, save for fleeting gratification, and yet inflicts lasting emotional trauma and, often, physical scars on the victim ... [and] ... it brooks no argument to the contrary that rape gratuitously violates the fundamental value of human dignity and related rights.'*⁵

[9] Goldstein J in *S v Ncheche*⁶ which was decided earlier held that:

*'Rape ... in our country ... occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman's body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish rapists very severely.'*⁷

[10] These cases demonstrate an uncompromising approach by the judicial branch of the state to ensure a deep-rooted understanding of the impact of the crime rape in the moral fibre of society. They are also of significance to demonstrate that rape goes far beyond and touch on the core content of the elements of upholding human dignity of women. O'Regan J in *S v Makwanyane*⁸ contextualised the significance of human dignity when she held "... the recognition of dignity is an acknowledgment of the intrinsic worth human beings [and] without [it], human life is diminished."⁹

[11] In this case, the appellant submitted that the complainant's age was obviously not the age of 16 years at the time of the commission of the offence. He was unaware that she might have been under the said years and he also did not apply his mind

⁵ DPP v Coko (note 3 above) paras 2 and 7.

⁶ *S v Ncheche* 2005 (2) SACR 386 (W).

⁷ *Ibid* para 35.

⁸ *S v Makwanyane* 1995 (6) BCLR 665 (CC).

⁹ *Ibid* paras 326-328.

to it. This exchange during trial may assist in understanding the essence of his defence in this regard:

‘Mr Humphries: On that day, did you know how old the complainant is?’

Accused: No, I didn’t know how old she was.

...

Accused: I tried to explain to the police I do not know how old she was. And then they did not listen to me, and they said they must go, I will tell my story in court.

Mr Humphries: How old did you think she was?

Accused: At that time, I did not think about the age of her.’

On appeal reliance was placed on *State v Lucas Rudman*¹⁰ in which Lowe J held that:

‘The subjective element of the test is that the accused must have believed that a young person was already at least 16 years of age, however, to be effective that belief must be viewed objectively in the sense that a reasonable person in the circumstances would in fact have believed that the child was already at least 16 years of age. This is insufficient, however, as a defence, unless the child acted or behaved in such a way that the accused was deceived into believing that the child was 16 years or older at the time,¹¹ (emphasis mine).

[12] This case was not of assistance in support of the appellant’s case to justify consensual sexual intercourse with the complainant. The appellant’s submission that the complainant’s body did not show that she was underage and he also did not apply his mind to it failed the threshold of a reasonable belief in consensual

¹⁰ *State v Lucas Rudman* (ECMk) Case no. CC58.2022.

¹¹ *Ibid* para 28.

sexual intercourse. Lowe J qualified the reasonable belief by holding that “it would be insufficient if there was no proof of deception that the complainant was of mature age”.¹² In this case, the appellant did not prove any deception by the complainant into believing that she was of mature age. The appellant’s Counsel relied on the complainant’s physique having possibly played a role in the circumstances including complainant having been at a tavern. The complainant’s going to the tavern while demonstrative of the unacceptable societal ill of young people and children consuming alcohol at a very young age does not, however, constitute any act of deception that the appellant could have reasonably believed that she was of mature age without more. The fact of the matter is that the appellant’s actions objectified the complainant and showed an opportunistic and his exploitative mindset which cannot be countenanced by our courts.

[13] The subjective approach to consent entails the interpretation of consent through lens of an implied belief to non-consensual sexual intercourse. This approach was equally criticized by Wille J in *Cola v S*¹³ who held that “it is problematic because it unfairly constitutes a shift to the conduct of the survivor who must prove that she did not consent rather than the other way around”.¹⁴ The approach further views survivors as untrustworthy and that they need intense scrutiny to establish whether they consented to sexual intercourse. This Court shares the same sentiments and refuses to adopt a victim-centred approach in establishing non-consensual sexual intercourse.

[14] Furthermore, the fact that the complainant was drunk must surely mean that the act of deceit could not have been drawn from a drunk underage child. The appellant admitted that he did not apply his mind to the complainant’s age. He then argued that the Court a *quo* adopted a subjective criterion in evaluating the facts instead of the objective question “whether the complainant could be seen as being older than 16 years”. Lowe J in *Rudman* above, placed great emphasis

¹² State v Lucas Rudman (note 12 above).

¹³ *Cola v S* [2025] ZAWCHC 514.

