

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: A75/2024
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO
DATE **11 May 2026**
SIGNATURE

In the matter between:

ESSET MABONA

Appellant

and

THE STATE

Respondent

JUDGMENT

LENYAI J (JANSE van NIEWENHUIZEN J Concurring)

[1] This is an appeal by the appellant against both his conviction and the sentence imposed by the Regional Court of Gauteng, sitting at Benoni on the 26th May 2021. The appellant was charged with, and subsequently convicted of, rape in

terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.¹ Following his conviction, he was sentenced to 20 years' imprisonment.

- [2] The appellant's application for leave to appeal against his conviction was refused by the trial court and it granted leave to appeal against sentence. The appellant subsequently petitioned the High Court Division, Pretoria for leave to appeal against his conviction, which leave was granted on 22 November 2023.
- [3] The appeal is directed, firstly, at the correctness of the trial court's findings on the merits, particularly its reliance on the evidence of a single child witness, and secondly, at the appropriateness of the sentence imposed. The identity of the appellant is not in dispute.
- [4] The first witness for the State was M[...] M[...] M[...], a medical practitioner who examined the complainant. She testified that during the examination, the complainant reported to her that a known male person had sent her to the shop, and upon her return, the appellant placed her on his lap, slipped his fingers into her panty, and inserted his finger into her private parts. The witness recorded a fresh tear on the complainant's left labia minora, while the hymen remained intact. She testified that, although her findings could not conclusively confirm sexual abuse, they equally could not exclude it. In her view, the injury may be consistent with sexual abuse, although it may also have been caused by other means. She further indicated that there was no evidence of penetration into the vagina. Notwithstanding this, she stated that the injury observed was compatible with the history provided by the complainant. She explained that, had there been an intention to penetrate the vagina fully, such conduct would likely have resulted in injury to the hymen.
- [5] The second witness for the state was O[...] S[...]. She testified that she was 9 years old. She was 6 years old at the time of the incident. She testified that she was watching television at the Appellant's place. The chair she was sitting on was uncomfortable and the Appellant invited her to sit with him on his chair. She sat on the Appellant's thighs. The Appellant undressed her tights and

¹ 32 of 2007.

panty. The Appellant inserted his finger inside her vagina. He said she must go and play and gave her R1,00. She told her friends, K[...], A[...], L[...] and L[...]. Her friends told their mothers, and their mothers came to report to her mother. They went to the clinic and to the police station. There was a family meeting. The Appellant was present in the meeting and was drunk. He was asked about the allegations, and he replied that he wanted to sleep with her and that he was opening ways. She testified that a magistrate came to the room where children are kept and asked her questions that were asked in court.

[6] The third witness for the state was N[...] T[...] L[...], the complainant's mother. She testified that the complainant is her child. She was a tenant at the Appellant's residential place. The complainant used to watch television in the Appellant's room. The complainant told her that the Appellant inserted his finger into her private. There was a meeting where the Appellant was confronted with the allegations. The Appellant agreed and stated that he did it and that he was paving a way to sleep with the complainant. The Appellant gave the complainant R1.00. It was put to her under cross examination that the complainant never testified that she felt pains when she was peeing.

[7] The issues to be determined by the court are the following:

- a. Whether the Appellant inserted his finger into the vagina of the Complainant or whether the injury on the Complainant's labia minora was caused by the Appellant's finger?
- b. Was the sentence imposed by the trial court appropriate?

Conviction

[8] Section 3 of Criminal Law Sexual Offences and Related Matters Amendment 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.”

[9] Section 1 of the Criminal Law Sexual Offences and Related Matters Amendment Act define sexual penetration as any act which causes penetration to any extent whatsoever by—

- (a) “the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person.”

[10] At the time of the incident, the complainant was six years old. Consequently, the provisions of section 51(1), read with Schedule 2 of the Criminal Law Amendment Act (“CLAA”) find application in this matter.² Section 51(1) of the CLAA reads as follows:

“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.”³

[11] Rape of a person under the age of 18 is listed in Part I of Schedule 2 to the CLAA. Accordingly, the prescribed minimum sentence of life imprisonment is applicable. This is so in the present matter, as the complainant was six years old at the time of the incident.

[12] An appellate court will be reluctant to interfere with a trial court’s findings of fact and its assessment of the evidence, especially where such findings turn on credibility, unless a material misdirection is demonstrated or the conclusions

² 105 of 1997.

³ Ibid.

reached are plainly incorrect. In *S v Francis* 1991(1) SACR 198(A),⁴ the approach of an appeal court to findings of fact by a trial court was crisply summarized as follows:

“The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of a witness’ evidence, is presumed to be correct. In order to succeed on appeal, the applicant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness’ evidence a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court’s evaluation of oral testimony.”

[13] Furthermore, in *S v Hadebe and Others* 1997(2) SACR 641(SCA),⁵ the supreme court of appeal stated that:

“In the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary.”

