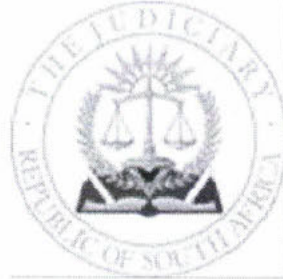


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
HELD AT PRETORIA**

CASE NO: A163/2025

DOH: 19 February 2026

- 1) REPORTABLE: NO
- 2) OF INTEREST TO OTHER JUDGES: NO
- 3) REVISED.

.....
SIGNATURE

25 May 2026
DATE

In the matter between:

MTSHALI SICELO JAMES

Appellant

And

THE STATE

Respondent

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on Caselines. The date of hand down shall be deemed to be 25 May 2026.

ORDER

The following order is granted:

1. The appeal is dismissed
-

JUDGMENT

Bam J, (Lenyai J concurring)

Introduction

1. The Appellant, Mr Sicelo James Mtshali, then a 50 year old male, was convicted of one count of rape as provided for in Section 3 of the Sexual Offences and Related Matters Act¹ read with the provisions of Section 51(1) of the Criminal Law Amendment Act², in the Regional Court for the Regional Division of Gauteng, held in Atteridgeville, on 16 November 2020. He was sentenced to life imprisonment. The appellant enjoys an automatic right of appeal, and he now appeals both the conviction and sentence.
2. Prior to the commencement of proceedings, the state applied for and was granted an order that the proceedings be held in camera; that the complainant testify via a closed-circuit television; and through an intermediary³. The state's

¹ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

² Act 105 of 1997.

³ As per Sections 153, 158, and 170A of the Criminal Procedure Act respectively.

case was led through the testimony of the complainant and her grandmother, as the first report witness. The medical report was admitted into the record by consent, and the Appellant confirmed such consent during his testimony. The Appellant testified in his own defence and called his wife as the second witness. He was legally represented throughout the duration of the trial.

Background

3. As to how the Appellant came to be convicted, the following summary of facts as accepted by the trial court will suffice: During the day on 5 November 2019, the complainant, then a girl of seven years (eight at the time of her testimony) was on her way to visit a friend by the name of Maria. She was called by the Appellant, whom she referred to as Lungelo's father, into his house to help with some cleaning. According to the record, the Appellant's home is near the complainant's grandmother's house, and so is Maria's home. The complainant was from her grandmother's house where she spends time during the day.

4. On arrival at the Appellant's house, the complainant began by mopping the stoep. She was in the kitchen washing dishes when the Appellant called her into his bedroom. There, the Appellant removed her panty and threw her on to his bed with her face up. He pulled out his penis and inserted it into the complainant's vagina and began bumping up and down. On finishing bumping up and down, the complainant realised as she was dressing up that her panty was wet. The Appellant gave her R8 and she left the house.

5. The second witness to testify for the state was Mrs Zulu. She testified that on 7 November, while the complainant was playing with her friends, she observed that she was walking with difficulty in that her legs were sort of apart. She asked the complainant what had happened and she responded that Lungelo's father had raped her. She inspected the complainant's private part and noticed that the area looked reddish and there were bruises as well as vaginal fluids. She took the complainant to the police station and to hospital.

6. According to the doctor's findings: there were multiple abrasions on labia majora and labia minora, laceration on the posterior fourchette and the injuries were said to be in keeping with forced penetration. The doctor further recorded that there was a yellowish discharge from the vagina. The Appellant was arrested on the same day of 7 November and brought to the police station where the complainant pointed him as the person who had raped her. To this I will revert.

Grounds of Appeal towards conviction

7. The conviction is assailed on six grounds. They are:
 - i) The court erred in not properly evaluating the evidence.
 - ii) The complainant was a single child witness.
 - iii) The complainant was unreliable, contradicted her own evidence and was untruthful.
 - iv) The evidence of the first report witness contradicted that of the complainant.
 - v) The trial court erred in rejecting the version of the Appellant

- vi) The trial court erred in rejecting the evidence of the defence witness.

Relevant legal principles

8. It is useful to first set out some of the key legal principles that govern appeals.

In *S v Hadebe and Others*, it was said that:

‘[I]n 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’⁴.

