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**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: A231/2025**

**Appeal No: 15/25**

**In the matter between:**

**WITTER JOJO MAILA**

Appellant

**and**

**THE STATE**

Respondent

**Neutral citation:** *State v Witter Jojo Maila*

**Coram:** MANTAME J and GXASHE AJ

**Heard: 12 June 2026**

**Delivered electronically: 17 June 2026**

**Summary: Conviction -Appellant convicted in the regional court- two counts of rape and kidnapping - minor child-automatic right to appeal- conviction and sentence - cautionary rules applicable- single child witness- appellants right to remain silent- duty of rebuttal- failure to testify- Sentence Part 1 schedule 2 - life imprisonment- substantial and compelling circumstances- no misdirection- appeal dismissed**

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**ORDER**

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Appeal against both conviction and sentence dismissed.

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**JUDGMENT**

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**GXASHE AJ**

**Introduction**

[1] The appellant appeals against conviction and sentence. The appellant was arraigned before the regional court, Wynberg, for two counts of rape in contravention of section 3 the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the ‘Sexual Offences and Related Matters Amendment Act’), read with the provisions of section 51(1) the Criminal Law Amendment Act 105 of 1997 (the minimum sentences legislation), assault and one count of kidnapping. The court below acquitted him on the assault charge (Count 3) but convicted him on both counts of rape (Count 1 and 2) and kidnapping

(Count 4). On 28 August 2024, he was sentenced to life imprisonment as prescribed by the minimum sentences legislation in respect of Count 1 and 2, and to five years imprisonment in respect of Count 4. In terms of section 280 of the Criminal Procedure Act 51 of 1977 (the CPA), the magistrate ordered that Count 2 and 4 shall run concurrently with the sentence on Count 1. By virtue of the sentence imposed on Count 1 and 2 by the court *a quo* the appellant exercised his automatic right to appeal as provided for in section 309(1)(a) of the CPA.

[2] The respondent opposed the appeal. Both the appellant and the respondent were legally represented in these proceedings.

### **Factual matrix**

[3] The complainant testified through an intermediary as she was still a minor when she gave evidence. On 17 July 2021 and in the late afternoon, the complainant, AN, who at the time was a six-year-old minor child was on her way home when she met an unknown man. This unknown man was later on identified by the complainant as the appellant in these proceedings. The appellant enquired if she knew Emihle. Before she could respond, he picked her up, threw her on his shoulders and ran away. The appellant took her to derelict area off R300 highway and laid her down on the grass. The appellant made her lie on her stomach and undressed her tights and panties. He proceeded to capture a photo of her bums with his cellular phone and penetrated her vagina with his penis.

[4] The complainant testified that when the appellant inserted his penis in her vagina it was painful. She was terrified to be in the presence of this stranger to the

extent that she pleaded with him to release her so that she could make her way home. At that time, it was getting darker and her anxiety was heightened. At some point, she told the man she wanted to go home because it was getting late.

[5] Instead, the appellant took her to his house where he penetrated her vagina with his penis again. As the pain was unbearable, she cried but no one could hear her. However, after a while, some people knocked at his door and asked whose child she was. The appellant told them that it was his child and they left without making any further enquiries.

[6] The appellant did not release the complainant to go home but the appellant made her sit on the chair and tied her up, stuffed her mouth with a sponge, and tape gagged her. The complainant remained there until the early hours of the morning when the appellant untied her, carried her, and dumped her in a dumping site.

[7] After the ordeal, the complainant ran home and on arrival she made a report to her mother. The complainant's mother immediately took her to the police station to open a criminal case. The police took the matter for investigation and requested her to take them to the house where the incident occurred.

[8] Although the complainant initially pointed the police to the wrong address, she somehow corrected herself and took them to the appellant's house. The police found the appellant still asleep and proceeded to search the house. On being questioned about the incident, the appellant proffered no plausible explanation. At the same time, the complainant was adamant that the appellant was the person who repeatedly raped and kidnapped her for the entire night.

