IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: A61/24
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE 01 July 2026
SIGNATURE

In the matter between:

G[...] M[...] **APPELLANT**

vs

THE STATE **RESPONDENT**

This judgment was delivered by uploading to CaseLines on 01 July 2026.

CORAM: RATSHIBVUMO AJP *et* VENTER AJ

ORDER

1. Condonation for the late filing of the appeal is granted.
2. The appeal against the conviction and sentence is dismissed.

JUDGMENT

VENTER AJ

Introduction

[1] This is an appeal which emanates from the conviction and sentence of the appellant by the Regional Court for the Regional Division of Mpumalanga on a charge of rape of a 7-year-old girl (FD). According to the charge sheet, this incident occurred during February 2018 at FD's home in Motlatse Trust. The boyfriend of FD's mother, the appellant, was identified as the perpetrator.

[2] The appellant was convicted in the Regional Court held in Mhala (the court *a quo*) on 02 March 2020 on a single count of rape, in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA). He was sentenced to 'life imprisonment' as provided in section 51(1) and Part I Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA) on 07 July 2020.

[3] In terms of section 309(1) of the Criminal Procedure Act 51 of 1977 (the CPA), once the regional court imposes a sentence of life, the appellant is entitled to an automatic right of appeal to a full bench of the High Court.

[4] Additionally, the appellant seeks condonation for the late filing of the appeal.

Condonation

[5] From the papers it appears that the court *a quo* condoned the late filing of the 'Notice of Appeal' in compliance with section 309(2) of the CPA.

[6] The appellant submitted an affidavit in support of his condonation application, in which the grounds are set as follows:

(a) Immediately upon being sentenced, he instructed his then attorney to pursue an appeal. The attorney let him down by failing to file a notice with the clerk of the court and failed to request transcripts of the proceedings. The

notice of appeal was only filed on 04 August 2024. He has not had contact with that attorney since.

(b) The appellant then consulted a paralegal during February 2025 in prison who assisted him to complete a Legal Aid application form. In September 2025, he was visited by Mr Kekana from Legal Aid South Africa, who informed him that he had been instructed to pursue his appeal. Another notice of appeal was filed with the Registrar of this Court on 16 March 2026.

(c) Although the appeal is late by 5 years and 5 months, he says he did not personally have any part in delaying its prosecution.

(d) He submits that his appeal has reasonable prospects of success.

[7] The Constitutional Court has, in the past, taken a dim view of parties disregarding Court Rules and generally required a reasonable explanation for any delay before condonation can be granted. In *Grootboom v National Prosecuting Authority*[1], the Constitutional Court held at paragraph 23:

> "It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation of the non-compliance with the rules or the court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."

[8] In *Ndlovu v The State*[2], the court went on to state:

> "However, the sufficiency of the explanation given for the delay is not wholly determinative of whether condonation should be granted. The pertinent question to consider is whether it would be in the interests of justice for condonation to be granted."

[9] In *Brummer v Gorfil Brothers Investments*[3], the Constitutional Court explained:

> "The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the

[1] [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) para 23
[2] [2017] ZACC 19 para 32
[3] [2000] ZACC 3 para 3

effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."

[10] The principles governing the considerations to be taken into account in granting an application for condonation are clear. Condonation is not a formality or simply there for the taking. A good cause must be shown for the applicant's failure to act timeously in prosecuting the appeal. To establish such a cause, the applicant must address the court on: the reasons for late filing, period out of time, the efforts made to file as soon as possible, albeit late, the seriousness of the matter, the interests of justice, and any prejudice suffered and the prospects of success in the consideration of the appeal. Even if the reasons for late filing are unsatisfactory on their own, convincing prospects of success on appeal could favour the granting of condonation.

[11] The court cannot blind itself to the difficult situation the incarcerated persons find themselves in, having restricted communication with family and only limited visitation interactions. They have difficulty engaging with legal representatives and have limited time for consultation. They are totally dependent on their legal representatives to ensure compliance with the enrolment of their appeal matters. Obtaining transcripts, on the other hand, often causes considerable delays. It cannot be denied that the current matter is serious in nature and has severe consequences for the appellant.

