



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

APPEAL NO: A60/2022

DPP Ref No: 10/5/1-(2022/035)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
	28/05/2026 DATE
	[Redacted Signature]

MOYO, NKULULEKO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Karam AJ:

INTRODUCTION

1. The appellant was charged and convicted in the Johannesburg Regional Court on three counts of having raped the 15 year old complainant, on three occasions in and during February 2015. The charges were read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the minimum sentence provisions").
2. He was sentenced to life imprisonment.
3. The matter comes before this court by virtue of the appellant's automatic right to appeal in terms of Section 309 (1) (a) of the Criminal Procedure Act 51 of 1977 ("the CPA").
4. The appellant appeals both the conviction and sentence.

THE EVIDENCE

5. The State led the evidence of the complainant, her teacher being the first report, the complainant's mother, and the doctor who examined the complainant.

The appellant testified in his defence and called as defence witnesses, the complainant's mother's employer and the investigating officer in the matter.

It was as a result of the evidence of the complainant's mother's employer, that the State, upon being granted leave to re-open the State case, called a further witness.

6. The complainant testified that she and her mother resided in a room at a residence where various other tenants occupied rooms thereat. The appellant was one such tenant. Her mother would occasionally sleep over at her employer. In and during February 2015, and on three occasions that her mother had slept at her employer and was thus not present at the residence, the appellant had raped the complainant.
 - 6.1 On the first occasion, the appellant had opened the unlocked door to her room, produced a firearm and, instructing her to keep quiet, proceeded to rape her.
 - 6.2 The second occasion was the following evening. She was alone in her room, her mother having gone to work. There was persistent knocking at her locked door and believing that it was the child who resided next door and whom she occasionally assisted with homework, she unlocked the door. Prior to her opening the door, the appellant burst into the room, instructed her to keep quiet, and stated that they would do what they had done the previous evening. After raping her, he repeatedly stated that he would kill her and her mother if she informed anyone as to what had occurred.

6.3 The third occasion was two days later. The complainant was busy washing dishes in the kitchen. It was in the evening and her mother, again, was not present having gone to work. The appellant approached the complainant from behind, pointed a firearm at her, ordered her to go to her room and not to lock the door thereof. Shortly thereafter, the appellant entered the room, raped the complainant, ordered her not to advise anyone thereof, and left the room.

6.4 In and during 2016, the appellant moved out of the premises. In January 2017, the complainant herself moved out of the premises and went to reside with her aunt.

7. Rhina Hove testified. She was a senior teacher at the complainant's school. As a result of the complainant having experienced what appeared to be epileptic fits or seizures and the complainant collapsing, she, as the senior teacher, was requested to attend thereto. Upon speaking to the complainant, the latter advised her, inter alia, that she was angry with life, chose death as her life was painful, that she had contracted an illness as a result of having been raped and proceeded to inform her of the appellant, a tenant, having raped her three times in her room and having threatened to kill her and her mother if she reported this. The complainant undertook to inform her mother thereof.

Several days later, the complainant again collapsed and learning that she had not advised her mother thereof, the witness called her mother to the school and

advised her thereof.

8. The complainant's mother testified. She stated that the complainant was born on 21 March 1999. She confirmed that at the relevant time the appellant had been a tenant at the residence. She had had a cordial relationship with him and there was no bad blood between them. She confirmed the evidence of Ms Hove and upon questioning the complainant, the latter informed her of what had transpired.

She worked at a creche during the day and would, on occasion, babysit for one of her employers, sleep over there, and return home the following morning.

The complainant commenced fainting in 2015. The complainant did not inform her of the cause thereof. She was aware that the complainant had commenced taking ARV medication since 2015.

9. Dr Kuya testified. She examined the complainant on 15 May 2017. She confirmed that the complainant had gynaecological injuries, remnants of the hymen and clefts which are healed tears of the hymen. The complainant had reported to her that she had been vaginally penetrated by a known man who was a tenant where she had resided.
10. The appellant testified. He denied the complainant's allegations, stating that he had

never touched or raped the complainant and never entered her room when her mother was not present.

