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REPUBLIC OF SOUTH AFRICA



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

CASE NO.: A222/2025

[1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES: NO
[3] REVISED: NO

Date: 19 August 2026

E van der Schyff

In the matter between:

JOHN KEKANA

APPELLANT

and

THE STATE

RESPONDENT

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. In the event that there is a discrepancy between the date the judgment is signed and the date it is uploaded to CaseLines, the date the judgment is uploaded to CaseLines is deemed to be the date that the judgment is handed down.

JUDGMENT

VAN DER SCHYFF J

Introduction

[1] The appellant was arraigned in the Regional Court, Pretoria, on five counts arising from events which occurred in Mamelodi during the early hours of 1 January 2015.

Count 1 was kidnapping. Count 2 alleged that he was an accomplice to the rape of the complainant by unidentified men. Counts 3 and 4 were separate counts of rape allegedly committed by the appellant at his residence. Count 5 was robbery.

[2] The appellant pleaded not guilty to all the counts. In respect of the sexual intercourse at his residence, he admitted penetration but maintained that it was consensual. He denied criminal participation in the complainant's abduction and gang rape and claimed that he drove the vehicle because he had been compelled to do so.

[3] On 13 June 2018, the Regional Magistrate convicted the appellant of kidnapping, being an accomplice to rape, and two counts of rape. He was acquitted of robbery. On 23 August 2018, he was sentenced to five years' imprisonment for the kidnapping count and to life imprisonment for each of the three rape-related counts. The sentences on counts 1 to 3 were ordered to run concurrently with the sentence on count 4, resulting in an effective sentence of life imprisonment.

[4] This is an automatic appeal against both conviction and sentence. The principal issues are whether the incomplete record is nevertheless adequate for the fair determination of the appeal; the effect of the appellant's automatic right of appeal; whether the trial court materially misdirected itself in its evaluation of the evidence; and whether there is a basis to interfere with sentence.

The incomplete record

[5] The appeal record is incomplete. The transcription does not contain the formal plea proceedings and omits the commencement of the complainant's evidence on 2 November 2015. The transcript records that the proceedings commenced at approximately 12h15, whereas the available transcription begins at 13h47.

[6] When the matter previously served before this Court, an order was granted directing the reconstruction of the missing portions and the correction of the duplicated material. Significantly, that order expressly recorded that "the appellant or his legal representatives carries the final responsibility to ensure that the appeal

record is in order". Despite the order, the missing material was not reconstructed and substantially the same record was re-enrolled.

[7] Section 35(3)(o) of the Constitution guarantees every accused person the right of appeal to, or review by, a higher court. That right must be practical and effective. An accused is therefore entitled to a record adequate for the proper exercise of the right of appeal. The question is not whether the record is a perfect reproduction of everything that occurred, but whether it is sufficient to enable the appeal court to adjudicate the issues fairly. The nature and materiality of the omissions must be assessed in relation to the issues to be determined.¹

[8] *Phakane* is particularly instructive. The decisive evidence of the principal State witness was absent from the appeal record and could not be reconstructed. Although the trial court had summarised portions of that evidence in its judgment, the summary did not reveal how the witness had been cross-examined on a material conflict between her oral evidence and her police statement, whether she had explained the conflict, or whether any explanation was acceptable. The Constitutional Court held that an appellate court could not fairly evaluate the trial court's preference for that witness's evidence without the missing material.²

[9] The Constitutional Court accordingly held that the failure to furnish an adequate record rendered the right to a fair appeal nugatory or illusory. Where a just hearing of the appeal is impossible through no fault of the appellant and the defect cannot be rectified, the conviction cannot stand. The trial proceedings, conviction and sentence in *Phakane* were set aside.³

[10] *Phakane* does not establish that every omission from a criminal record invalidates the proceedings. It affirms the fact-specific test in *Chabedi*: whether the available record is adequate for proper consideration of the particular appeal. The enquiry turns on the nature of what is missing, the role it played in the conviction, and whether the appeal court can nevertheless test the trial court's reasoning and the grounds of appeal fairly.