[12] It is therefore not surprising that the courts often favour granting condonation for late filing of appeal matters. Under the circumstances, condonation for late filing of the appeal is granted.

Grounds of appeal

[13] The appellant contends that the court *a quo* erred and misdirected itself as follows:

Ad Conviction:

a) Allowing inadmissible/hearsay evidence was at issue when the J88 medical report was accepted, even though the author of the J88 did not testify in

court. The content of the J88 was also said to be contradictory, unreliable and to contain multiple errors.

b) In finding that the victim was raped on more than one occasion, since there was only a single charge;

c) In not considering contradictions in the evidence of the complainant to that of her sister.

d) In evaluating the evidence implicating the appellant in isolation and not examining probabilities on both sides when concluding to accept evidence presented by the state over that of the appellant.

Ad Sentence:

(a) The court *a quo* misdirected itself in finding that the appellant's personal circumstances were not exceptional. This is not a requirement within the Act or from case law to qualify as substantial or compelling. The permanent physical disability of the appellant was not given due weight.

(b) The court imposed life imprisonment, partially influenced by the conclusion that the victim was previously raped by the appellant.

[14] The respondent filed no opposing papers despite having received notice of the appeal on 17 March 2026.[4] It is unclear as to why the prosecution did not respond to this appeal.

[15] This Court decided to exercise its discretion by disposing of the appeal without hearing oral argument, in terms of s19(a) of the Superior Courts Act, 2013 (Act 10 of 2013).[5]

Background

[16] The salient facts are as follows. Both the complainant and her younger sister testified through an intermediary and the CCTV system[6] some two years after the

[4] See the date stamp by the office of the Director of Public Prosecutions – Mpumalanga, on the Notice of Appeal.

[5] s19 (Act 10 of 2013): Powers of court on hearing of appeals. 'The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law—
(a) dispose of an appeal without the hearing of oral argument;

incident. The victim was seven years old at the time of the incident. She and her sister, then aged five, came home after school one afternoon. The complainant changed into a T-shirt, a skirt, and a pair of panties. She took a blanket and made a bed on the floor where she then slept. She was woken up by the appellant, whom she considered her stepfather. He had just come back from his brother's place at the time. He undressed her panties, took off his trousers and took out his penis and inserted it into her vagina. She felt pain. The appellant gave her little sister money and instructed her to stand by the door to watch for their mother. When he finished, she saw blood coming from her vagina.

[17] FD's five-year-old sister (ST) testified that the appellant was at home when FD changed clothes and went to lie on the floor. Using the anatomically correct dolls in the intermediary room, she demonstrated to the court how the appellant took off FD's clothing and took out his private part. He lay on top of her and inserted his private part into her front private part, making up-and-down movements.

[18] She further testified that when their mother, Ms CN, came back from work, she told her what had happened, saying the complainant was in pain. She also mentioned that the appellant gave her (ST) money and instructed her to be a lookout and not to disclose what she observed. Ms CN then confronted FD, who confirmed the report. She then inspected FD and noticed blood both on her genitals and in the basin into which she urinated. She also observed 'sticky things' on her vagina, which was stretched. She then confronted the appellant, who denied the allegations. Ms CN then summoned the appellant's brother. The appellant's brother also confronted him, and he again denied the accusations. The appellant's brother asked Ms CN not to report the incident to the police because he was the one providing for the family. Ms CN did not report the matter to the police or take the child for any treatment. She, however, reported the incident to TM.

[19] Ms MM, who raised Ms CN as her own daughter, testified that she received a call from her daughter KM about the incident. Because she was working away from

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[6] The court *a quo* did this in accordance with the provisions of sections 170A and 158 of the CPA.

home, she was only able to return home about three to four days later. She was annoyed that Ms CN had not taken FD to the doctor. She also reprimanded her for not informing the biological father of the child about the incident. Ms CN's excuse was that she did not have airtime. Together with other females in the community, Ms MM inspected FD's genitals and saw blood on the panty and some sticky substance on the vagina. FD also urinated frequently. She then took her to the police, who took them to the clinic.