[9] The complainant further identified the chair she was made to sit on when she was tied up. The police further recovered the cellotape that was used to tape gag her. The appellant was then arrested.

[10] The complainant was thereafter taken to Thuthuzela Care Centre for medical examination. Dr. Haffejie examined the complainant and collected the samples and specimens for forensic analysis.

[11] B[...] M[...] is the complainant's mother. In her testimony, she stated that she learnt that the complainant was missing on her arrival from work. Attempts to find her were unsuccessful and she ended up reporting her daughter to the police as missing. However, during the early hours of the morning, AN came home hysterical and reported to her that she was kidnapped by a man in front of the gate. In her report, she also told her that he took her to the R300 open site where she was raped, and later to his house where she was raped once more and then tied up. The appellant inserted a sponge in her mouth, and tape gagged her to silence her speech. At the time, she could see the cellotape marks around AN's mouth and she took her to the police station.

[12] AN later led the police to the house where she was kept hostage and they found the appellant sleeping. AN identified him positively as the perpetrator and pointed out the chair and the rope that was used to tie her up, a sponge which was on the floor, and a drawer where he kept the cellotape. In cross examination, she

was adamant that they did not find an upholstery material from the man's house but a sponge.

[13] Doctor Macky Laurie Matanda (Dr. Matanda) testified on behalf of Dr. Haffejie who examined the complainant on 14 July 2021. Dr. Haffejie could not testify as he was indisposed. Dr. Matanda testified that according to J88, AN was examined by Dr. Haffejie on 14 July 2021 at 10:20. The history was obtained from the complainant's mother that AN might have been sexually assaulted on 13 July 2021 in the evening. At the time of the examination, AN was merely wiped with a cloth and did not bath. It was confirmed that she urinated. During the examination, it was not clear whether a condom was used by the appellant when he performed sexual acts on the minor child.

[14] According to the doctor's testimony, at the time of the examination, AN had not changed her clothes and it was noted that her panty was stained and it was then collected for forensic analysis. The doctor also noted some tape marks on the cheeks and the side of the neck on both sides. No injuries were noted on anal examination. The configuration of the hymen was annular with a notch at 7 o'clock. The vagina and cervix were not examined and there was no discharge noted. The doctor's conclusion was that findings on genital examination are compatible with sexual abuse or assault.

[15] Dr. Matanda then confirmed in evidence that there is redness on the vestibule noted in the report. According to her, the vestibule is part of the external genitalis which covers the labia before you get to the vagina. The redness in this case could have been caused by sexual contact, probably a finger or penis which

touched that area. The notch, according to her, is commonly found on the hymen membrane which can be caused by blunt trauma. Usually, it appears more or less the same as a cleft, the difference is that the notch is more superficial and the cleft is a bit deeper. A notch can be a pre-existing condition but, in this case, she doubted that it is an acute finding because it could have been that the child was born with it and does not link to this case because it is not a fresh finding. The child could have injured herself by touching the genitals.

[16] The doctor noted further that from the schematic drawing, the findings indicated that there was a two-millimeter fresh tear on the perineum. The perineum is the area between the genitals of the woman and the anus. According to her, based on the history given, that tear could have been caused by the attempt to penetrate the vagina.

[17] Dr. Matanda confirmed in evidence that Dr. Haffeje submitted a DNA collection kit with the swab collected on the perinium where there was a tear. The second swab was collected from the vestibule where there was redness.

[18] In cross examination, she confirmed that redness could be caused by irritation or infection. However, when the defence attorney suggested that the injury on the perinium could be caused by an attempt to rape, she clearly indicated that that it may be caused by rape or an attempt to rape. The doctor further stated that redness can be caused by infection, history of previous irritation or allergy only if there was such history and that was not reported in this matter. The doctor also

confirmed that the report does not indicate any of such disclosure by the child and according to the notes they only mentioned an unknown man.

