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REPUBLIC OF SOUTH AFRICA



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

CASE NO: A11/2025

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: NO

DATE 21 AUGUST 2026

SIGNATURE

In the matter between:

NYATHI REPLY

Appellant

And

THE STATE

Respondent

Coram: **TEFFO J AND KEKANA AJ**

Heard on: **21 MAY 2026**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is electronically circulated to the parties/their legal representatives by

*e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be **21 August 2026**.*

JUDGMENT

KEKANA AJ (TEFFO J CONCURRING)

Introduction and background

[1] This is an appeal against the conviction and sentence imposed by the regional court at Pretoria. The Appellant was sentenced to life imprisonment on 29 July 2024. He therefore has an automatic right to appeal in terms of section 309 of the Criminal Procedure Act 51 of 1977.

[2] The Appellant was found to have had unlawful and intentional sexual intercourse with the complainant, Ms M[...] B[...], to whom he was separated, and the two had four children together at the time of the incident.

Submissions by parties

[3] In his argument, the Appellant attacks the credibility of the complainant's evidence that:

- 3.1 she testified that he used the flat side of the knife to pull down her pants, but contradicted herself thereafter when she testified that the appellant placed the knife on her chest and used his other hand to undress her pants;
- 3.2 she did not complain of rape when she reported to Mr S[...];
- 3.3 she did not complain of rape when she reported to Ms S[...] N[...];
- 3.4 she did not complain of rape when she reported to the taxi marshals who came to her assistance and apprehended the Appellant;
- 3.5 she did not complain of the rape to the Tshwane Metro Police officers at the time they apprehended the appellant and took him to the police

station; instead, she only complained of abuse, assault and kidnapping, but never mentioned rape at the time;

3.6 the morning after the alleged incident, she was on her way to work, not heading to the police station to open criminal charges regarding the incident in *casu* at all. The charge of rape was laid as an afterthought.

[4] Respondent submits that:

4.1 despite some discrepancies in the evidence of the complainant as a single witness, the court correctly found that such shortcomings did not affect the credibility of the witness;

4.2 insignificant contradictions are expected from an honest but imperfect recollection, observation and reconstruction of evidence;

4.3 while it is correct that the complainant did not report the incident to any other person but decided to report it only upon arrival at the police station, there exists no provision in law which compels her to report it to those people, and that a delayed report cannot be the only reason for drawing a negative inference against the complainant;

4.4 the evidence of the complainant on the use of force was corroborated by Dr Mimbula and by Ms N[...] regarding timelines;

4.5 the evidence of the Appellant was not reasonably possibly true as it was tainted with improbabilities, inconsistencies and recent fabrications;

4.6 it agrees with the Appellant that the learned magistrate misdirected himself in finding that the appellant failed to prove the existence of substantial and compelling circumstances in this matter.

Condonation

[5] The Respondent had filed its heads of argument late; but because a satisfactory explanation was provided, condonation thereof was granted unopposed.

The Evidence

[6] The complainant's evidence is that she was sleeping with her children in her shack when the Appellant scaled the perimeter fence and attempted to force the

window open. The complainant then opened the door for him, and he started to threaten her with a knife, telling her that he wanted to kill her. The complainant then ordered him to leave her shack, as they were separated and no longer in a relationship.

[7] She went on to testify that the Appellant then told her that he was going to sleep with her that night and that she must get into bed. The Appellant refused, and he then used the knife which he had in his possession to remove her pants. The Appellant raped her with a condom, and after he ejaculated, he told her that he was not satisfied and penetrated her again. She then opened a case of rape at the police station on the same day of the incident.

[8] The Appellant denies raping the complainant; he told the trial court that in both instances the sexual intercourse was consensual. The Appellant testified that he went to visit the complainant at her request, brought groceries, and later the two had consensual sexual intercourse. He went on to testify that the reason for the altercation in the morning after the alleged incident was that the complainant wanted to take the kids to creche without bathing them, and he was not happy with the kids going to school not bathed.

Ad Conviction

[9] The issue before this Court is whether the trial court erred in its finding that the Appellant had sexual intercourse with the complainant without her consent. Put differently, the issue is whether the trial court misdirected itself in finding that the complainant did not consent to the sexual intercourse.

