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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR350/2022

In the matter between:

S[...] C[...] L[...]

APPELLANT

and

THE STATE

RESPONDENT

Coram: Siwendu and Mathenjwa JJ

Heard: 08 May 2026

Delivered: 22 May 2026

Summary: *Criminal law — Sentence — Rape of a child — Complainant five years old — Appellant pleading guilty in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 — Conviction on single count of rape — Applicability of prescribed minimum sentence in s 51(1) of the Criminal Law Amendment Act 105 of 1997 — Life imprisonment — Whether guilty plea, apology, personal circumstances and prospects of rehabilitation constituted substantial and compelling circumstances — Apparent absence of severe physical injury not a mitigating factor in terms of s 51(3)(aA) — Psychological and bodily*

consequences of rape inseparable — Familial breach of trust — No genuine remorse established — No substantial and compelling circumstances - No misdirection by trial court — Sentence not disproportionate or shockingly inappropriate — Appeal dismissed.

ORDER

On appeal from: Regional Court, Scottburgh (sitting as court of first instance):

1. The appellant's appeal against the sentence is dismissed.
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JUDGMENT

Siwendu J (Mathenjwa J concurring)

Introduction

[1] This appeal is against the life sentence imposed by the Regional Magistrate, sitting in Scottburgh. The appellant, S[...] C[...] L[...], an adult male who was approximately 35 years old at the time, was charged with one count of the rape of ML, a five-year-old minor child. ML is the appellant's paternal niece.

Background

[2] The rape incident occurred during school holidays on 25 December 2019, while ML was visiting her father's family at Malangeni, where the appellant

resides. ML reported the incident and was examined by Dr Pratt at 23:30, the same day.

[3] The charge against the appellant was proffered in terms of Part 1 of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the minimum sentencing provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA).¹ The appellant was represented by the Legal Aid South Africa.

[4] At the trial conference, the appellant disputed the rape incident. It was recorded that he would plead a ‘not guilty plea’. However, at the trial, he pleaded guilty to a single act of vaginal penetration of ML and tendered a statement in terms of s 112(2) (the section 112(2) statement) of the Criminal Procedure Act 51 of 1977 (the CPA). He was denied bail and remained in custody throughout the trial proceedings.

[5] The appellant’s account of the rape incident is that on Christmas day, he was in the company of his cousins, ML’s father, his parents and other people. He had consumed alcohol. He went to his backroom with two of his cousins, including ML’s father, but fell asleep. His s112 (s) statement states that the appellant’s friend woke him up and thereafter left the room. The appellant was alone with ML. He admitted to a single act of sexual penetration.

[6] In the s 112(2) statement, the appellant admitted to all the elements of the crime; namely, the act of penetration, that the conduct was intentional, and unlawful. He admitted that he was aware of his actions despite having

¹ Section 51(1) reads:

‘(1) 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.’

consumed alcohol. He accepted that a minor, ML, was legally incapable of consenting to sexual intercourse. He knew his conduct was wrongful.

[7] There is nothing ambiguous or irregular in the guilty plea tendered by the appellant. The trial court was satisfied that it was made freely and voluntarily. It covered all the elements of the offence. The appellant was accordingly convicted and charged on 13 February 2022.

[8] The appellant had previous convictions. On 2 December 2014, the appellant was convicted of possession of dependence-producing substances (dagga). On 23 June 2016, he was convicted on two counts of attempted murder and a count of malicious damage to property, but these were taken as one count for purposes of sentence, which was eight years' imprisonment, half of which was suspended for five years, in respect of malicious damage to property, a fine of R5000 or 18 months imprisonment.

[9] Since the complainant was under the age of 16 years, s 51(1) of the CLAA, mandates that a sentence of imprisonment for life be imposed on the appellant unless substantial and compelling circumstances existed which justified the imposition of a lesser sentence in terms of s 51(3)(a).²

[10] In arriving at the sentence, the trial court considered the aggravating and mitigating factors in respect of the circumstances of the offence, such as it being on Christmas day, the tender age of ML. It weighed the breach of trust given the familial relationship and the social effects of the crime. It considered the

² Section 51(3)(a) provides that:

'(3)(a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify 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: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.'

mitigating factors, including the appellant's guilty plea as an expression of remorse.

[11] The mitigating factors placed before the trial court, were the appellant's personal circumstances. He was 35 years old at the time. He attained grade 12 and had three children who were two, six and eleven years old. He was the sole breadwinner and earned R 6500 as a woodworker, but the amount varied from month to month. He was arrested on 27 December 2019 but made his first appearance on 28 August 2020. He then convicted and sentenced on 16 February 2022.

[12] The trial court considered that the appellant had minor children and weighed these factors with his previous convictions. It found that when faced with serious crime as this, personal circumstances receded to the background. The seriousness of the offence, the young age of the complainant, and the breach of trust inherent in the familial relationship were weighty aggravating factors. It concluded that the mitigating factors did not constitute substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence.