[19] Clarisa Simone Muthakapperang (Ms. Muthakapperang) is a forensic analyst under the employ of the South African Police Services. She analysed the DNA samples in this matter, and she testified on the report she compiled after the process was completed. Ms. Muthakapperang confirmed in evidence that her finding was that the DNA results obtained from reference sample 22DBAJ7291 IN BAG PA4006061951 Maila J and reference sample 22DBAJ3785 in bag PA4006058330 Maila W are the same and they matched the DNA found from the panty. That is confirmed by the DNA report which reads: ‘the DNA sample from the Panty A 19d7AB6658 (PW 3000859625) matches the DNA from reference sample 22DBAJ7291 (Maila j)’.

[20] The appellant did not testify in rebuttal of this evidence but exercised his right-to remain silent.

### **Discussion and analysis**

[21] Counsel for the appellant correctly pointed out that the complainant’s evidence had to be evaluated with caution because she was a single child witness. It is important to note that section 208 of the CPA permits a conviction on the evidence of a single and competent witness. In *R v Mokoena*,<sup>1</sup> the court held that the equivalent provision in the 1917 Act that ‘the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a

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<sup>1</sup> *R v Mokoena* 1932 OPD 79 at 80

conviction . . ., but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect’.

[22] This passage was endorsed in *S v Sauls*,<sup>2</sup> where the court held ‘[t]here is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness...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 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 . . . It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense’.

[23] In *Rex v Manda*,<sup>3</sup> Schreiner JA explained that there is no rule of law that the evidence of a child must be corroborated, but that ‘[n]evertheless the principle has properly been acted upon that the evidence of young children should be accepted with great caution’. The learned judge further held that the dangers inherent in relying on ‘the uncorroborated evidence of a young child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting perhaps, to suspicion’.

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<sup>2</sup> *S v Sauls and Others* [1981] 4 All SA 182; (3) SA 172 (AD) at 180.

<sup>3</sup> *Rex v Manda* [1951] 3 All SA 236 (A) at 239.

[24] From the outset, the magistrate understood that she was dealing with the evidence of a single child witness. In her judgment, she explicitly stated that such evidence should be approached with caution and be weighed against the factors which militate against his or her credibility. She analysed the evidence of the complainant sufficiently and, in particular, the fact that the appellant was a stranger to her. She stated that even though the complainant did not describe her perpetrator when reporting the matter to the police she was able to identify and differentiate his house by the black door. Even though the complainant conceded with the defence during cross examination that the door was silver, the State presented compelling evidence to exclude any doubt that the appellant was the perpetrator.

[25] This was confirmed by the complainant's mother who was in her company when she was leading the police to the house of her perpetrator. As counsel for the appellant correctly pointed out, these offences were committed towards sunset, and it was already dark by the time the perpetrator took AN to his place. He, however, refused to consider AN's evidence that a candle was lit and it provided sufficient light. Moreover, the appellant kept AN captive for a considerable period, and the scene was not moving. The complainant had an entire night to see and identify the appellant.

[26] Of importance is the fact that her mother confirmed in evidence that a rope, cellotape, and a sponge were found in the appellants' house. The cellotape was not visible but the complainant was able to point out the drawer where the appellant put it after gagging her and that is where it was found by the police. Even though the appellant did not testify, it was not denied in cross examination that these items

were found. It was merely insinuated that a piece of upholstery material was found and not a sponge. However, no evidence was presented to support this allegation.

[27] Evidently, the appellant did not refer to an upholstery fabric and what he posed during cross-examination could be an upholstery material which look like a sponge, and it can be expected that a child would not be able to differentiate that from a sponge. Be that as it may, what was put to the witnesses cannot gainsay the State's evidence because even the complainant's mother confirmed in evidence that a sponge was found on the floor. The appellant did not testify and what was put to the witnesses is not evidence because it was never confirmed under oath. Moreover, the complainant's mother noted the cellotape marks on her cheeks and that was corroborated by the contents of the J88 during the evidence of Dr. Matanda. Accordingly, when considering these pertinent issues that were identified by a six-year-old child, how can it be said that the complainant made a mistake because these items were not found anywhere else but from the appellant's house.

