



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. A329 / 2024

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **YES**

DATE 29 April **2026**

SIGNATURE

In the matter between:

T[...] M[...]

Appellant

and

THE STATE

Respondent

ORDER

1. The appeal is dismissed but the sentence is backdated to 4 October 2024.

JUDGMENT

TOLMAY J:

[1] The appellant was convicted on 22 October 2024 on two counts of rape and was sentenced to life imprisonment on each count. The sentences to run concurrently. He pleaded guilty and the appeal is against sentence only. The appellant has an automatic right of appeal in terms of section 10 of the Judicial Matters Amendment Act.¹ The minimum sentence provisions pertaining to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act² was applicable.

[2] The victims of the rapes were the appellant's own children a girl L who was 10 years old and a boy K who was 8 years old. In the statement in terms of s112(2) of the Criminal Procedure Act³ the appellant explained that the children were living with their maternal family in Mafikeng, and he was living with his new girlfriend in K[...]. On the insistence of his girlfriend, he requested that primary care of the children be given to him. The request was granted and the children moved in with the appellant and his girlfriend. He enrolled them in a primary school in the area where he resided in January 2023. Before the academic year began, he broke up with his girlfriend and became a single parent to the children. He stated that his difficulties in relationships caused him stress, which was worsened by him not being paid his salary. He says these circumstances led him to abuse alcohol.

[3] As far as the rapes are concerned he set out the circumstances leading up to the incidents. He stated that on 1 September 2023 the children were watching television and after they went to bed, he started writing a suicide note and made a noose with a cloth. Before he could place the noose around his neck he was interrupted by L, when she went to the bathroom. He took her to her bedroom where he unsuccessfully attempted to put his penis in her vagina. This, he says, caused his

¹ 42 of 2013.

² 105 of 1997.

³ 51 of 1977.

foreskin distress. He then proceeded to insert his finger into her vagina. On 21 September 2023 he was sleeping with K in the same bed when he raped him. The children informed their grandmother, Ms. M[...], of the incidents the following day and she subsequently notified the police which resulted in his arrest.

[4] The personal circumstances of the appellant, that were provided to the court were that he was 35 years old and unmarried, he has three children (the two who were the victims of these rapes and a three-year-old with a previous girlfriend), he completed grade 9 at school, he has several security certificates and was employed as a security officer.

[5] It was submitted that, for sentencing purposes, the Court should also consider the fact that the appellant pleaded guilty and spent twelve months in custody awaiting trial. As exceptional circumstances, the argument was that the Court should consider that he suffered from stress, wanted to commit suicide, was under the influence of alcohol and can be rehabilitated.

[6] Our courts have explained that even though a life sentence is a minimum sentence it should not be imposed if it is disproportionate to the facts and the court should take into consideration that it is the ultimate sentence.⁴ We were referred to *S v MN*⁵ where on appeal the sentence of life imprisonment for the rape of a 10 year old was reduced to 15 years.

[7] We were additionally referred to *S v MM*; *S v JS*; *S v JV*⁶, in which the Full Court reduced the life sentences handed down by the Regional Court. In *S v MM* the appellant raped his 12-year-old stepdaughter and on appeal the sentence was reduced to 12 years imprisonment. In this case the accused was found guilty of one offence of rape. The accused's attention was in that case not drawn to the fact that s51 of the CPA would find application.⁷

[8] In *S v JS* the appellant was convicted of raping a 4-year-old girl. The appellant pleaded not guilty. On appeal the court held that it was not dealing with the category of the worst kind of rape, and this should be considered in arriving at an appropriate

⁴ *S v GN* 2010 (1) SACR 93 (T), *S v Vilakazi* 2009 (1) SACR 552 (SCA) at p. 554 f - g

⁵ 2011 (1) SACR 286 (ECG).

⁶ 2011(1) SACR 510(GNP).

⁷ *Id.* Paras 7-9.

sentence. The rape did not cause the complainant serious injury, and it was impossible to say what the psychological effects will be as the full nature and extent were not investigated at the trial. The sentence of life imprisonment was set aside, and a sentence of 12 years' imprisonment was imposed on appeal.

[9] In *S v JV*, the appellant was convicted of two counts of rape of his own daughters. Upon appeal, the court determined that - considering all relevant factors - it could not conclude this was among the most severe instances of rape. The two sentences of life imprisonment were set aside and replaced with two sentences of 15 years' imprisonment, which were ordered to be served concurrently. In this matter, the Full Court determined that the accused demonstrated insufficient insight and comprehension regarding his actions, including the unlawfulness thereof and the reasons why society deems such conduct unacceptable. He was supported in his actions by his wife and probably other members of his family. This the Full Court explained must have played a part in the commission of the crimes.

[10] Sentencing varies with each case and is not governed by a universal standard, so the Full Court's decision does not serve as binding authority to depart from the sentence of life imprisonment for all cases involving the rape of minors. The Court is required to consider all the facts of the case before it.