[13] As alluded to, the appeal is limited to the life sentence imposed by the trial court. The grounds for appeal were prefaced on the trial court's application of the well-established *Zinn Triad*,³ and the need to balance the nature of the punishment, which should fit the crime, the offender, the interests of society all of which must be blended with a measure of mercy. The second prefix was based on the proportionality of the sentence and prospects of rehabilitation of the appellant.

³ *S v Zinn* 1969 (2) SA 537 (A) at 540G.

[14] It is contended that the trial court misdirected itself in failing to find that there were substantial and compelling circumstances which warranted a departure from the prescribed minimum sentence of life imprisonment. The complaint on appeal is directed at the way the trial court weighed the evidence and factors before it to arrive at the life sentence imposed. It was submitted that the sentence was harsh.

[15] The first criticism is levelled at the failure by the trial court to attach some weight to the guilty plea. It was contended that the guilty plea ought to have weighed in favour of the appellant to ameliorate the gravity of the sentence because he did not waste the court's time with a protracted trial. Importantly, the guilty plea obviated the need for ML to testify and expose her to further trauma. These factors should have been weighed.

[16] Counsel for the appellant conceded the trauma effects of the rape and accepted the evidence of the psychological fallout, being a consequence of the rape. Nevertheless, he submitted that there was 'a singular act of penetration'. The J88 shows that ML did not suffer serious physical harm. The appellant had apologised to ML's father for his conduct.

[17] Notwithstanding that the appellant had previous convictions, it was submitted that he should have been construed as a first offender in respect of rape. The submission means the previous convictions would recede to the background when considering an appropriate sentence. It was further submitted that the appellant may be a good candidate for rehabilitation.

[18] The question is whether there was a misdirection by the trial court, warranting interference with the sentence and/or the sentence imposed was shockingly inappropriate or disproportionate, and thus impels this Court to

interfere with the trial court's exercise of discretion and impose a lesser sentence.

[19] These submissions were considered after a careful consideration of the record of the trial proceedings and the evidence tendered. ML's father testified that although the plea of guilty obviated the need for ML to testify, which would have traumatised her, ML was in any event already traumatised by the rape incident. She was receiving counselling. According to ML's father, the consumption of alcohol by the appellant was not an exculpatory factor. This evidence was consistent with the appellant's s 112(2) statement.

[20] It was put to counsel that the guilty plea is a neutral factor in the present case, and the finding that it equated to remorse was not correct in law.⁴ It was submitted that the guilty plea was tendered out of concern for ML, and the appellant offered an apology to ML's father for his conduct. Counsel emphasised in argument that the written clinical findings in the J88 medical report, which recorded that ML sustained a 5mm superficial vertical tear at the posterior fourchette at the 6 o'clock position, made findings that the injuries 'were suggestive of possible attempted vaginal penetration, but cannot exclude vaginal penetration.' The conclusion was suggestive of less serious injuries.

[21] The submission stands to be rejected on two grounds. First, it minimises the physical consequences of the rape and is not borne out by the facts. The injuries were found to be consistent with sexual penetration, and the appellant accepted the contents of the J88, which were admitted in terms of s 212 of the CPA. According to the evidence placed before the trial court and the victim impact report, ML's mother informed the court that ML lived with physiological

⁴ *S v Barnard* 2004 (1) SACR 191 (SCA) para 1 of the separate concurring judgement of Marais JA; *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 para 13 and *D v S* [2016] ZASCA 123 para 12.

aftereffects of the rape, which include abdominal pain and constant urination, a bladder medical consequence which requires medical attention.

[22] The second fundamental reason to reject this submission is that jurisprudentially, it goes against the legislative scheme pertinently, s 51(3) (*aA*) of the CLAA provides that:

‘When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;
- (ii) an apparent lack of physical injury to the complainant;

The submission contradicts the long-established body of precedents from higher courts that rape is about consent, and physical harm is not a necessary indicator of rape.⁵ Furthermore, it is against the evolving social understanding of the gravity of the rape offence, particularly a rape of a minor child.⁶ To be fair, counsel readily conceded that ML suffered the psychological effects of the rape incident.

[23] Apart from finding no support in the facts of the present matter, the appellant’s fragmented approach, which seeks to distinguish between physical trauma, whether visible or invisible, and psychological harm, creates an artificial separation between the two. It fails to recognise that ML’s psychological injury is inextricably bound to her physical being and can manifest only through her bodily and emotional experience. It should be firmly discouraged, consistent with development of the law.⁷

⁵ *Director of Public Prosecutions Limpopo v Motloutsi* [2018] ZASCA 182 para 16; *Maila v S* [2023] ZASCA 3 para 48.

⁶ *Otto v S* [2017] ZASCA 114 paras 13-16; *S v SM* [2013] ZASCA 43; 2013 (2) SACR 111 (SCA) paras 36-42, and *Maila v S* [2023] ZASCA 3 paras 50-51.

⁷ *S v Tshoga* [2016] ZASCA 205; 2017 (1) SACR 420 (SCA) para 5; and *Marota v The State* [2015] ZASCA 130 paras 6; 20.