[14] In *Osman and Another v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC),⁶ Madala J stated that:

“Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution’s case may be sufficient to prove the elements of the offence.”

[15] Having regard to all the evidence that has been brought before the court *a quo* and contained in the record, the definition of rape per section 3 and 1 Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007, and most importantly evidence by witnesses and most critical, the medical practitioner, I am satisfied that the prosecution has proven all the elements of

⁴ *S v Francis* 1991(1) SACR 198(A) at 204D-E.

⁵ *S v Hadebe and Others* 1997(2) SACR 641(SCA) at 645E-F.

⁶ *Osman and Another v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC) at para 22.

rape. The appellant did unlawfully and intentionally commit an act of sexual penetration on the complainant without her consent. In other words, there is a *prima facie* case proved by the state. The burden of proof the shifted to the appellant to rebut the state's *prima facie* case.

[16] In the criminal matter, the state bears the onus to prove its case against the accused beyond a reasonable doubt. The *audi alteram partem* rule is a fundamental principle of our law and is entrenched in the Bill of Rights in the Constitution of the Republic of South Africa, 1996. Every litigant is therefore entitled to a fair and public hearing before a court where the dispute is capable of resolution through the application of law. The appellant was afforded the opportunity to defend his case but chose to exercise the right to remain silent which he is very much entitled to.

[17] The appellant in this matter has exercised his right to remain silent in terms of section 35(3)(h) of the Constitution. In *S v Boesak* 2001 (1) SACR 1 (CC),⁷ the Constitutional Court stated that:

“The right to remain silent applies at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against him or her. This right arises again at the trial stage, where an accused is entitled to be presumed innocent, to remain silent, and not to testify. However, the fact that an accused person is under no obligation to testify does not mean that the decision to remain silent carries no consequences. Where there is evidence calling for an answer and the accused elects to remain silent, a court may be entitled to conclude that, in the absence of an explanation, the evidence is sufficient to prove guilt. Whether such a conclusion is justified depends on the weight of the evidence.”

[18] In the present matter, the appellant was confronted with evidence calling for an answer and failed to provide a satisfactory response thereto. By electing to remain silent in the face of such evidence, the appellant failed to gainsay the State's case. In the circumstances, his silence weighs against him, as there was no version placed before the court to rebut the incriminating evidence. I am accordingly satisfied that the prosecution presented evidence sufficient to

⁷ *S v Boesak* 2001 (1) SACR 1 (CC) at para 24.

establish a prima facie case which, in the absence of any rebuttal, proved the appellant's guilt beyond a reasonable doubt. The conviction of the appellant was therefore correct. His silence thus leads irresistibly to the conclusion that there was nothing to be said in his favour.

[19] The court a quo correctly recognised that the complainant was a single witness in respect of the alleged rape and accordingly approached her evidence with the requisite caution, duly admonishing her in that regard.

[20] In terms of section 208 of the Criminal Procedure Act ("CPA"),⁸ an accused may be convicted of any offence on the single evidence of any competent witness. The complainant in this matter is a single witness on the rape incident and therefore section 208 of the CPA is applicable. In *S v Stevens* 2004 JDR 0505 (SCA),⁹ the Supreme Court of Appeal stated that "It is a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility."

[21] The appellate division in *S v Sauls and Others* 1981 (3) SA 172 (A),¹⁰ stated the following regarding the application of the cautionary rule on single witness evidence—

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber*. . .). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded" (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[22] Furthermore, the court a quo also found corroboration emerging from the evidence of her mother and the medical practitioner. The latter testified that the

⁸ 51 of 1977.

⁹ *S v Stevens* 2004 JDR 0505 (SCA) at para 17.

¹⁰ *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G.

injury sustained by the complainant could not exclude sexual abuse and that such an injury could be caused by the insertion of a finger. The complainant's ability to recall and demonstrate the events in detail, including using anatomical dolls, strengthen the state case particularly given that she was only 6 years old at the time of the incident and that the trial commenced approximately two years thereafter. I agree with the trial court finding that the slight contradictions between her evidence and her mother's evidence are not material and that her evidence was indeed satisfactory, credible and reliable.

[23] The appellant's contention that the complainant's testimony is not fully corroborated, on the basis that the J88 does not exclude the possibility that the injuries could have been caused by some other means, is without merit. The purpose of medical evidence is not to exclude every hypothetical alternative cause of injury, but rather to support or be consistent with the complainant's version. In the present matter, the findings recorded in the J88 are not inconsistent with the complainant's account of sexual assault and, when considered together with her clear and credible testimony, serve to corroborate her version in material respects. The argument advanced by the appellant is therefore speculative and does not create a reasonable doubt.