¹⁴ *Ibid* para 26.

on the requirement of “consent” and rejected the appellant’s reliance on “reasonable” belief and held that:

‘If the accused commits an act of sexual penetration with a child below the age of 12 and 16 this is criminalised because such a child is not yet mature enough to properly appreciate the implications and consequences of sexual acts, especially sexual penetration. The basis of section 56(2)(a) is to especially protect such children. Consent by the child to the commission of the offence is no defence. If the act takes place without any consent by the child the more serious offence of rape is committed. The defence available in section 56(2)(a) of the CLAA relates to the child deceiving the accused into believing that he or she was 16 years or older at the time and that the accused “reasonably believed” that the child was 16 years or older,¹⁵ (emphasis mine).

[15] In this case, consent could not have been obtained from an underage child who was asleep and woke up with her pants and underwear on her knees with blood from her thighs downwards. The appellant also conceded that he also saw the blood in the morning and that the complainant was staggering when they met on the street. The appellant’s concession nullified what could have been the act of deceit.

[16] The subjective criteria reinforce the misconception of non-consensual sexual intercourse and ignores its impact as a form of violence that is degrading to the dignity of the human person and an expression of power. The legitimacy of the fundamental rights of the survivors of rape is deeply hemorrhaged by what is perceived as a reasonable belief in consent to sexual intercourse. Khampepe J in *Tshabalala* expressed this view in no uncertain terms and held that:

¹⁵ Rudman (note 12 above) para 27.

'For many victims and survivors of rape, they "do not experience rape as a sexual encounter but as a frightening, life-threatening attack" and "as a moment of immense powerlessness and degradation."¹⁶

[17] Khampepe J highlights the impact of rape as the country is reeling from high levels of violence against women and children that traumatizes the nation at large. A misguided focus on the conduct of the survivor undermines all fundamental freedoms, which include the right to be free from all forms of violence and the right not to be treated in a cruel, inhumane or degrading way.¹⁷

[18] This Court takes note of the developments relating to the application of the subjective test in proving non-consensual sexual intercourse in a judgment delivered by Baqwa J in *Embrace Project NPC v Minister Justice and Correctional Services*.¹⁸ In that case, Baqwa J had declared sections 3,4,5,6,7,8,9 and 11A read with section 1(2) of the Criminal Law (Sexual Offences and Related Matter) Amendment Act of 2007 as invalid and unconstitutional. He held that these provisions justify:

'The absence of consent... to the extent that the Act does not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant consented to the conduct in question, therefore enabling the accused to successfully avoid conviction on the grounds of subjective belief that consent was given.'¹⁹

[19] This Court is inclined not to comment on this case because it is still awaiting confirmation of the declaration of invalidity of those sections by the Constitutional Court. On the other hand, I must express that it serves as groundbreaking in the development of the law as envisaged in section 39(2) of the Constitution and its affirmation of explicit consent in sexual rights violations. I believe Baqwa J's

¹⁶ Tshabalala (note 3 above) para 70.

¹⁷ Section 12(1) of the Constitution.

¹⁸ *Embrace Project NPC v Minister Justice and Correctional Services* 2025 (1) SACR 36 (GP).

¹⁹ *Ibid* para 1.

paving the way for explicit consent and endorsed a legal stance which is drawn from Nkabinde J in *Masiya v Director of Public Prosecutions Pretoria*²⁰ who held that:

'The prevalence of sexual violence in our society is deeply troubling. The extension of the definition of rape to include anal penetration will not only yield advantages to the survivor but will also express the abhorrence with which our society regards these pervasive but outrageous acts. This Court, while not unmindful of the fact that the 2003 Bill is before Parliament, cannot delay, defer or refuse to deal with an extension of the definition when the facts before it demands such an extension and when it is clearly in public interest to do so. Any further delay in or suspension of the extension of the current definition will constitute an injustice upon survivors of non-consensual anal penetration such as the nine-year-old complainant in this case. That result cannot and should not be countenanced. The fact that the [judgment is before the Constitutional Court for confirmation of invalidity, should not thwart the ["objective criterion" from the current subjective criterion of rape in the interpretation of the principle of consent] ... in these exceptional circumstances and when the interests of justice so demand. ... [The objection towards the use of subjective criteria to determine consensual sexual intercourse] will [not] be in the interests of justice'²¹ (emphasis mine).

- [20] The appellant contended that the evidence of the complainant was unfounded because she was a single witness and that the Court *a quo* misdirected itself in accepting the reliability of her evidence. He submitted that the complainant was not just a single witness but a child of 14 years of age and that the Court *a quo* could have exercised caution in admitting her evidence as credible. The established facts which were not denied by the appellant proved sexual intercourse with the complainant. Further, it was also his evidence that he noticed the blood on the bed in the morning. Despite the complainant being a single witness, the appellant confirmed that he was the only one who was in the

²⁰ *Masiya v Director of Public Prosecutions Pretoria* 2007 (2) SACR 435 (CC) para 44.