[24] Returning to the criticism of the weighing of the factors to arrive at an appropriate sentence, the victim impact statement obtained following a consultation with ML's mother was received into evidence, pointing to adverse childhood effects for ML and her family. Despite counselling, ML cries in her sleep and experiences nightmares. She was reported to be afraid of all males and was clingy compared to children of her age. Although, as alluded to, the appellant conceded this, the imprint left by the rape trauma has not resolved.

[25] It had a knock-on effect on ML's mother emotionally. It was reported that it compromised her ability to function at work. Both of ML's parent testified that their relationship broke down and they no longer lived together in the aftermath of the rape incident, although ML's father maintains regular contact with her.

[26] The fallout stretched to the relationship with the extended family. Since the appellant is ML's paternal niece, ML's mother testified that her children no longer visit their father's family. All this evidence is also contained in a report prepared by Mrs Mkhize, a social worker who interviewed ML's mother and was before the trial court.

[27] The above facts are to be considered against the weight of the apology tendered by the appellant, relied upon in the appeal. The finding by the trial court that the guilty plea and the apology equated to remorse is not supported by legal principles. As the court held in *S v Matyityi*,⁸ the surrounding actions of the accused, rather than what he says in court, are of importance. The appellant's first stance was to deny any wrongdoing.

⁸ *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) (*Matyityi*) para 13.

[28] The reliance on the guilty plea and the apology tendered rings hollow, appears self-serving and is inconsistent with the argument advanced on his behalf. The appellant did not lead evidence on the sentence but elected to address the trial court on mitigating factors. He did not explain the change of mind or take the court into his confidence.

[29] The apology tendered to ML's father falls short of the exerting standards of genuine remorse and contrition articulated by the court in *Matyityi*. It cannot be elevated to the level of remorse, which includes an undertaking not to repeat the wrongdoing.⁹ When evidence of ML's father is read in the proper context, he makes it plain that although he would accept an apology, the damage had already been done. Apart from what is articulated in case law, *reparation* is integral to genuine remorse.¹⁰

[30] It bears emphasising that although MLs was a minor, unable to exercise self-agency and is under the care of her parents, the law singles her out as a specific vulnerable class for protection. ML's inalienable constitutional right to personal autonomy, bodily and sexual integrity, her right to dignity, right to safety, and equality accrue and are conferred to her, not her parents. To pass as genuine contrition and demonstration of remorse, mechanisms to *repair* directed at her as a self-standing holder of the protected rights, with the assistance of her parents, would have found favour with this Court. There is no evidence of steps taken by the appellant to this effect, given the uncontroverted evidence of the adverse effects caused.

[31] Turning to the individualised and appropriateness of the sentence imposed, the starting point in these matters is the will of the legislature unless

⁹ S Tudor 'Why Should Remorse be a Mitigating Factor in Sentencing?' *Criminal Law and Philosophy* 241–257 (2008) at 243.

¹⁰ *Ibid* at 253-255.

substantial and compelling circumstances are found. As held in *S v Malgas*,¹¹ and several other court decisions,¹² courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Substantial and compelling circumstances need not be exceptional but entail weighty factors which would warrant the departure.¹³

[32] Other than what is already stated above, further reliance was placed on the appellant's age as a 35-year-old, that he had young children, was employed, and was a candidate for rehabilitation. These were mitigating factors before the trial court. Counsel correctly accepted that the grounds for interference with the sentence by the appeal court are limited. Moreover, the time the appellant spent awaiting trial was not relied upon on appeal since there was no evidence of the reasons for the period.¹⁴

[33] Apart from the conclusion that the apology equated to remorse, which is clearly incorrect in law, the trial court reliance on the rape having occurred on a Christmas day as an aggravating factor is not based on legal authority. But to the extent that it accentuates the lack of safety as an aggravating factor because the rape occurred during holidays while ML was under the care of her parents, and extended family, the view cannot be criticised.

[34] We can find no misdirection by the trial court or that the sentence is shockingly inappropriate. It is a sentence that this Court would have imposed, given the gravity of the offence, the fundamental breach of trust and the adverse

¹¹ *S v Malgas* 2001 (2) SA 1222 (SCA) (*Malgas*) para 8.

¹² *Matyityi* paras 18; 23; *S v Dodo* [2001] ZACC 16; 2001 (1) SACR 594 (CC) paras 10-11; 40; *DPP, Pretoria v Zulu* [2021] ZASCA 174 para 25.

¹³ *Malgas* para 18; *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA) para 16.

¹⁴ *S v Ngcobo* [2018] ZASCA 6; 2018 (1) SACR 479 (SCA) para 1; and *S v Radebe and Another* [2013] ZASCA 31; 2013 (2) SACR 165 (SCA) paras 11-14.

consequences. There was no evidence that the appellant was an appropriate candidate for rehabilitation.

Order

[35] The following order is made:

1. The appellant's appeal is dismissed.

NTY SIWENDU J

I agree.

MATHENJWA J

Appearances

For the Appellant:

T Pillay

Instructed by:

Legal-Aid South Africa

For the Respondent:

A. M Makhanya

Instructed by:

National Directors Public Prosecutor