He further denied the complainant's mother's evidence that she ever slept over at her employer's residence during that period.

11. Jane Govender was called as defence witness. She testified that she was the Employer of the complainant's mother. Whilst the latter never babysat for her or slept over at her residence, she was aware that she did so for a parent whose children attended her creche.
12. Sergeant Shai was also called as a defence witness and testified as to the arrest of the appellant.
13. Upon reopening of the State's case, Paulina Ngceba testified. She knew the complainant's mother from the latter's employment at the creche. She confirmed that the latter would babysit for her from 2014. In that year and in 2015, the complainant's mother would, on occasion, sleep over when she requested her to do so.

ISSUES ON APPEAL

14. The issues to be determined on conviction are whether the trial court erred in finding that the State had proved its case beyond reasonable doubt and in not

finding the appellant's version to be reasonably possibly true.

The issues to be determined on sentence are whether the trial court erred in failing to find substantial and compelling circumstances to exist, warranting a deviation from the prescribed sentence of life imprisonment, or whether the sentence imposed is disproportionate in the circumstances and results in an injustice.

LAW AND ANALYSIS

15. It is trite that in a criminal trial, the onus of proof is on the State to prove its case beyond reasonable doubt. This is indeed a stringent test but is applied in order to ensure that only the **proven** guilty are convicted. It is further trite that the Court is required to adopt a holistic approach in respect of the evidence and its assessment thereof, and use a common sense approach. It is not sufficient if the guilt of the accused appears possible or even probable – his guilt must be proven beyond reasonable doubt. If his version is found to be reasonably possibly true, he must be acquitted.

S v Van Der Meyden 1999 (1) SACR 447 (SCA)

at p448 (f) – (h); p449 (j) – p550 (b)

S v Phallo & Others 1999 (2) SACR 558 (SCA) at p562 (g) – p563 (e)

S v Shackel 2001 (2) SACR 185 (SCA) at p194 (g) – (h)

S v Chabalala 2003 (1) SACR 134 (SCA) at p139 (i) – p140 (b)

AD CONVICTION

16. The complainant was a single witness.

It is trite that a court can convict on the evidence of a single witness if such evidence is satisfactory in all material respects. The evidence must not only be credible, but must also be reliable.

R v Mokoena 1932 OPD 79 at p80

S v Webber 1971 (3) SA 754 (A) at p758 (F) – p759 (A)

S v Sauls & Others 1981 (3) SA 172 (A) at p180 (C) – (G)

I am of the view that the court a quo correctly accepted the evidence of the complainant. She was extensively cross examined and nothing material emanated therefrom.

16.1 It is inexplicable and incomprehensible as to why the complainant would, for no reason, seek to falsely implicate the appellant. Furthermore, that she would do so some two years after the incident.

16.2 She gave a vivid account of what had occurred on the three occasions that the appellant raped her.

16.3 She implicated the appellant as the rapist to her teacher, her mother, the doctor and in her evidence in the trial court.

16.4 There is nothing sinister in her failure to report the matter to her mother after the appellant had vacated the premises or to her aunt with whom she subsequently resided. It must be borne in mind that she is a child and that she had been threatened with the death of herself and her mother, if she said anything.

These threats, coupled with her seeing the appellant in possession of a firearm, and having regard to her age, adequately account for her failure to scream out in order to attract the attention of the other tenants.

16.5 It is significant that she suffered the fainting spells or seizures subsequent to the rapes.

16.6 It is certainly not the complainant's fault that her mother, whilst being aware of the complainant being on HIV medication since 2015, failed to investigate the cause thereof or the reason/s therefor.