²¹ *Ibid* para 44.

room with her. Her evidence was corroborated by her mother, particularly with reference to her arriving home, noting the blood in her jeans, asking her to take a bath and then stopping her from taking it so that the matter was reported to the police.

[21] Dr Forbia who examined the complainant after the incident corroborated the complainant's non-consensual sexual intercourse evidence. This case was not one of a mistaken identity. It also did not challenge the credibility of medical evidence regarding the injuries suffered by the complainant. Dr Forbia's medical opinion established that there was no condom used and the complainant did not urinate after the sexual assault had occurred. On the other hand, the appellant contradicted Dr Forbia's examination about condom use. He submitted that they agreed on condom use because the complainant did not want to fall pregnant. Dr Forbia further established that the complainant did "not have previous sexual history and her external injuries signify the trauma that supports that the occurrence and circumstances were surrounding that sexual act, which was traumatic and forcible in nature".

[22] I am puzzled by the appellant's dismissal of Dr Forbia's medical evidence following the complainant's examination. He justified his dismissal on the fact that the injuries sustained by the complainant were not indicative of forced penetration and the complainant could have had anxiety about what her mother would say for going to the tavern. Dr Forbia even addressed the impact of alcohol relating to the complainant's drunken status. In her examination in chief, she pointed out that "if a person is intoxicated to an extent of being unaware of her surroundings and may not be fully conscious, she would not be aware to protect herself by means of moving away ... to avoid the assault from happening ... [and] she added that the use of alcohol significantly dulls [the] perception of pain ... in a person who has consumed alcohol ... it may be less, ... as the time goes by and alcohol leaves the system".

- [23] This Court does not doubt the credibility of the complainant's version which was corroborated by medical evidence. The main issue was "consent" and the circumstances relating to the way in which it was acquired. The medical evidence indicated a forceful penetration with the consequent result of external bruises which were sore to touch, a point which was also not disputed by the appellant.
- [24] Despite the complainant being a single witness, it is my view that her evidence was credible. Dr Forbia's was explicit, and her opinion was based on her clinical examination, and the totality of her findings directly link to the injuries that are in keeping with non-consensual or forcible sexual assault. Even in cross-examination in the Court *a quo* she was not shaken about her clinical findings that "the injuries [were] quite extensive ... [with] bruising, swelling, tearing ...".
- [25] It is therefore my further view that the appellant did not show any element of remorse. The appellant misconstrued his reasonable belief because he engaged in a proscribed conduct of having sexual intercourse with an underage child. The appellant did not even regret his non-consensual sexual intercourse with the complainant. The issue of remorse was well-crafted by Ponnann JA in *S v Matyityi*²² who held that:

*'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. ... After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.'*²³

²² *S v Matyityi* 2011 (1) SACR 40 (SCA).

²³ *Ibid* para 13.

[26] Remorse has a direct effect on the sentence to be imposed with a potential to establish whether there is existence of substantial and compelling circumstances that could justify the imposition of a lesser sentence.

[27] The appellant raised the following issues as mitigating factors regarding the imposition of the sentence that could have been considered by the Court *a quo*:

- (i) *the facts and version presented on the sequence of events leading to and after the commission of the alleged crime;*
- (ii) *the imposed sentence of life term imprisonment is shocking; and*
- (iii) *put more emphasis on the impact of crime in society without balancing with his personal circumstances.*

[28] In this instance, Marais JA in *S v Malgas*²⁴ “wielded a legal axe” in the development of the well-known principles that serve as a guide to sentencing and started with a preamble and held that:

*‘Judicial hostility to legislative prescriptions which strip courts of their sentencing discretion is hardly surprising. Given the infinite variety of circumstances which attend the commission of crimes, who are better placed than the courts, which experience daily the complexities of imposing sentences which are as just as human fallibility can make them understand the arbitrariness and potential unjustness of such edicts? Sentencing has rightly been described as “a lonely and onerous task”. For those who must shoulder that responsibility in society’s name, to have to impose a statutorily decreed sentence which is manifestly unjust in the circumstances of the case is a monstrous thing.’*²⁵ (emphasis mine.)

²⁴ *S v Malgas* 2001 (1) SACR 469 (SCA).

²⁵ *Ibid* para 1.

[29] Marais JA's tone was set by Langa J in *S v Williams*²⁶ with an endorsement of the transformative changes that have been brought by the Constitution relating to sentencing and held that:

'...[T]he Constitution ensures that the sentencing of offenders must conform to standards of decency recognised throughout the civilised world In the process, it sets the State up as a model for society as it endeavours to ensure that they are available to all. It is therefore reasonable to expect that the [judiciary] must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that ... even the vilest criminal remains a human being possessed of common human dignity.'²⁷
(emphasis mine).