¹ *S v Chabedi* 2005 (1) SACR 415 (SCA) paras 5-6; *S v Schoombee and Another* 2017 (2) SACR 1 (CC) paras 28 and 29; *S v Phakane* 2018 (1) SACR 300 (CC) paras 20 and 39.

² *Phakane* paras 27-37.

³ *Phakane* paras 38-41 and 46.

[11] The present matter differs materially from *Phakane*. The missing portion here is the commencement of the complainant's evidence, not the entirety of the decisive witness's testimony. The available record contains the balance of her evidence and her extensive cross-examination, the evidence of the corroborating witnesses, the appellant's evidence and that of his brother, the parties' full addresses, and a detailed judgment recording the material evidence, concessions, disputes, inconsistencies and reasons for the credibility findings. No identified material contradiction is concealed from this Court merely because the opening portion is absent.

[12] The absence of the formal plea proceedings causes no substantive uncertainty. The Regional Magistrate recorded in her judgment that the appellant pleaded not guilty to all counts, that he tendered a plea explanation in respect of the sexual intercourse at his residence, and that his case was that the intercourse was consensual. That is consistent with his evidence, the cross-examination of the State witnesses, the defence address and the manner in which the case was conducted.

[13] It is therefore common cause that the appellant denied all criminal liability but admitted two acts of sexual intercourse with the complainant at his residence, relying on consent. I agree with the respondent that no prejudice arises from the absence of the formal plea proceedings.

[14] The missing commencement of the complainant's evidence requires closer attention. When the recording resumed, the prosecutor placed on record a recap of the evidence already tendered.

[15] A prosecutor's recap is not itself a substitute for sworn testimony. It is nevertheless relevant in determining the scope of the omission, particularly where the missing evidence is reflected in the subsequent cross-examination, in the summaries of both parties, and in the trial court's reasons.

[16] The extent of the record materially strengthens the conclusion that the appeal can be fairly adjudicated. The prosecutor's address contains a detailed summary of the complainant's account and the defence case. The defence address identifies the common-cause facts, isolates the disputes concerning common purpose in relation to the kidnapping, accomplice liability, in relation to the gang rape, duress and

consent, and engages directly with the probabilities. The Magistrate's judgment then summarises the evidence of every witness, records the concessions made under cross-examination, identifies the common-cause and disputed facts, and explains why the State's evidence was accepted and the defence version rejected.

[17] The appellant's heads of argument likewise formulate substantive challenges to the convictions. They contend that common purpose in relation to the kidnapping and accomplice liability in relation to the gang rape were not established and that the version of consensual intercourse was reasonably possibly true. Those grounds can be evaluated on the available record.

[18] The omission remains regrettable. The failure to reconstruct the record despite a court order is serious. That consideration cannot, consistently with *Phakane*, be used mechanically to defeat the appeal or to cure a record that is constitutionally inadequate. It does, however, explain why the Court must now determine adequacy on the existing material rather than assume that a further postponement will yield a reconstructed record.

[19] Having considered the nature of the omissions, the role of the missing evidence in the convictions, the available portion of the complainant's testimony and cross-examination, the corroborating evidence, the parties' full addresses, the detailed judgment, and the grounds advanced on appeal, I am satisfied that the record permits this Court to test the Magistrate's findings and to determine the appeal fairly. Unlike *Phakane*, the missing material does not prevent scrutiny of a decisive contradiction or deprive this Court of the evidential basis upon which the trial court preferred one version over another.

[20] A further postponement is unlikely to produce a better record. The offences occurred in January 2015, and the trial judgment was delivered in June 2018. The appellant has been serving an effective sentence of life imprisonment since August 2018. The constitutional right is to a fair appeal, not to indefinite delay in pursuit of a perfect record. Because the available record is adequate, the interests of justice favour a careful determination of the appeal on the record as it stands.

The automatic appeal

[21] The appellant was sentenced to life imprisonment by a regional court. Section 309(1)(a) of the Criminal Procedure Act 51 of 1977 therefore confers an automatic right of appeal.

[22] In *Ncitha v The State*⁴ the Supreme Court of Appeal explained that, following the retrospective amendment effected by the Judicial Matters Amendment Act 42 of 2013, an accused sentenced to life imprisonment by a regional court has, with effect from 1 April 2010, an automatic appeal and need not obtain leave under ss 309B or 309C.