[28] In addition, the court *a quo* also considered the medical evidence that was presented by the State during the trial. It can be gleaned from the report that the child did not present any information that she was sexually assaulted. Because of her age, that can be expected. That information was obtained from her mother who was also not sure what happened. However, on examination, the doctor observed injuries and concluded that findings on genital examination are compatible with sexual abuse or assault.

[29] Moreover, the evidence of DNA and findings thereof remain uncontroverted. During the analysis, Ms. Muthakapperang found that the DNA which was found from the complainant's panty matched the accused's DNA. If that does not support the evidence of the complainant, I do not know what else could, because the appellant's DNA could not have miraculously found its way into the complainant's underwear. The only plausible explanation is that he had penetrated her with his penis, which supports the complainant's evidence.

[30] The appellant did not testify or call any witnesses in rebuttal of the State's evidence, save to deny the allegations notwithstanding the overwhelming evidence against him. Of course, he has a right to remain silent but if the State succeeded in showing a *prima facie* case against him, the duty of rebuttal arises. This, however, does not relieve the state from proving its case beyond reasonable doubt. In *Osman and Another v Attorney-General, Transvaal*,<sup>4</sup> the learned Judge Madala J said the following:

'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. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice'.

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<sup>4</sup> *Osman and Another v Attorney-General, Transvaal*, [1998] ZACC 14; 1998 (4) SA 1224 (CC); 1998 (2) SACR 493 (CC) at 22.

[31] 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 that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.<sup>5</sup>

[32] Similarly, the State's evidence called for an answer and the accused election not to testify was to his detriment. In the end, I am of the view that the finding of the court *a quo* was based on the evaluation of the evidence in totality, and I could not find any misdirection herein.

[33] With regard to sentence, the appeal court has to consider whether the magistrate's finding that there are no substantial and compelling circumstances justifying deviation from the prescribed minimum sentence as provided for by Act 105 of 1997 was wrong. From the outset, it is important to note what was said in *Tafeni v S*,<sup>6</sup> while referencing *S v PB*, when the court considers an appeal against a mandatory sentence that:

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<sup>5</sup> *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 SACR 1 (CC).

<sup>6</sup> *Tafeni v S* [2015] ZAWCHC 150; 2016 (2) SACR 720 WCC at 8.

‘... The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.’

[34] In considering whether substantial and compelling circumstances exists in this matter, the magistrate took into account the seriousness of the offences and the gravity thereof, the interests of the community and the appellant’s personal circumstances as enunciated in *S v Zinn*.<sup>7</sup> The magistrate then considered the following mitigating circumstances as placed on record by the defence attorney: that the appellant is 38 years old, a father blessed with two children. His highest standard of education is grade 10. He studied upholstery and electrical engineering to advance his academic pursuits. Before his arrest, he was under the employ of Westlake Upholstery earning about R1800.00 per week. He suffers from chronic asthma and sinusitis. He has been in custody for three years.

[35] It is interesting to note that during arguments, the defence counsel did not address the question whether the appellant’s personal circumstance so stated above, qualify as substantial and compelling circumstances justifying the imposition of a lesser sentence. In fact, reliance was placed on the fact that the appellant is a first-time offender and had been in custody for three years before his sentence. It is worth noting that the court in *Director of Public Prosecutions, North*

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<sup>7</sup> *S v Zinn* 1969 (2) SA 537 (A).

*Gauteng: Pretoria v Gwala and Others* made the following remark about the period of pre- detention referencing to *S v Radebe*:<sup>8</sup>

“In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial.” ... A better approach, in my view, is that the period of detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly in determining ... whether substantial and compelling circumstances, warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997, the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one’.