[10] The Appellant's main ground of appeal against his conviction is that the trial court erred in finding that the state proved its case beyond reasonable doubt. The contention is that, in considering the peculiar set of facts involved in this matter, the trial court misdirected itself in finding, on the evidence presented, that the state had proved the Appellant's guilt beyond reasonable doubt despite the discrepancies in the complainant's testimony. In support of this argument, the reliance is based on what the Appellant refers to as material contradictions between the evidence of the

complainant and also contradictions in the evidence of Mr Shalang, the metro police officer.

[11] The trial court, in considering the evidence before it, accepted that there were some discrepancies in the complainant's evidence. However, when considering whether those discrepancies were so material as to destroy the state's case, it found they were not.

[12] This Court agrees with the trial court's finding and the authority relied on **S v Mkohle**¹ that the contradictions in the state's evidence "are of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction". It is this Court's view that there are no contradictions regarding the violence or the use of a knife in the commission of the offence. Any contradiction on whether the knife was used to remove the pants or was placed on the chest is, in our view, not a material contradiction warranting the destruction of the state's case. Instead, what it confirmed with absolute certainty is the use of a knife in the furtherance or commission of the offence. The use of a knife was also corroborated by the medical evidence of Dr Mimbula, who confirmed the cut on the complainant's hand and a cut of her braids.

[13] As regards the evidence of the complainant, as a single witness, an accused may, in terms of section 208 of the Criminal Procedure Act, be convicted of any offence on the single evidence of any competent witness. Rumphff JA in **S v Webber**², which was quoted with approval in **Stephens v S**³:

"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"

[14] Turning to the submission by the Appellant that the magistrate does not seem to have exercised caution in the evidence of the complainant, this Court is of the

¹ (639/88) [1989] ZASCA 98 (7 September 1989) para 13.

² 1971 (3) SA 754 (A) at 758.

³ (417/03) [2004] ZASCA 70.

view that it is necessary to remember that the cautionary rule is a rule of practice, not a rule of law, and that in applying the cautionary rule it is well to have regard to the warning of Holmes JA in the judgment of **S v Artman**⁴.

“While there is always need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense”.

[15] In **S v Bellingham**⁵ it was found that:

“it has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense”

[16] There is uncontested evidence of violence before the incident, including but not limited to jumping the perimeter fence, a broken window and forced entry into the complainant's shack, all committed by the Appellant, confirming the use of force and again in the morning after the incident, which forced the complainant to involve other persons to rescue her. It cannot be true that, in the middle of these multiple acts of violence and the use of force carried out by the Appellant against the complainant, there was some island of consent where no force was used and that, somehow, the complainant gave consent to sexual intercourse. The events on the day were adumbrated by too much violence and the use of force for consent to be obtained.

[17] It should also be kept in mind that the trial court made factual and credibility findings in favour of the state's evidence. It found the evidence of the state witnesses to be credible and satisfactory despite the discrepancies. The trial court found in all respects that the testimony of the state witnesses was true. It further made factual findings that the Appellant had sexual intercourse with the complainant without her consent.

[18] It is trite that appellate courts are reluctant to interfere with the factual and credibility findings made by trial courts unless there are shown to be clearly wrong or based on material misdirection.⁶ Bearing in mind the advantage that a trial court has

⁴ 1968 (3) SA 339 (A) at 341C.

⁵ 1955 (2) SA 566 (A) at 569.

⁶ *S v Monyane* 2008(1) SACR 543 (SCA) para 15.

of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial court's evaluation of oral testimony.⁷

[19] This Court cannot find the findings of the trial court to be clearly wrong or based on material misdirection. The complainant's evidence was corroborated by that of Dr Mimbula. The Appellant's version, it is agreed with the trial court, cannot be reasonably possibly true. This Court finds it difficult to reconcile the events with what the Appellant alleges, that he was invited by the complainant, but on arrival, he had to use force to access the premises, jump the perimeter fence, break the window and force his entry into the shack by pushing the door. It is not in dispute that the Appellant had a knife with him, and the same knife somehow happened to cut the complainant's hand. These actions cannot be reconciled with that of a person who came at the request of the complainant, as argued by the Appellant.