[23] *Ncitha* further establishes that the automatic appeal encompasses both the conviction and the resultant sentence or order. An appellate court may not determine one component and leave the other unresolved. The present appeal must therefore be adjudicated in relation to both conviction and sentence.

[24] The notice of appeal is essentially of no value, as no specific grounds of appeal are listed therein. Since this is an automatic appeal, however, and since grounds of appeal were identified in the appellant's heads of argument, this appeal can be considered.

Grounds of appeal

[25] The appellant's principal complaint is that the incomplete record prevents the proper determination of the appeal and, under *Phakane*, infringes his constitutional right to a fair appeal. For the reasons already given, the governing principle is accepted but the factual contention cannot be sustained. The present record is adequate for a fair and meaningful adjudication of the issues raised.

[26] On conviction, the appellant contends that the evidence did not prove that he acted in common purpose with the men who abducted the complainant; that his presence and conduct did not establish accomplice liability for the gang rape; that the men's departure without him indicated that he was not one of them; and that his

⁴ (987/2024) [2026] ZASCA 53 (15 April 2026).

version of duress and subsequent consensual intercourse was reasonably possibly true.

[27] The appellant also relies upon the fact that the complainant did not implicate him as one of the men who physically raped her at the primary scene and argues that his remaining in the vehicle was consistent with non-participation.

[28] The respondent contends that the appellant's conduct in stopping and waiting while the complainant was chased, driving away at high speed after she had been forced into the vehicle, taking the group to an isolated area, failing to escape or seek assistance when the vehicle struck a rock, and remaining present while the complainant screamed and was raped established his knowing participation. The respondent further contends that the version of consensual intercourse was irreconcilable with the complainant's condition, her immediate report and her flight from the appellant's room.

Appellate principles

[29] The powers of a court of appeal to interfere with factual and credibility findings are limited. In *R v Dhlumayo and Another*,⁵ the Appellate Division emphasised the advantages enjoyed by a trial court which sees and hears the witnesses and is immersed in the atmosphere of the trial. In the absence of a material misdirection, the trial court's factual conclusions are presumed to be correct and will be disturbed only where the recorded evidence shows them to be clearly wrong.

[30] The principle does not render credibility findings immune from scrutiny. An appeal court must still examine whether the findings are supported by the evidence and the probabilities. It is, however, only in exceptional cases that a court will be entitled to interfere with a trial court's evaluation of the oral testimony.⁶

[31] The evidence must be considered holistically. The State's case and the accused's version are not to be evaluated in separate compartments. The proper

⁵ 1948 (2) SA 677 (A) at 696-697.

⁶ *S v Francis* 1991 (1) SACR 198 (A) at 204E-F.

enquiry is whether, on all the evidence, the State proved guilt beyond reasonable doubt and whether the accused's version is reasonably possibly true.⁷

[32] An accused bears no onus to prove innocence. Improbabilities or falsehoods in the defence case do not reverse the onus. They are relevant only as part of the overall assessment of whether the State has discharged its burden. A version may be rejected only if it is so improbable that it cannot reasonably possibly be true.⁸

[33] The complainant was a single witness in relation to important aspects of the offences. Section 208 of the Criminal Procedure Act permits a conviction on the evidence of a single competent witness, but the evidence must be approached with caution and assessed for reliability in the light of the probabilities and any corroboration. The cautionary approach is a rule of practice and must not displace common sense.

[34] Contradictions must be evaluated in context. Not every difference constitutes a material contradiction. Their seriousness depends upon their nature, the circumstances in which the evidence was given, the lapse of time and whether proper cross-examination could have affected the assessment of credibility and reliability.⁹

The evidence and the material common-cause facts

[35] The Magistrate correctly identified the following material facts as common cause. The complainant and her boyfriend were accosted by men travelling in a white Mazda. The appellant was the driver. The complainant was forcibly placed in the vehicle. The vehicle travelled along a gravel road towards a bushy area and collided with a rock. The complainant was raped by men who had been passengers in the Mazda. She later went to the appellant's residence. The appellant had two acts of sexual intercourse with her, using condoms. He was arrested at his residence later that morning.