[20] Ms MM's daughter, KM, testified about an incident of 12 February 2018, when she met FD in the morning, returning home from school. FD walked with her legs spread apart as if she were in pain. After dropping her own child at the crèche, she went to her to enquire what the matter was. FD made a report to her. KM reported to her mother, Ms MM, that Ms CN's daughter was raped. There is a dispute about the date she made this report to her mother, but nothing much comes of it.

[21] The court *a quo* admitted the J88 medical examination report and relied on its contents, which were presented through the viva voce evidence of Dr Moagi. He was not the medical practitioner who examined the patient or the author of the J88. Dr Moagi interpreted the content of the J88 and provided his expert opinion based thereupon. He testified that it is not normal for a 7-year-old girl to bleed from her vagina (par 20 of the J88). Girls only start menstruation at the age of 13-14 years old.

[22] The appellant denied the allegations of rape. He testified that Ms CN and her children fabricated these allegations against him because they disapprove of his relationship with her. Ms MM schooled the two young kids into accusing him of raping FD. According to him, Ms MM and others caused the injury to FD's genitals to give credence to the accusations.

[23] Turning to the sentence. The State and the defence, by mutual agreement, submitted the pre-sentence and victim impact reports, both compiled by social workers. Both the State and the defence addressed the court from the bar and presented no *viva voce* evidence relating to the sentence.

Ad Conviction.

[24] Section 309(3) of the CPA provides:

> 'The Provincial or Local Division concerned shall thereupon have the powers referred to in section 304 (2), and, unless the appeal is based solely upon a question of law, the Provincial or Local Division shall, in addition to such powers, have the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence: Provided that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to such Division that a failure of justice has in fact resulted from such irregularity or defect.'

[25] Section 304(2)(a) provides:

> 'If, upon considering the said proceedings, it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed, and shall thereupon lay the record of the proceedings and the said statement before the court of the provincial or local division having jurisdiction for consideration by that court as a court of appeal: Provided that where the judge concerned is of the opinion that the conviction or sentence imposed is clearly not in accordance with justice and that the person convicted may be prejudiced if the record of the proceedings is not forthwith placed before the Provincial or Local Division having jurisdiction, the judge may lay the record of the proceedings before that court without obtaining the statement of the judicial officer who presided at the trial.'

[26] It is trite that in criminal proceedings the State bears the burden of proof to establish the guilt of the accused beyond reasonable doubt. There is no reverse onus on the accused, and he will be entitled to a discharge if he presents an exculpatory explanation, which is reasonably possibly true in the holistic consideration of facts.

[27] This principle in law has been succinctly and elegantly stated by Nugent JA in *S v Mbuli*[7] as follows:

> It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (*R v Difford* 1937 AD 370 at 373, 383). In *S v Van der Meyden* 1999 (2) SA 79 (W), which was adopted and affirmed by this Court in *S v Van Aswegen* 2001 (2) SACR 97 (SCA), I had occasion to reiterate that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true.

[28] It is imperative that the court, in assessing the evidence, consider all evidence holistically to determine whether the guilt of the accused is proved beyond a reasonable doubt. This does not mean that breaking down the evidence into its component parts is not a useful aid to a proper evaluation and understanding thereof. In *S v Shilakwe*[8], the Supreme Court of Appeal approved of the following dictum:

> "But in doing so, (breaking down the evidence in its component parts) one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees."

[29] The quote from the judgment of Malan JA in *R v Mlambo*[9] is also apposite:

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[7] 2003 (1) SACR 97 (SCA) at para 57.
[8] 2012 (1) SACR 16 (SCA) at para 11.
[9] 1957 (4) 727 (AD) at 738 A-B

'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of doubt when it may be said to exist must not be derived from speculation but must rest upon reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.'