[35] In addition, it was argued that this was not the worst case of rape despite the provisions of section 51(3) (aA) of the minimum sentences legislation that the apparent lack of physical injury to the complainant does not constitute substantial and compelling circumstances.

[36] The magistrate then proceeded and considered the interests of the complainant and referred to section 28 the Constitution which provides that a child under the age of 18 has a right to be to be protected from being mistreated, neglected or abused. This is apposite to what was once said in *LN v S*<sup>9</sup>:

‘Gender-based violence has regrettably reached pandemic proportions in our country. Despite campaigns and law reform efforts from the government, there is no demonstrable

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<sup>8</sup> *Director of Public Prosecutions, North Gauteng: Pretoria v Gwala and Others* [2014] ZASCA 44; 2014 (2) SACR 337 (SCA) at 16.

<sup>9</sup> *LN v S* [2026] ZAWCHC 7 at 58.

stem in the scourge of violent crimes committed against women and children. We believe an unambiguous message must be sent to offenders who commit this type of criminal activity. That is what section 51 (1) of Act 105 of 1997 requires. That this crime was committed against a thirteen-year-old child also requires that, in considering the issue of sentence, the court must consider the provisions of section 28 of the constitution, namely the right of every child under section 28(1)(d), to be protected from maltreatment, neglect, abuse or degradation- a right which the appellant egregiously violated in this case’.

[37] Evidently, the appellant kidnapped a minor child next to the gate of her home. He lured her into a secluded area to take advantage of vulnerable child. The appellant then violated her sexually on two occasions, thus stripping her inherent right to dignity and to enjoy her childhood to which she is entitled to as a child. Moreover, he kept the child hostage for the night to satisfy his selfish desires. I cannot imagine the torment the child was subjected to when she was forcibly tied up in a chair, gagged with a sponge and cellotape, and ultimately discarded like refuse in a dumping site. This devastating violation devalued her self-worth and foolishly left her vulnerable and exposed to danger. Miraculously, the child found her way back home safely.

[38] Indeed, this is a serious offence which has devastating and negative lasting impact on the child’s right to human dignity and bodily integrity. In this regard, this court aligns itself with what was said by the magistrate that, the community demand sentences which reflect the determination of the courts to protect the vulnerable members of the community and more in particular, children.

[39] The enduring trauma experienced by the complainant is clearly evidenced by the Victim Impact Report compiled for the court below. The report indicates that

the complainant remains highly anxious and hypervigilant, both at home and at school. She continues to harbour a profound fear that the appellant will return to violate her, which has caused her to become reclusive and unwilling to leave the safety of her home. Consequently, her mother was compelled to arrange dedicated transport to escort her to and from school to mitigate her fear of being abducted or harmed again, an administrative and protective measure that has come at great financial expense to the mother.

[40] By way of an *obiter dictum*, this court deems it necessary to address the ongoing welfare of the minor complainant. Given that she continues to harbour profound psychological trauma years after the incident, it is strongly recommended that the relevant state authorities specifically the Department of Social Development, in conjunction with the National Prosecuting Authority's victim support structures conduct a follow-up assessment on her well-being. Continued psychological counselling and support, extended to both the complainant and her mother, are imperative to facilitate their long-term healing and rehabilitation.

[41] After careful consideration of this appeal on sentence, I could not find any factors which justify the court to deviate from imposing life imprisonment in the circumstances. Evidently, the aggravating factors in this matter far outweighed the appellant's mitigating circumstances. As a result, there is no reason for this Court to interfere with the sentences imposed. Accordingly, I am satisfied that the magistrate applied her mind properly and could not be faulted in her findings.

[42] In the result, the appeal against both conviction and sentence are dismissed.

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**GXASHE AJ**  
**ACTING JUDGE OF THE HIGH COURT**

**I agree and it is so ordered:**

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**MANTAME J**  
**JUDGE OF THE HIGH COURT**

**Appearances: RN Sivnarain**  
**For the Appellant**

**Advocate J Van Der Merwe**  
**For the Respondent**