⁷ *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448F-450B.

⁸ *S v Shackell* 2001 (2) SACR 185 (SCA) at 194G-I.

⁹ *S v Mkohle* 1990 (1) SACR 95 (A) at 98F-G.

[36] The principal disputes were whether the appellant acted in common purpose in the kidnapping; whether he intentionally assisted the perpetrators of the gang rape; whether he forced the complainant to accompany him to his residence; and whether the intercourse there was consensual.

[37] The complainant testified that the Mazda approached at high speed. Several occupants alighted, swore at her, chased her and her boyfriend, and forced her into the vehicle. The appellant remained behind the steering wheel. She was undressed in the vehicle while it travelled towards the bushes. After the vehicle struck a rock, she was raped by the men while the appellant looked on.

[38] After the perpetrators left, the appellant ordered her to accompany him, pulled her by the arm and dragged her towards his residence. She was weak, shocked, and unable to resist effectively. In his room, he threatened that his brothers would kill her if she screamed. He removed condoms, ordered her to undress and penetrated her on separate occasions. When he fell asleep, she escaped.

[39] The complainant returned home barefoot, dirty, crying profusely and unable initially to speak properly. Her sister, T[...], persuaded her to report the matter. The complainant directed the police to the appellant's residence, where he was found asleep and arrested.

[40] T[...] confirmed that the complainant was moderately under the influence earlier in the evening but remained aware of her surroundings. When the complainant returned, she was barefoot, dirty, hysterical and crying so intensely that she could not give a coherent account immediately. The J88 also recorded that she was anxious.

[41] The complainant's boyfriend confirmed the approach of the Mazda, the pursuit and the fact that the vehicle drove away. He later followed the gravel road and found the damaged Mazda near the rock, but the complainant was no longer there.

[42] The appellant testified that he had picked up the men as passengers. When they chased and returned with the complainant, he drove because the men seated in front had threatened him with knives. He denied seeing the complainant being raped, although he admitted hearing her scream for help and accepted that she had been forcibly taken and did not wish to be there.

[43] According to him, after the men left, the complainant said that she was shocked and needed somewhere to calm down. He offered to take her to his residence. She agreed, spoke to him normally on the way, and later initiated sexual intercourse. He testified that they had two rounds of intercourse, after which both fell asleep.

[44] The appellant's brother, Daniel Kekana, testified that he saw the appellant and a woman in the room and that she appeared merely tired. He described clothing materially different from that which the complainant had worn. He conceded that he had discussed the case with the appellant, did not see them enter the house, could not dispute that the complainant had been dragged into the room, and that his account differed from that of the appellant on material aspects.

The Magistrate's approach

[45] The judgment demonstrates that the Magistrate set out the evidence with care and accurately isolated the disputes. She summarised the evidence of the complainant, T[...], the complainant's boyfriend, the appellant and Daniel Kekana. She recorded material concessions made in cross-examination and distinguished the common-cause facts from those requiring determination.

[46] The Magistrate expressly recognised that the onus remained upon the State throughout and that the appellant bore no burden to prove his innocence.

[47] She further referred to the three interrelated considerations of credibility, reliability and probabilities, drawing upon *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*.¹⁰ Although that authority arose in civil proceedings, the Magistrate did not apply a civil standard of proof. She repeatedly returned to the question of whether the State had proved guilt beyond reasonable doubt and whether the appellant's version was reasonably possibly true.

[48] The Magistrate was alive to the fact that the complainant was a single witness concerning important parts of the case. She reminded herself that cautionary rules are rules of practice rather than rigid formulae, that their purpose is to reduce the risk of wrongful conviction, and that caution should not displace common sense.

¹⁰ 2003 (1) SA 11 (SCA) para 5.

[49] She identified the inconsistency concerning whether the appellant raped the complainant twice or three times. She did not ignore it. She considered its weight in the context of the whole case and concluded that it was not destructive because the appellant himself admitted two acts of intercourse and was charged with two counts of rape. The finding was accordingly confined to two separate acts.