[30] It is settled that a court of appeal is bound by the factual findings of the trial court, especially where those findings depend on the credibility of the witnesses who testified. It is only in circumstances where it is clear that the court *a quo* misdirected itself or was clearly wrong that a court of appeal is duty-bound to interfere and re-evaluate the facts.[10]

Hearsay evidence.

[31] The appellant contends, as a ground of appeal and the main bone of contention, that the court *a quo* admitted hearsay evidence in the form of the J88 medical report.[11]

[32] During the trial, the State referred to *Maemu v S,*[12] which, it claimed, permits a doctor to read into the record the contents of a J88 compiled by another. The effect thereof would be that the content of the J88 would then become admissible evidence. It appears this argument convinced the court to accept the J88 as evidence.[13]

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[10] In *S v Hadebe*, 1997 (2) SACR 641 (SCA) at 645 e - f the court re-emphasised the following principles applicable to appeals:

"Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, 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".

[11] Case line Vol 3 076-173 line 2-13.

[12] 147/11) [2011] ZASCA 175 (29 September 2011).

[13] Case line 076-235 line 5-8 and 20-22; 076-249 line 3; 076-235 line 9; 076-239 line 8.

[33] On reading *Maemu*, the SCA did not make any pronouncement on the admissibility of the J88 evidence. It did, however, note that the content was inconclusive regarding penetration, which implies the SCA considered it. The SCA also indicated that the doctor testifying could not confirm whether the 'cleft' injury noted in the report was fresh, most likely because he was not the one who examined the patient. There were a number of other shortcomings in the state's case, which led to the setting aside of that conviction. In my view, the State's assumption that *Maemu* serves as authority for the inclusion of a J88 content read into the record by a different doctor, simply because this practice was not criticised by the SCA, is misleading and far-reaching. The reference to *Maemu* was simply a matter of convenience, but the principle he sought to extract from that case was misinterpreted.

[34] It is common cause that Dr Moagi did not personally examine the patient and was not the author of the J88. There were no issues raised regarding his credibility. The issue was rather taken in respect of the recorded content of the J88 because there was a correction made in par 10 'posterior fourchette'. The word 'mild bleeding' was deleted and indicated 'error'. The defence pointed out further concerns with the recordings of the J88 content, which they argue are confusing and indicative of errors. The further contention was that Dr Moagi could not confirm the accuracy of his colleague's recordings and observations; therefore, the content amounted to hearsay.

[35] In terms of s 3(4) of the Law of Evidence Amendment Act, 1988 (Act 45 of 1988) 'hearsay evidence means':

> "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence".

[36] To properly introduce the document into evidence, the state needed to call the author to testify to the originality, authenticity and the truth of the content thereof. The failure to call the author leaves this document in a state of unconfirmed hearsay. The other options available were that the parties may submit the document by mutual agreement as an exception to the hearsay rule with reference to section 3(1)(a) of the Law of Evidence Amendment Act, 1988 (Act 45 of 1988).

The State could have launched a substantial application to include hearsay evidence under that section. None of the latter two options was employed. There was no adjudication by the court *a quo* of section 3 of Act 45 of 1988 to admit it, in the interests of justice.[14]

[37] Because the author of the J88 was never called and subjected to cross-examination, its veracity cannot be authenticated, which bears directly on the evidential weight the court may attach to it. Dr Moagi may interpret the observations and findings recorded in the document, but only on the assumption that they were accurately recorded. He could not confirm their accuracy. Without such, the content of the J88 became irrelevant, and there is was no need for the court *a quo* to discuss it any further. For this reason, it is not necessary to evaluate other concerns raised by the appellant in respect of the errors contained in the J88.[15]

[38] In *Fortuin and Another v S*[16] the court of appeal was seized of a very similar situation in which a different doctor to the one who compiled the J88 report was called to testify. Saldanha J held as follows:

> "I should point out that the evidence of the J88 report was, in my view, not properly considered by the court a quo as hearsay evidence which it was both in fact and in law. Neither the State nor the regional magistrate, and most of all the defence, failed to deal with it as hearsay evidence in terms of the prescripts of Section 3 of the Law of Evidence Amendment Act 45 of 1988. The State merely sought to have the J88 admitted as an exception to the best evidence rule."