[30] Van Veenendaal AJ in *S v Bodibe*²⁸ operationalized the imposition of a sentence and held that:

*' ... [I]t is necessary to examine the circumstances of the offence intensively and attempt to determine the exact degree of seriousness of the particular act in respect of which the accused has been found guilty, as well as the personal circumstances of the accused and the interests of the community.'*²⁹

[31] Willis J in *S v Loggenberg*³⁰ identified substantial factors that are foundational to sentence and held that it must:

- (i) *deter other members of the community from committing such acts or thinking that the price of wrongdoing is worthwhile;*
- (ii) *deter this individual from being tempted to act in such a manner ever again;*

²⁶ *S v Williams* 1995 (7) BCLR 861 (CC).

²⁷ *Ibid* para 77.

²⁸ *S v Bodibe* [2021] ZAGPPHC 715.

²⁹ *Ibid* para 3.

³⁰ *S v Loggenberg* 2012 (1) SACR 462 (GSJ).

- (iii) *enable the possibility of correction, unless this is very clearly not likely;*
- (iv) *be protective of society, from those who do it harm and*
- (v) *serve society's desire for retribution, ... [which] must be placated.*³¹

[32] These factors seek to ensure the striking of a balance between the crime and sentence which should consider the mitigating factors and the circumstances of the offender. As expressed by Govindjee J in *S v Yali*³² that “the sentencing court ... must not attempt to set an example or satisfy public opinion but to serve public interests”³³ Sentencing is to ensure the interest of the public and not its opinion. The question of public opinion on the functional role of judiciary was settled in *S v Makwanyane*.³⁴ The Constitutional Court held that:

*‘... This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.’*³⁵

[33] I need not express any further view in this regard. The public outrage over the crime of rape has also been repeatedly expressed by the judiciary as a judicial voice for the public.

[34] I am mindful of the fact that the appellant was 23 years of age when he committed this offence. However, in the circumstances of this case, what should be considered as the “interests of society” is also with reference to the survivor of rape. How far should access to justice be of direct effect to the interest of the survivor? To what extent should the personal circumstances of the appellant take precedence over the interest of the complainant? Does it mean the continuation of the misconception relating to the distinction between those alleged to have committed crimes and those who survived the said crimes. These questions

³¹ *Ibid* at para 6.

³² *S v Yali* [2025] ZAECKMHC.

³³ *Ibid* para 4.

³⁴ *Makwanyane* (note 10 above).

³⁵ *Ibid* at paras 88-89.

which are of direct relevance to sentencing and deterrence of those who committed serious crimes such as rape find expression by Nugent JA in *S v Vilakazi*³⁶ who held that:

*'In cases of serious crime the personal circumstances of the offender, by themselves, will 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 me to be the kind of 'flimsy' grounds that Malgas said should be avoided,'*³⁷ (emphasis mine).

Simply put, the approach to sentencing should be such that it takes into serious account the vulnerability of the survivors of crime such as the 14-year-old child in this matter.

[35] This Court, as the Appellate Court subscribes to non-interference in the exercise of the discretion by the sentencing court in the position of the sentence unless justified by the circumstances of a particular matter and the way such sentencing discretion was exercised. Such interference will only be permitted when there is clear evidence of misdirection in its findings.

[36] The Court *a quo*, having considered the established facts in totality, was satisfied that the State proved the guilt of the appellant beyond reasonable doubt that he had sexual intercourse with the complainant without her consent. Therefore, this Court is of the view that the Court-*a quo* was justified in finding the appellant guilty of the rape of the complainant. The appellant was also correctly sentenced to imprisonment for life as he failed in establishing any substantial and compelling circumstances that would have justified a departure from that

³⁶ *S v Vilakazi* 2012 (6) SA 353 (SCA).

³⁷ *Ibid* para 58 (footnotes omitted).

prescribed sentence. The appellant's circumstances were immaterial and did not stand any justification for departing from life imprisonment.

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

[37.1] The appeal against both conviction and sentence are dismissed.

**N NTLAMA-MAKHANYA
ACTING JUDGE OF THE HIGH COURT
MAKHANDA**

I agree

**M JOLWANA
JUDGE OF THE HIGH COURT
MAKHANDA**

Delivery: *This judgment is issued by the Judge whose name appears herein and its date of delivery is deemed 10 April 2026.*

Date Heard: 25 February 2026

Date Delivered: 10 April 2026

Appearances:

Appellant:

Advocate JC McConnachie SC

Instructing Attorneys:

Legal Aid South Africa

Respondent:

Advocate NP Phikiso

Instructing Attorneys:

Director of Public Prosecution's Office
Makhanda