9. In *Makate v Vodacom (Pty) Ltd*, the Constitutional Court, reaffirming the trite principles outlined in *R v Dhlumayo*, noted:

[37] Ordinarily appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial....

[38] In our system, as in many similar systems of appeal, the cold record placed before the appeal court does not capture all that occurred at the trial. The disadvantage is that the appeal court is denied the opportunity of observing witnesses testify and drawing its own inferences from their demeanour and body language. On the contrary, this is the advantage enjoyed by every trial court. Hence an appeal court must defer to the trial court when it comes to factual findings.⁵

10. Perhaps, before going any further, it is convenient to record that the Appellant, or more aptly those responsible for preparing his heads of argument, whilst having isolated the Appellant’s grounds of appeal at the beginning of the heads of argument, chose to advance his case under different topics, which

⁴ (298/94) [1997] ZASCA 86; 1998 (1) SACR 422 (SCA) (29 September 1997), paragraph 11.

⁵ *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13, paragraph 37; *Rugnanan v S* (259/2018) [2020] ZASCA 166 (10 December 2020), paragraph 23.

are not mentioned in the grounds earlier identified. I now deal with the contentions raised under the different headings.

(i) *Swearing in of a witness*

11. The submission is that the trial record does not show that the witness was tested in respect of whether she was aware that consequences may follow upon telling a lie. It is further said that the complainant was not a competent witness and her evidence was inadmissible. The record bears quite the opposite, to demonstrate that the court *a quo* followed the provisions of the Criminal Procedure Act, CPA. In this regard, the court, at the start of the trial, devoted time to establish whether the witness can distinguish between a truth and a lie. She was asked several questions and when the court was satisfied, it went on and admonished her to tell only the truth and the whole truth. This is exactly what the CPA in Section 164 provides for:

‘164 When unsworn or unaffirmed evidence admissible

(1) Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.’

(ii) *Single witness*

12. It is difficult to identify what the complaint is in respect of this ground as all that is set out in the heads of argument is a recital of the legal position as set out in Section 208 of the CPA and case law. A conclusion is drawn that the trial court failed to properly consider and caution itself with respect to the evidence of the complainant who was a single witness. There is no evidentiary basis

relied upon to demonstrate any misdirection by the trial court. See in this regard, the remarks of the court in *S v Gentle*:

'In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence... There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.'⁶

13. In *S v Stevens*, with reference to *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G, the court espoused the correct approach to be followed:

'There 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 [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" It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'⁷ (citations excluded)

(iii) *Child Witness*

14. Once again, it is difficult to establish what the complaint is in respect of this point. Instead, what is set out is a caveat drawn from *S v Hannekom* 2011 (1) SACR 430 (WCC) regarding the need for the court to be cautious where the witness is a child, particularly in charges of sexual misconduct. This ground

⁶ (317/2003) [2005] ZASCA 26; 2005 (1) SACR 420 (SCA) (29 March 2005), paragraph 17.
⁷ (417/03) [2004] ZASCA 70; [2005] 1 All SA 1 (SCA) (2 September 2004), paragraph 17.

concludes with the following statement: 'In search of the hallmark of trustworthiness, a trial court may consider evidence in respect of the first report [witness], as well as medical examination conducted, if any.'

15. I should first note that the medical report in this case was not challenged in any way. I will deal with the evidence of the first report witness in the next point. For now, it is appropriate to address the issue of the complainant as a child witness, even though there is no complaint levelled against her testimony, solely to demonstrate that the circumstances in *Hannekom* are plainly distinguishable from the present case. I commence by drawing from the caveat set out in *S v Viveiros*⁸ on which the court in *Hannekom* relied.

There the court said:

'[W]hilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with; and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach (*S v J* 1998(2) SA 984 (SCA) at 1009B).'