[39] Because the court *a quo* erred in failing to rule the J88 inadmissible hearsay, the effect thereof is that its acceptance of the previous penetration evident from the J88,[17] that the hymen was torn, and that something had been inserted into the

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[14] See *S v Kapa* 2023 (1) SACR 583 (CC).
[15] In *S v Shackell* (380/1999) [2001] ZASCA 72 (30 May 2001); 2001(2) SACR 185 (SCA) par 27, the SCA held the view that the State failed to call the author of a document which was never properly introduced as evidence. The expert evidence presented by the doctor who testified was unfounded because it was based on an unproven document that should have been disregarded.
[16] (A17/2024) [2024] ZAWCHC 136 (5 September 2024) at para 52.
[17] Case line 076-235 line 5-8.

vagina,[18]was based on inadmissible hearsay, which should not have been accepted. The court *a quo* found supporting evidence from KM, who saw the child walking with discomfort about a week earlier, which led it to the conclusion that there was a previous penetration event. It needs to be emphasised that the court rejected the report made to KM as inadmissible. A person cannot be convicted of an offence he/she was not charged with.

[40] Although there may have been confusion regarding the date on which the complainant was raped, the court did not conclude that there had been a second charge of rape, as the appellant submits in his arguments. Moreover, the errors flowing from the conclusions in the J88 and possible confusion on the dates are not the apex consideration on which the conviction was based. Although the court *a quo* admitted inadmissible evidence in the form of the J88 report, that alone does not render the judgment unsound. The medical report was meant to corroborate evidence largely provided by the complainant and other witnesses who observed her and testified to what they saw. The removal of the J88 report does not remove or negatively impact their evidence.

Evidence supporting penetration.

[41] The value of Dr Moagi's evidence lies in his expert opinion. His qualifications, experience and expert status were not challenged. To the extent that his opinion relates to a general approach, not linked to any specific case or those facts *in casu* which are not in dispute, there is nothing wrong in attaching the necessary weight to his expert views. For example, there was no misdirection by the trial court to accept the general statement that it is abnormal for a girl aged seven years to bleed from her vagina unless there was some unnatural cause. Girls typically start their menstrual cycles at ages 13-14. The factual basis for finding that the complainant bled through her vagina is found in the evidence of several witnesses, including the complainant, her mother and Ms MM. The appellant also admitted and/or could not dispute that there was blood in the complainant’s vagina.

[18] Case line 076-239 line 8-11.

[42] In assessing the evidence of the witnesses, the court *a quo* cautioned itself about the dangers of accepting the evidence of a child witness and of treating the victim as a single witness, invoking a double-cautionary approach.[19] The court evaluated each witness systematically and concluded that the evidence, supported by external corroboration and measured against the totality of the evidence, is reconcilable with the objective facts and contains no improbabilities that would militate against it. In *Woji v Santam Insurance Co Ltd,*[20] the appeal court noted factors that courts must take into account to conclude that a child's evidence is trustworthy, without creating a closed list. In this regard, the court held: 'trustworthiness . . . depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. . . . his capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs", while the capacity of narration or communication raises the question whether the child has the "capacity to understand the questions put, and to frame and express intelligent answers." As pointed above, the court *a quo* was alive to all these.

Ad Sentence:

[43] I now turn to the second part of the appeal, which lies against the sentence of life imprisonment. It is trite that rape of a child under the age of 16 years falls within the ambit of Part I Schedule 2 offences[21], which invokes the provisions of section 51(1) of the CLAA, which obligates the imposition of life imprisonment in case of conviction.[22]

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[19] Case line 076-230 line 3 to 076-235 line 1.
[20] 1981(1) SA 1020 (A) at 1028 B-D.
[21] In Part I of Schedule 2 of the CLAA, rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is defined as;
(b) where the victim—
(i) is a person under the age of 18 years; (only relevant portions quoted)
[22] Section 51(1) of the CLAA reads as follows:
section 51(1) the CLAA '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.'