[20] Regarding the reporting of rape as an afterthought, as argued by the Appellant, and that the magistrate misdirected himself in relying on section 59 of Act 32 of 2007. Section 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 states that:

"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".

[21] This Court agrees with the trial court that this was not an afterthought but rather a delayed report of the crime. The complainant met a lot of people during the morning after the incident but may have lacked a comfortable space to report the crime of rape. Rape is a crime that a victim thereof may not simply open up to everyone about it but may need some secluded space to open up about it. The secluded space referred to may not be there on the street as the complainant meets with all these people but may be there once she reaches a secure environment, a police station, where there exist even specialised units to deal with rape cases. There must be a reason specialised units were established within police stations to deal with the reporting and handling of rape cases. The unique trauma victims of rape require a special space with a person specifically trained to handle the matter.

⁷ S v Francis 1991 (1) SACR 198 (A) at 204e.

[22] Regarding the submission by the Appellant that the complainant does not inform the court the reason for the quarrel and the motive for the Appellant to follow her with Ms N[...] up to the point where the Appellant is assaulted and apprehended by taxi marshals, we find this to be immaterial as this happened after the incidents of rape and does not take away the fact that the Appellant went to the complainant's residence and forced to have sexual intercourse with her without her consent.

[23] The statement by the Appellant that the complainant had in the past told him that she wanted to have him imprisoned for a very long time, is found wanting, not consistent with the actions of the complainant, as the same complainant testified on behalf of the Appellant in mitigation of sentence.

[24] This Court agrees with the Appellant that the magistrate misdirected himself in finding on the rape charges that the evidence of the complainant was corroborated by that of Ms N[...]. Ms N[...]’s evidence did not corroborate the complainant on the rape allegations. However, this we find not to be material in that the testimony of the complainant is supported by the evidence of Dr Mimbula.

[25] This Court have to hold that the trial court correctly found that the sexual intercourse in both instances was without the consent of the complainant, and that the State proved its case beyond reasonable doubt. The appeal on conviction is, as a result, dismissed.

Ad Sentence

[26] In the case of **S v Rabie**⁸ it was stated by Holmes JA that:

“In every appeal against a 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."*

⁸ 1975(4) SA 855 (A).

[27] The question, therefore, is whether this Court has the authority to alter the sentence of life imprisonment imposed by the trial court. Put differently, the question is whether the discretion of the trial court has not been judicially and properly exercised.

[28] This Court will only interfere with the sentence imposed by the trial court where there has been an irregularity that results in a failure of justice; that 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 it⁹.

[29] The Appellant was convicted of two counts of rape read with the provisions of section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997 (CLAA), which provides that:

“[n]otwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in Part I of Schedule 2, to life imprisonment.”

[30] In terms of section 51(3) of the CLAA, the trial court has discretion to impose a lesser sentence than the one prescribed by law, provided there are substantial and compelling circumstances which justify the imposition of a lesser sentence.

[31] It is argued on behalf of the Appellant that the learned magistrate misdirected himself in finding that the Appellant failed to prove the existence of substantial and compelling circumstances in this matter. Further that the trial court was too harsh in imposing a sentence of life imprisonment.

[32] It is trite that a material misdirection by the trial court vitiates its exercise of its discretion. In **S v Malgas**, the Supreme Court of Appeal held that:

“Where material misdirection by the trial court vitiates its exercise of that discretion, an appeal court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first

⁹ S v Bogaards 2013 (1) SACR 1 (CC) at para 41.

instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is large".¹⁰

[33] The trite traditional factors applicable to sentencing are the personal circumstances of the offender (this would include mitigating and aggravating factors); the nature and gravity of the offence; and the interests of society.¹¹ In determining the sentence to be imposed, the purpose of sentencing, being prevention, retribution, reformation and deterrence, must also be taken into account.¹²

[34] The personal circumstances of the appellant tendered in mitigation of sentence are that:

- 34.1 he was 34 years old at the time of sentence;
- 34.2 he is single and has four minor children with the complainant in this matter;
- 34.3 he is a first offender;
- 34.4 he dropped out of school in Grade 11 in Mozambique;
- 34.5 before his arrest, he secured employment at MCD Construction Company as a supervisor and earned R2500.00 per week;
- 34.6 he supported his children financially;
- 34.7 he was kept in custody awaiting trial for a period of about two years.