16. In both *Viveiros* and *Hannekom*, the conviction was overturned due to the finding by the Supreme Court of Appeal that the trial court had materially misdirected itself which entitled the court of appeal to interfere with the trial court's findings of fact. In the two cases, the evidence of the complainants, (there was only one in *Hannekom*, whilst there were several in *Viveiros*) was

⁸ (75/98) [2000] ZASCA 95; [2000] 2 All SA 86 (A); 2000 (1) SACR 453 (SCA) (9 March 2000).

said to have material contradictions. A period of three years had elapsed between the date of the incident and the testimony of the witnesses in court.

17. In *Hannekom* the incidents of indecent assault said to have been perpetrated by the father, the appellant, took place when the witness was five. She testified three years later. It further transpired that the parents were divorced, and the witness was said to be close to the mother, whom, the Court of Appeal noted may have harboured resentment against the appellant arising from the divorce. Importantly, there was no evidence to corroborate the witness' version. The trial court paid no regard to any of these issues, notwithstanding that they were all indicators that caution was required when assessing the witness' evidence, hence the Court of Appeal decided to interfere with the trial court's findings of fact.

18. In *Viveiros*, there had been prior clashes between the appellant and some of the complainants. Here too, there was a lapse of a period of three years from the date of the incident to the date of the witnesses' testimony in court. The witnesses could not recall the details of the incident and plainly contradicted themselves. Some of complainants, who were not necessarily children at the time of the incident, were found to be evasive when direct questions were posed to them during the trial. Most importantly, as the Court of Appeal found, the appellant's version was not such that it should have been automatically rejected by the trial court. Several key witnesses were not called by the State, leading to the court drawing adverse inferences against the State. Witnesses

called in support of the complainants' version were discredited, and in some instances, said to be unsatisfactory.

19. None of these issues arise in the present case. Contrary to the situation in the two cases, the complainant testified a year after the incident. Two independent pieces of evidence accepted by the trial court corroborated the complainant's version in material respects. These were the evidence of the first report witness, and the medical report. As a matter of record, the Appellant was found to be a poor witness and so was his wife. Much of the evidence put to the complainant during her cross examination was new, according to the court *a quo*. Hence the magistrate concluded that he was making up his case as he went along.
20. The record further shows that the court was alive to the fact that it was dealing with the evidence of a single witness and in weighing the evidence, it critically sought and identified those aspects which militated against the admission of her evidence. See in this regard, the discussion in paragraph 22 of this judgment. In the end, the court concluded that the Appellant's version could not be reasonably probably true and rejected it.

(iv) First Report Witness

21. The submission in advancement of this point is that there was some contradiction between the complainant's version as to the date when the report was first made to the grandmother, the first report witness. According to the record, the complainant testified that the grandmother saw her walking

with difficulty on the same day of the incident, on 5 November, while, according to the grandmother's testimony, she noticed that the complainant was walking with difficulty on 7 November. On this date, the complainant was taken to the police station and to hospital where she was examined. There is a further complaint which questions why an alarm was not raised if indeed the complainant was raped on 5 November and slept at her mother's house on 5, and 6 November, with parents, siblings and cousins.

22. The record suggests that the grandmother looks after the complainant during the day while her parents are at work. It is not clear from the record whether the reference to during the day means after school or the entire day. But the disparity regarding the dates was clearly identified by the court and correctly, in our view, the court recognised that the complainant was mistaken because the medical report suggests that she was seen by the doctor only on the 7th, which is the date, according to the first report witness, she had seen the complainant walking with difficulty. On the same day, she was taken to the police and to the doctor.

23. As to the insinuation that appears to question whether the complainant was indeed raped, on 5 November, there are two answers to this. The first is this, the appellant consented to the admission of the medical report. It is not open to him to challenge whether the complainant was indeed raped. I have already dealt with the incorrect date mentioned by the complainant in her testimony.

24. I may further note that there is no requirement that ‘the evidence of a single witness must be free of all conceivable criticism. The requirement is merely that it should be substantially satisfactory in relation to material aspects or be corroborated⁹’. The trial court, having observed and listened to the complainant during her testimony, notwithstanding the mistake about dates, found her to be an exceptionally good witness, intelligent, and with good memory. After weighing all the evidence before it, the court concluded that her evidence was substantially satisfactory in relation to the material respects. I have already mentioned that the submission made on behalf of the Appellant on this point makes no mention that the court misdirected itself.