[44] The legislation permits departure from the prescribed sentence only if certain criteria are satisfied. In terms of section 51(3)(a) of the CLAA, the court is to impose the prescribed sentence unless there are substantial and compelling circumstances which would justify the imposition of a lesser sentence. Section 51(3)(a)(A) limits what can be classified as substantial and compelling circumstances, specifically in rape convictions.[23]

[45] The leading authority in all sentence considerations where s 51(1) and (2) of the CLAA find application is: *S v Malgas*[24] where the court summarised the jurisprudence at hand and determined that:

> 'par A: Section 51 has limited but not illuminated 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).
>
> par 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.
>
> Par 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 efficiency of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
>
> Par 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."

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[23] Section 51(3) of the CLAA reads: (3)(a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.
(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.

[24] 2001(1) SACR 469 (SCA) at para 29.

[46] It is settled law that the powers of the court of appeal to interfere in sentence are limited. In *S v Rabie*[25] the following was stated by Holmes JA :

> "In any appeal against sentence, whether imposed by a magistrate or a Judge, the court hearing the appeal - (a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and; (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".

[47] In *Malgas*[26] the Court applied a broadened scope for the interference and held that:

> "However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned".

[48] The approach adopted to an appeal against sentence has been endorsed by the Constitutional Court in *S v Bogaards*[27] where the following is stated:

> "Ordinarily, sentence is within the discretion of the trial court. An appellate court's power to interfere with sentence imposed by courts below is circumscribed. 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. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."

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[25] 1975 (4) SA 855 (A) at 857 D – E.
[26] *Supra* at 478 D-G.
[27] 2013 (1) SACR 1 (CC).

[49] In *Malgas,*[28] Marais JA, in discussing the meaning of the phrase 'substantial and compelling circumstances' said,

> 'The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once the court reaches the point where unease has hardened into a conviction that an injustice will be done, that will only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust, or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.'

[50] The main grounds of appeal in respect of sentence submitted by the appellant were that the court *a quo* had misdirected itself in finding that there was nothing exceptional about the personal circumstances of the appellant, usurping something exceptional as a requirement to satisfy substantial and compelling circumstances and that the court's finding of previous penetration influenced it not to deviate from imposing life imprisonment.

[51] I turn to the appellant's personal circumstances. It was submitted that he was a first offender, 31 years old, unmarried, and had a nine-year-old child. He was born with a walking disability and uses crutches to aid him in walking. As a result of this disability, he received a disability grant from the Department of Social Development. His child lived with the biological mother, who received a child support grant. The appellant financially contributed to the child's maintenance from his disability grant. Academically, he passed grade three but was forced to leave school due to financial hardship. He was raised by his eldest sister after they lost both their parents in short succession. Regarding the crime he was convicted of, he maintained his innocence.

[52] The court *a quo* indeed concluded that his personal circumstances were not exceptional. It added that his disability does not leave him incapable of fending for himself. This must be read in conjunction with the conclusion that there is nothing that

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[28] *Supra* at para 22.

stands out as substantial and compelling to deviate from imposing the prescribed sentence.

[53] In *Vilakazi v S*[29] Nugent JA said,

> 'In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of "flimsy" grounds that Malgas (supra) said should be avoided.'

[54] The court *a quo's* approach should be weighed against the fact that the appellant did not testify in mitigation to take the court into his confidence. During the sentencing phase and in his interview with the probation officer, the appellant continued to maintain his innocence. The court *a quo* correctly found that he showed no remorse or penitence and took no responsibility for his actions.[30]

[55] Whereas it is true that the legislation requires substantial and compelling circumstances, rather than exceptional circumstances, to deviate from the prescribed sentences, the court *a quo's* finding should be read in context. Upon reading the analysis of the court a quo on this aspect, it is clear that the court could find no substantial and compelling circumstances warranting a deviation from the sentence of life imprisonment. Reading from the triad consisting of the crime, the offender and the interests of society prescribed in *Rabie supra*, we are in agreement that there are no

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[29] [2008] 4 All SA 396 (SCA) at para 58.