[24] The argument that the State failed to call certain witnesses is equally without merit. The State is not required to call every possible witness, but only to present sufficient evidence to prove its case beyond reasonable doubt which it has done. In this instance, that threshold was met and the burden shifted to the appellant to rebut the state's prima facie case.

[25] The appellant, having failed to present any cogent rebuttal to the State's evidence, did not displace the inferences properly drawn therefrom. On a conspectus of the evidence as a whole, I am satisfied that the court a quo correctly convicted the appellant. The conviction accordingly stands to be upheld.

Sentencing

[26] The appellant submitted that in sentencing the Appellant to an effective term of 20 years' imprisonment, the sentencing court erred in over-emphasized the seriousness of the offence and the interest of the society whilst the personal circumstances of the appellant were under-emphasized. The appellant had further submitted that the court *a quo* erred in imposing the sentence which is shockingly harsh and which induces a sense of shock.

[27] In *S v Bogaards* 2013 (1) SACR 1 (CC),¹¹ the Constitutional Court held that an appellate court's power to interfere with sentences imposed by lower courts was as follows:

"It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

[28] The Supreme Court of Appeal in *S v Monyane and others* 2008 (1) SACR 543 (SCA),¹² further stated that "it would interfere with sentences imposed by a trial court only where the degree of disparity between the sentence imposed by the trial court and the sentence this court would have imposed was such that interference was competent and required."

[29] It is apposite to note again that in this matter the complainant was 6 years old at the time of the incident and life imprisonment is applicable. However, the court has got the discretion to deviate from the prescribed minimum sentence if there are compelling and substantial circumstances.

[30] The Supreme Court of Appeal in *S v Malgas* 2001 (1) SACR 469 (SCA),¹³

summarized courts power to deviate from the prescribed sentence as follows:

¹¹ *S v Bogaards* 2013 (1) SACR 1 (CC) at para 41.

¹² *S v Monyane and others* 2008 (1) SACR 543 (SCA) paras 23 and 26.

¹³ *S v Malgas* 2001 (1) SACR 469 (SCA) at para 25.

- (a) "Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part I of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).
- (b) Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
- (c) Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.
- (d) The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
- (e) The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
- (f) All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process."
- (g) The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and

must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

- (h) In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
- (i) If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
- (j) In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided.”

[31] In *S v Vilakazi* 2009(1) SACR 552(SCA),¹⁴ the Supreme Court of Appeal stated that:

“It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.”

[32] The court in *S v Chapman* 1997 (2) SACR 3 (SCA),¹⁵ described rape as a “very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.”

[33] The appellant submitted that in sentencing the Appellant to an effective term of 20 years’ imprisonment, the sentencing court erred in over-emphasizing the seriousness of the offences and the interest of the society whilst the personal circumstances of the appellant was under-emphasized. I am of view that the

¹⁴ *S v Vilakazi* 2009(1) SACR 552(SCA) at para 15.

¹⁵ *S v Chapman* 1997 (2) SACR 3 (SCA) at 5-B.

court a quo has correctly balanced the personal circumstances of the accused with the seriousness of the crime and interest of justice. It must also be taken into account that the complainant suffers from depression and is very much aggressive towards other children especially boys per probation officer's report.

[34] The personal circumstances of the appellant, as placed on record, were duly considered by the trial court. He was born on 11 January 1975 and was 46 years old at the time of sentencing, and 43 years old when the offence was committed. He was unmarried and had no dependants. His highest level of education was Grade 11, and he was not formally employed, earning an income of approximately R300 per week through recycling activities. Importantly, he had no previous convictions at the relatively advanced age of 43, a factor which ordinarily entitles an accused to some measure of mercy. He was arrested on 13 May 2018 and released on bail in the amount of R2 000 on 29 May 2018.

[35] Notwithstanding these personal circumstances, the trial court was required to balance them against the seriousness of the offence, the interests of society, and the circumstances of the complainant. The offence in question involves the sexual violation of a minor child of tender age, which constitutes a grave invasion of bodily integrity and dignity. Such offences are prevalent and demand a firm and deterrent response from the courts.

[36] Despite the seriousness of the offence, the trial court imposed a sentence of 20 years' imprisonment, which is less than the prescribed minimum sentence of life imprisonment. This clearly indicates that the court exercised its discretion with due regard to all relevant factors.

[37] There is no indication that the trial court committed any material misdirection or overemphasised any particular factor. The sentence imposed is neither disproportionate nor does it induce a sense of shock. In the circumstances, there is no basis for this Court to interfere with the sentence.

[38] The appeal against both the conviction and sentence is dismissed.

LENYAI J
JUDGE OF THE HIGH COURT
PRETORIA

And

I concur and it is so ordered.

JANSE van NIEWENHUIZEN J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearance:

For the Appellant: S Moeng

Instructed by Legal Aid SA

For the Respondent: EM Mafunisa
Prosecutions

Instructed Director of Public

Date of Hearing

16 April 2026

Date of Judgement

May 2026