(v) Failure to report at the first available opportunity

25. In advancement of this point, the law as set out in Section 59 of the CPA is set out. The section reads:

‘In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.’

26. It is then stated that the complainant did not report the incident to anybody. Only when prompted by the grandmother did she explain that the Appellant was the cause. A further statement is made that the evidence does not suggest that the Appellant made any threats towards the complainant and that she testified that she did not report the incident as she was afraid of her

⁹ *Rugnanan v S* (259/2018) [2020] ZASCA 166 (10 December 2020), paragraph 23.

grandmother. There is no attack that the court misdirected itself in any manner, especially, considering the provisions of Section 59.

(vi) Onus on the appellant

27. In respect of this point, it is said that there is no onus on an accused person to prove his innocence. There is further reference to case law. A conclusion is then drawn that the appeal in respect of conviction ought to succeed based on the following factors:

1. The complainant was not a competent witness.
2. The trial court did not apply the cautionary rules in respect of a single witness who is also a child.
3. The evidence of the first report witness did not corroborate the version of the complainant in respect of the date of the incident.
4. The complainant did not report the incident at the first available opportunity to her grandmother, parents or aunt.
5. The reason for not reporting was fear that the grandmother would assault the complainant.
6. The method followed by the police in having the Appellant pointed out by the complainant suggested the answer to the complainant.

28. While I am satisfied that there is no basis for any of the conclusions drawn on behalf of the Appellant, I take the liberty to make a single point in respect of very last point in paragraph 27, even though it is not necessary to do so. There is no substance to the point. While it is not clear what is being referred to with the words, 'the method followed by the police which suggested the answer to the complainant', I note that the Appellant's identity was never placed in

dispute before the trial court. In addition, the Appellant, in what may be seen to be a contradiction to Ms Mtshali's evidence, confirmed that the complainant had been visiting their home to see Ms Mtshali.

Grounds against sentence

29. In advancing the argument against sentence, it is submitted that the Appellant is 51 years old, married with three children, and had no previous convictions. He spent a year in custody while awaiting trial and he will be 76 by the time he becomes eligible for parole. The point is made that the trial court erred in not finding that there were substantial and compelling circumstances and that a sentence of life imprisonment is disproportionate given the circumstances of the case.

30. The principles dealing with the appellate court's interference with the exercise of the trial court's discretion on sentence are captured in *S v Packereysammy*.

There it was said:

'[5] Before discussing the above submissions it is necessary to restate briefly the well-known approach to be adopted by a court of appeal when dealing with the question of sentence. Punishment is pre-eminently a matter for the discretion of the trial court. The court on appeal is not to erode such discretion; on appeal no general right exists to interfere with a sentence imposed by the trial court. It will only interfere if the discretion has not been judicially and properly exercised. This will be so only where the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate.'¹⁰

¹⁰(48/2003) [2003] ZASCA 146; 2004 (2) SACR 169 (SCA) (28 November 2003), paragraph 5; also, *Mdlongwa v S* [2010] JOL 25668 (SCA), paragraph 29.

31. I have noted the personal circumstances of the Appellant. It is however not clear what the Appellant means by referring to 'the circumstances of the case'. So far, the Appellant has not pointed this court to any misdirection nor irregularity committed by the trial court. Nor do we understand the Appellant to suggest that there are substantial and compelling circumstances from the fact that he was 51 at the time of sentencing, married with three children, with no previous convictions, had been in custody for one year prior to sentencing and will be 76 when he is eligible for parole.

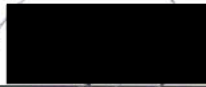
32. The record suggests a singular absence of remorse and regard for the plight of the complainant -- a seven-year-old at the time of the offence -- her family and the lifelong scars she is likely to carry. There is no basis for this court to interfere with the exercise of the court *a quo's* discretion.

Conclusion

33. Based on all the reasons set out in this judgment, the appeal must fail.

Order

The appeal is dismissed.



BAM J

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

I agree:



LENYAI J

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

Date of Hearing:

19 February 2026

Date of Judgment:

25 May 2026

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