[30] See *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 13 where Ponnan JA stated as follows: "There is moreover a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing of the conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to a valid consideration, the pertinence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to have exist cannot be determined. After all, before a court can find an accused person to be genuinely remorseful, it needs to have an appreciation of inter alia: what motivated the accused to commit the deed, what has since provoked his or her change of heart; and whether he has a true appreciation of the consequences of those actions .... "

substantial and compelling circumstances that justify the imposition of a sentence less than life imprisonment. There is therefore no misdirection on the part of the trial court.

[56] This court aligns itself with the views expressed by the SCA in *Maila v S*[31] when it said,

> "Taking into account *Jansen* (*S v Jansen* 1999 (2) SACR 368 (C) at 378G-379B), *Malgas, Matyityi, Vilakazi* and a plethora of judgments which follow thereafter as well as regional and international protocols which bind South Africa to respond effectively to gender-based violence, courts should not shy away from imposing the ultimate sentence in appropriate circumstances, such as in this case. With the onslaught of rape on children, destroying their lives forever, it cannot be 'business as usual'. Courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences. Reasons such as lack of physical injury, the inability of the perpetrator to control his sexual urges, the complainant (a child) was spared some of the horrors associated with oral rape, which amount to the acceptance of the real rape myth, the accused was drunk and fell asleep after the rape, the complainant accepted gifts (in this case, sweets) are an affront to what the victims of gender-based violence, in particular rape, endure short and long term. And perpetuate the abuse of women and children by courts. When the Legislature dealt some of the misogynistic myths a blow, courts should not be seen to resuscitate them by deviating from the prescribed sentences based on personal preferences of what is substantial and compelling and what is not. This will curb, if not ultimately eradicate, gender-based violence against women and children and promote what Thomas Stoddard calls a 'culture-shifting change."

[57] It has been said many times that rape is a serious, cruel, and heinous offence. It is degrading, humiliating and a brutal invasion of a person's most intimate privacy.[32] A girl losing the innocence of her virginity through forced intercourse by the person she considers to be her father leaves profound and distressing emotional scars. As her father figure, he was in an authoritative position and took advantage of the trust position he had over her. His conduct was reprehensible, which in no doubt called for a strong sentence.

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[31] (429/2022) [2023] ZASCA 3 (23 January 2023) par 59.
[32] See *S v Chapman* 1997 (2) SACR (SCA) at 5A-D; *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) 577 G-1).

[58] The sexual abuse and rape perpetrated within the confines of a family unit are notoriously underreported and frequently remain concealed. This concealment is often exacerbated by the conduct of the family members associated with both the perpetrator and the victim who, through influence, pressure, intimidation, or coercion, compel or persuade the victim to suppress disclosure of the abuse and to refrain from reporting the offences to the relevant authorities.[33]

[59] Having found no misdirection by the court *a quo*, we are satisfied that it balanced the mitigation against the aggravation factors. There is therefore no reason to interfere with the sentence it imposed.

Order

[60] In the result, the following order is granted:

1. Condonation for the late filing of the appeal is granted.
2. The appeal against the conviction and sentence is dismissed.

P VENTER

ACTING JUDGE OF THE HIGH COURT

I agree.

TV RATSHIBVUMO

ACTING JUDGE PRESIDENT

[33] See news24 article, https://www.news24.com/health24/news/public-health/rape-within-families remains-under-reported-20150821-2.

FOR THE APPELLANT:	**ADV. M V Kekana**
INSTRUCTED BY:	**Legal Aid Board South Africa** **MBOMBELA**
FOR THE RESPONDENT:	**NO APPEARANCE**
DATE OF HEARING:	**24 APRIL 2026**
DATE OF JUDGMENT:	**01 July 2026**