[50] The Magistrate found the complainant reliable because she testified logically and confidently, maintained her account under extensive cross-examination, and made concessions adverse to the State's case. In particular, she admitted consuming alcohol and expressly did not implicate the appellant as one of the men who physically penetrated her at the primary scene. That restraint supported the finding that she was not seeking indiscriminately to implicate him.

[51] The Magistrate found T[...] and the complainant's boyfriend to be credible witnesses. Their evidence corroborated the abduction, the damaged vehicle, the complainant's immediate condition and the consistency of her report.

[52] The Magistrate was equally conscious that improbabilities in the appellant's evidence did not impose an onus upon him. She nevertheless found him to be a poor and evasive witness. When confronted with inconsistencies between the version put to the State witnesses and his evidence in chief, he blamed his former legal representative. The Magistrate found that he was determined to portray the complainant as content and untroubled, even on collateral matters where that portrayal produced improbable evidence.

[53] Her observation bears repetition: "The accused was so determined to prove that all was well with the complainant that even on the aspects which were not material, he gave improbable evidence."

[54] The Magistrate found Daniel Kekana biased and intent upon exonerating his brother. His evidence differed materially from the appellant's concerning where and how he first saw them, and his description of the complainant's clothing was wholly inconsistent with the uncontested evidence. The Magistrate rejected his evidence.

[55] The judgment thus reflects an appreciation of the correct legal tests, an engagement with the weaknesses in both cases, and a reasoned explanation for the acceptance and rejection of the respective witnesses. It is not a case in which the

trial court merely announced credibility conclusions without reference to the probabilities.

Duress and the appellant's knowledge

[56] The appellant's duress defence was unsatisfactory at several levels. The allegation of a knife threat was not mentioned in his evidence in chief. It emerged only under cross-examination, when he said that two men seated in front had knives. He explained the omission by saying that he had not been asked specifically about knives.

[57] That was no minor omission. The alleged threat was the foundation of his claim that he unwillingly transported the complainant. A person relying upon compulsion would ordinarily be expected to explain the nature, source and duration of the threat when setting out his defence.

[58] The appellant's conduct before the alleged threat is also significant. On his version, the men asked him to stop, alighted, chased a woman who was unknown to him, and returned after forcibly apprehending her. He remained in control of the vehicle and waited. The alleged knife threat arose only after she had been brought back. The Magistrate was entitled to regard his failure to drive away before then as inconsistent with the role of an uninvolved taxi driver.

[59] After the complainant was forced into the vehicle, the appellant drove away at high speed towards a secluded bushy area. The complainant's evidence that no one directed him where to go at that stage was not displaced. The route and speed were circumstances from which his knowledge and association could properly be inferred.

[60] When the vehicle struck the rock and became immobilised, the appellant had a further opportunity to escape or seek help. On his own version, the men moved away from the vehicle with the complainant. He remained behind while she screamed for help. He did not run, summon assistance, intervene, or later report the alleged kidnapping and rape.

[61] His explanation that different people react differently to danger is true at a general level but does not render every claimed response reasonably possible. His

entire course of conduct had to be assessed, including the belated knife allegation, his continued presence, his admitted awareness that the complainant had been forcibly taken, his hearing of her screams, and his subsequent conduct.

[62] The Magistrate's finding that the appellant was not acting under duress was firmly grounded in the evidence and the probabilities. We share that conclusion.

Kidnapping and accomplice liability

[63] The basis of criminal liability differed in respect of Counts 1 and 2. The kidnapping charge in Count 1 was pursued upon common purpose. The Magistrate referred in this regard to *S v Mgedezi and Others*¹¹ which requires, in the absence of a prior agreement, proof of presence at the scene, awareness of the unlawful conduct, an intention to make common cause, an act of association, and the requisite mens rea.

[64] The appellant was present and in control of the vehicle. He stopped and waited while the complainant was chased; drove away after she had been forced inside; transported her at speed to an isolated area; and remained present while she was detained and raped. Those were not neutral acts of presence. They materially enabled the deprivation of her freedom.

[65] The appellant's alleged ignorance is incompatible with his own concessions. He accepted that she had been forcibly taken and did not want to be there. He heard her scream for help. His conduct before, during and after the abduction established intentional association with the kidnapping.