[35] Further submissions made on behalf of the Appellant were that the complainant did not suffer severe and long lasting physical, psychological and emotional harm, the fact that the Appellant and the complainant were in an intimate relationship for years and lived together as husband and wife before separation and that they had a total of four children together, renders this rape offence as less severe warranting or deserving of characterization of less serious or not the worst type of rape. Furthermore, the Appellant apologised to the complainant for abusing her, and the complainant had forgiven him, as she even testified as the Appellant's witness during his sentencing that he be given a non-custodial sentence.

[36] Section 51(3) of the CLAA provides as follows:

"If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the

¹⁰ *S v Malgas* 2001 (2) SA 1222 (SCA) para 12.

¹¹ *Ibid* at para 25F.

¹² *S v RO and Another* 2010 (2) SACR 248 (SCA) para 30.

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.”

[37] It is this Court’s view that there are substantial and compelling circumstances warranting a deviation from imposing the prescribed sentence. Although one can consider the personal circumstances of the Appellant, his history with the complainant, such factors cannot be overemphasised, in light of the gravity of the offence and the interests of society. This Court is, thus, at large to look at sentence afresh.

[38] Counsel for the Respondent conceded that the sentence of life imprisonment was harsh and shockingly inappropriate given the history of the Appellant and the complainant and the fact that the complainant testified for the Appellant during sentencing and that the Appellant had apologised for his actions and the complainant had forgiven her.

[39] Counsel for the Appellant submitted that the Appellant is a candidate for rehabilitation. We find this submission to be exiguous, in that the Appellant did not plead guilty; he also did not show any remorse. The Appellant may have regretted his actions but did not show any remorse. Ponnann JA in **S v Matyityi**¹³ states that:

“In order for the remorse to be a valid consideration, the penitence 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 exist cannot be determined”.

[40] The circumstances under which this offence was committed, and the gravity of the offence, a lengthy custodial sentence is still warranted. The offence was humiliating and degrading; hence, it was not easy for the complainant to open up and report it to people around her. Evidence shows that she was raped more than once, in fact twice, on the second instance without a condom. She was threatened with a knife and got cut on her hands in the process of this ordeal.

Conclusion

¹³ 2011 (1) SACR 40 (SCA)

[41] This Court concludes that the Appellant did not come at the request of the complainant as he alleges, and that he had planned to carry out the offence as he did; hence, he brought a knife. He used force to access the premises, forced himself inside the shack and continued to force himself to have sexual intercourse with the complainant. The complainant did not consent to have sexual intercourse with the Appellant, and hence the cut she sustained on her hand. The trial court was correct in its findings in convicting the Appellant of both counts of rape.

[42] The magistrate should have at least considered the fact that there was a history between the Appellant and the complainant, that they had been intimate before, and they both have four children together. However, this does not in any way condone the conduct of the Appellant. A woman has the right to choose who she gets to be intimate with, and that right cannot be taken away, not even by the person with whom she previously had a relationship. This court agrees with the Appellant that this may not be a worse type of rape. Also, the magistrate should have at least considered the fact that the complainant had forgiven him and, in fact, testified in his favour during sentencing. Under the circumstances, this Court is of the view that the sentence of life imprisonment imposed was shockingly harsh. For this reason the court has to interfere.

Order

[43] In the circumstances, the following order is made:

1. The appeal against conviction is dismissed.
2. The appeal on sentence is upheld, and the imposed sentence of life imprisonment is set aside and replaced with a sentence of 20 years imprisonment on both counts.
3. The sentences on both counts are to run concurrently.
4. The sentence is to be ante-dated to the date of 29 July 2024.

ND KEKANA
ACTING JUDGE OF THE HIGH COURT

I agree, it is so ordered.

MJ TEFFO
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Appellant: Adv JL Kgokane
Instructed by Legal Aid South Africa

Counsel for The State: Adv D Molokomme
Instructed by Director of Public Prosecutions