[11] The point of departure when dealing with rape should be as was stated in *S v Chapman*⁸ where the SCA explained that rape is a very serious offence and constitutes a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. This is even more true when we deal with the rape of a minor. In *Director of Public Prosecutions v Thabethe*,⁹ the SCA held:

“...Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy which is founded on protection and promotion of the values of human dignity, equality and the advancement of human right and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting

⁸ 1997 (2) SACR 3 (SCA).

⁹ [2011] ZASCA 186, 2011 (2) SACR 567 (SCA) at 577G-I [also reported at [2011] JOL 27881 (SCA) – Ed].

members of society. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system..."¹⁰

[12] In *S v Malgas*¹¹ the SCA explained how the application of minimum sentences should be approached:

"... 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..."¹²

[13] Our courts are required to approach sentencing with the understanding that the prescribed sentence is ordinarily appropriate and should not be departed from lightly.

[14] While factors such as being a first offender, expressing remorse, or having a clean criminal record may be presented as mitigating, they must be weighed against the gravity of the offence. In cases involving the rape of minors, these factors are often insufficient to constitute substantial and compelling circumstances. Section 51(3)(aA)¹³ of the Criminal Law Amendment Act establishes clear boundaries for what may not be considered as substantial and compelling circumstances, ensuring that minimum sentences are applied consistently for serious offences. By excluding personal circumstances, the nature of the offence, and victim-related factors, the provision reinforces the principle of proportionality and the deterrent effect of sentencing. This framework ensures that deviations from prescribed sentences are

¹⁰ Id par 22.

¹¹ 2001(1)SACR 469(SCA).

¹² Par 9.

¹³ 105 of 1997. It reads as follows: (aA) 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;
- (iii) an accused person's cultural or religious beliefs about rape; or
- (iv) any relationship between the accused person and the complainant prior to the offence being committed.

reserved for truly exceptional cases. The legislature pertinently excluded the absence of physical injury as a circumstance that will constitute compelling circumstances justifying the imposition of a lesser sentence.

[15] In recent years our courts, probably because of the persistence of the occurrence of the rape of minors, seemed to be more reluctant to deviate from the prescribed minimum sentence of life imprisonment where children are involved. In *S v DL*¹⁴, the court emphasised that the prescribed sentence should not be departed from unless the cumulative impact of mitigating factors renders the sentence disproportionate to the crime, the criminal, and societal needs. The court found no substantial and compelling circumstances and imposed life imprisonment. In *S v Pepping*¹⁵, the court reiterated the importance of balancing the offender's personal circumstances, the nature of the offence, and societal interests is by now an established principle. The absence of substantial and compelling circumstances resulted in the imposition of life imprisonment.

[16] A court on appeal will not interfere with a sentence unless it is established that the trial court's discretion was exercised improperly or unreasonably or where the sentence imposes a sense of shock.¹⁶ Rape is not only a very serious offence, but it is endemic in our society. In this instance the appellant raped his two children whom he should have protected from harm. What is even more concerning is that after he raped L on 1 September, he proceeded to rape K on 21 September, some 20 days later. He had ample time to reflect on his conduct yet he did not. If the children did not report it and the grandmother did not take immediate action, this behaviour may have gone unpunished. It is doubtful that he is a good candidate for rehabilitation, or that he had actual remorse.

[17] The circumstances that allegedly led to the rape, namely the loss of his job and his girlfriend cannot by any stretch of the imagination be regarded as exceptional circumstances that would allow a deviation from the prescribed minimum sentence. Although reliance is placed on the abuse of alcohol as an explanation for his conduct, there is nothing in his statement to indicate that such alleged abuse led

¹⁴ [2015] JOL 34912 (ECG) See also *Nkosi v S*, [2025] JOL 69889 (KZP)

¹⁵ *S v Pepping*, [2023] JOL 57822 (ECM) where the appellant raped a six year old girl

¹⁶ *Hewitt v S* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) para [8]. *S v Pieters* 1987 (3) SA 717(A), *S v Lowis* 1997 (1) SACR 235(T) at 240, *Sv Rabie* 1975(4) SA 855 A.

to the rapes or impacted on his ability to make rational decisions. To the contrary the facts set out in the s112 statement make it clear that he was always aware of what he was doing and chose to proceed with his actions regardless.

[18] A perusal of the judgment on sentencing reveals that the learned magistrate considered all the circumstances surrounding this case. He considered the personal circumstances of the appellant, but also the trauma that the children went through and the scars they will carry because of these incidents and the interests of society. Considering all the facts, the appeal should not succeed. We were however requested to backdate the sentence to 4 October 2024, which is appropriate regardless of the outcome of the appeal.

ORDER:

1. The appeal is dismissed but the sentence is backdated to 4 October 2024.

R TOLMAY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

D MAKHOB
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be ____ April 2026.

APPEARANCES:

For the Appellant : Mr MB Kgagara
Instructed by : Legal Aid
For the Respondent : Adv MJ Nethononda
Instructed by : Director of Public Prosecutions
Matter heard on : 12 March 2026
Judgment date : ___ April 2026