[66] The Magistrate also treated the deprivation of liberty as continuing until the complainant escaped from the appellant's residence. Once the other men departed, the appellant himself pulled and dragged her to his home. Her evidence that she resisted and did not know where he was taking her was not displaced. Even independently of common purpose at the initial scene, that conduct constituted a continuation of the unlawful deprivation of her freedom.

¹¹ 1989 (1) SA 687 (A).

[67] Count 2 rested on a different basis. The appellant was not charged with the rape committed by the unidentified men on the basis of common purpose, nor was it alleged that he personally penetrated the complainant at the primary scene. He was charged and convicted as an accomplice to rape. An accomplice intentionally and unlawfully furthers the commission of a crime by another, although not satisfying the definitional conduct of the crime itself.¹²

[68] The appellant's assistance consisted of providing and controlling the vehicle used to abduct the complainant, driving her to the isolated place where the rapes occurred, removing her from the possibility of public intervention, and remaining present while the perpetrators carried out the rapes. The Magistrate accepted the complainant's evidence that he watched. His conduct afforded the perpetrators the opportunity and means to commit the crime. It materially facilitated the rape.

[69] The fact that the perpetrators later left without him does not neutralise the assistance already rendered. Nor was it necessary for the State to prove that the appellant knew them beforehand. Accomplice liability depends upon intentional furtherance of the offence, not prior friendship or membership of a pre-existing group.

[70] The conclusion that the appellant knowingly facilitated the gang rape was justified beyond reasonable doubt.

The rapes at the appellant's residence

[71] The only issue concerning the two acts of penetration at the appellant's residence was consent. The complainant testified that the appellant dragged her there, threatened her, ordered her to undress and penetrated her without consent. The appellant claimed that she accompanied him voluntarily and initiated sexual intercourse.

[72] The statutory definition of consent is a voluntary or uncoerced agreement. The Magistrate correctly recognised that real consent must be freely, voluntarily and consciously given.

¹² See *S v Kimberley and Another* 2004 (2) SACR 38 (E) para 10.

[73] The appellant's version must be considered against the whole sequence. He knew that the complainant had just been forcibly abducted and gang raped. He admitted that she was emotionally distressed, shocked or confused. Yet he claimed that while walking to his house her emotional state changed, that she conversed happily, and that she initiated sex.

[74] That account was contradicted by the complainant's evidence, her sister's direct observations, the J88 notation that she was anxious, and the appellant's own concession that the evidence concerning her condition was inconsistent with his assertion that she had become happy.

[75] The Magistrate did not reason that a person who has experienced sexual violence can never thereafter consent to intercourse. Her conclusion was case-specific. It rested upon the complainant's accepted evidence that she was dragged and threatened; her immediate emotional and physical condition; her flight at the first opportunity; her prompt report; and the inherent improbability of the appellant's account in the particular circumstances.

[76] The complainant's flight is especially telling. If she had voluntarily sought refuge with the appellant and consensually engaged in intercourse, her escape as soon as he fell asleep, her return home barefoot and dirty, and her immediate report identifying him as a perpetrator would be inexplicable. Those facts are entirely consistent with her account.

[77] The appellant's own legal representative was unable, during address, to offer a coherent explanation for why a complainant who had allegedly been rescued and treated with empathy would immediately return with the police and identify the appellant as a rapist.

[78] The Magistrate found that the two admitted acts of penetration were distinct. The complainant's initial reference to three rapes did not justify a third conviction, and the appellant was charged with two counts. On the evidence, the Magistrate convicted on two separate acts, consistent with the appellant's own admission that there had been two rounds of intercourse.

[79] The State proved beyond reasonable doubt that the two acts occurred without consent and that the appellant knew this. The appeal against both rape convictions cannot succeed.

Conclusion on conviction

[80] The Regional Magistrate did not misdirect herself on the burden or standard of proof. She considered the evidence holistically, applied caution to the complainant's evidence, addressed the discrepancies, and remained mindful throughout that the appellant bore no onus.

[81] Her credibility and reliability findings are supported by the record and the objective probabilities. The complainant's evidence was materially corroborated by her boyfriend concerning the abduction and damaged vehicle, by T[...] and the J88 concerning her immediate condition, and by the appellant's own concessions concerning her forcible abduction, screams and emotional distress.