16.7 The complainant's evidence was corroborated in material respects by her teacher.

16.8 It is significant that the medical evidence corroborates the fact that she was sexually violated.

16.9 It is significant that the appellant was in fact resident at the premises at the relevant times of the rapes.

17. The appellant's evidence was a bare denial.

17.1 He was unable to furnish any reason/s as to why the complainant had accused him of committing these offences.

17.2 His denial of the complainant and her mother's evidence that the latter would, on occasion, sleep out, leaving the complainant on her own at the residence, was refuted by the witness Ngceba.

17.3 His version was that he, upon learning that he was being sought by the police, called them. This was not borne out by the investigating officer, who testified that upon not finding the appellant at his place of employment, had left his contact details with the security officer and that the latter had called him to advise him that the appellant had arrived at his workplace.

18. Having regard to all of the aforesaid, I am of the view that the learned Magistrate correctly convicted the appellant and rejected his version as not reasonably possibly true.

19. I am of the view that there is no merit in the appeal on conviction.

AD SENTENCE

20. Having been charged and convicted in terms of Section 51(1) of the minimum sentence provisions, the prescribed minimum sentence was life imprisonment, the complainant being under the age of 16 years when the offences were committed, and further, the appellant having raped the complainant more than once.

21. I can find no fault with the court a quo's determination that the mitigating factors, either individually or cumulatively considered, do not constitute substantial and compelling factors warranting a departure from the prescribed sentence.

I further do not find the imposition of the minimum sentence to be disproportionate in the circumstances or that it results in an injustice.

22. There are numerous aggravating factors:

22.1 the fact that the complainant was raped on three occasions;

22.2 the grave effects that the rapes have had on the complainant's physical health, resulting in her having convulsions/seizures, that she hitherto did not suffer from;

- 22.3 the grave effects that the rapes have had on the complainant's mental health, resulting in her attempting suicide on more than one occasion;
- 22.4 the evidence that the complainant contracted HIV from the appellant as a result of these rapes;
- 22.5 the fact that it can be gleaned from the evidence that the commission of the offences was premeditated. The appellant, having worked and resided with the complainant's mother, would in all probability have had insight as to when she would be baby sitting and sleeping out, leaving the complainant on her own at the residence;
- 22.6 the lack of any remorse whatsoever;
- 22.7 the scourge of rape, particularly that of minor children, in our society.
23. Whilst it is trite that a court consider the period of incarceration, it is further trite that detention awaiting finalisation of a trial matter does not on its own constitute a substantial and compelling factor, but is one of the factors to be considered.

S v Radebe & Ano 2013 (2) SACR 165 (SCA) at p170 (b)

**DPP N G, Pretoria v Gcwala & Others 2014 (2) SACR 337 (SCA)
at p342 para 16 – p343 para 18**

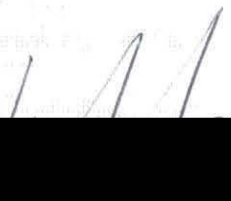
Ngcobo v S 2018 (1) SACR 479 (SCA) at p483 (d) – (e)

The two year period awaiting finalization of the matter is not an unduly lengthy period of time. It must further be borne in mind that we are dealing with an indeterminate sentence in this matter.

24. Accordingly, I am of the view that there is no merit in the appeal against sentence.

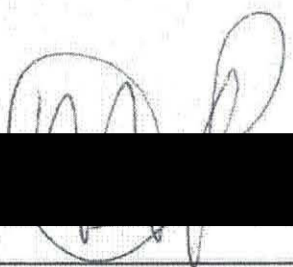
25. In the circumstances I propose the following Order:

25.1 The appeal against both conviction and sentence is dismissed.



W A KARAM
ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED



R MKHABELA
JUDGE OF THE HIGH COURT

Appearances:

Appellant: Adv S Hlazo
Legal Aid SA
Johannesburg Office

Respondent: Adv L R Surendra
Director of Public Prosecutions
Gauteng Local Division