[82] The appellant's version required acceptance that he innocently waited while passengers chased and forcibly apprehended a woman; drove her at high speed to an isolated area only because of an inadequately explained threat; remained unaware of the gang rape despite hearing her screams; failed to escape or seek assistance when the vehicle became immobilised; then acted as her rescuer; and that the recently gang-raped and visibly distressed complainant voluntarily accompanied him, initiated sex, fled at the first opportunity and falsely accused him immediately thereafter.

[83] Considered cumulatively, that version is not reasonably possibly true. The State proved the appellant's guilt beyond reasonable doubt.

[84] Applying *R v Dhlumayo*, there is no demonstrable and material misdirection warranting interference with the trial court's factual findings. On our own assessment of the record, the convictions were correctly entered.

Sentence

[85] The automatic appeal encompasses an appeal against sentence. The appellant was sentenced to five years' imprisonment on the count of kidnapping and to life imprisonment on each of the three rape-related counts. The Regional Court directed that the sentences imposed on counts 1, 2 and 3 run concurrently with the sentence imposed on count 4. The effective sentence is therefore one of life imprisonment

[86] Sentence is pre-eminently a matter for the discretion of the trial court. An appeal court may interfere only where the sentencing court materially misdirected itself, failed properly to exercise its discretion, or imposed a sentence so disproportionate that the disparity is shocking, startling or disturbingly inappropriate.¹³

[87] Where a prescribed minimum sentence applies, all relevant circumstances must be considered to determine whether substantial and compelling circumstances justify a lesser sentence and whether the prescribed sentence is proportionate to the offence, the offender and the interests of society.¹⁴

[88] The reasons for sentence demonstrate that the Regional Court undertook a detailed and individualised assessment. It considered the submissions made on behalf of both parties, a pre-sentence report compiled by the probation officer and a victim-impact report. The court expressly applied the triad identified in *S v Zinn* 1969 (2) SA 537 (A), namely the personal circumstances of the offender, the nature of the offences and the interests of society. It also considered the purposes of punishment, the need to individualise sentence, the interests of the complainant and the principle that punishment must fit both the offender and the crime, be fair to society and be tempered with mercy.

[89] The appellant's personal circumstances were fully canvassed. He was the third of five siblings. His parents died while he was still young and he assumed responsibility for the family. He left school after Grade 7 because the family was experiencing financial hardship and thereafter held various forms of employment, eventually working as a taxi driver until his arrest. He was single, had a child from a

¹³ *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12; *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA) para 10.

¹⁴ *S v Malgas*, *supra*; *S v Dodo* 2001 (3) SA 382 (CC); *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 15.

previous relationship, and was described as physically and psychologically healthy. The court identified his age, family circumstances and the period spent in custody awaiting trial as mitigating factors.

[90] The Regional Court was therefore not unaware of the appellant's personal history or the hardship which he had experienced. It nevertheless found that those considerations were outweighed by the aggravating circumstances. That conclusion cannot be faulted. Personal circumstances, even where deserving of sympathy, do not exist in isolation and must be weighed against the gravity of the offences, the offender's degree of culpability and the interests implicated by the criminal conduct.

[91] The aggravating features were substantial. The appellant drove the vehicle in which the complainant was forcibly taken from her companion and transported to a secluded area. He facilitated the rape committed by the other men. After the complainant had endured that assault, he took her to his home and raped her twice. The sentencing court correctly regarded his exploitation of a person who had already been subjected to extreme violence and was plainly traumatised and vulnerable as a particularly serious aggravating circumstance. This was not a single, impulsive act. The appellant's conduct formed part of a sustained sequence of violations of the complainant's bodily integrity, dignity and sexual autonomy.

[92] The victim-impact report recorded that the complainant continued to suffer trauma long after the offences. She experienced difficulty trusting men, feared that disclosure of the offences might result in rejection by her partner, became emotional and cried throughout the interview, and experienced the prolonged trial as a source of secondary trauma. The Regional Court was entitled to take those consequences into account. In doing so, it did not impermissibly elevate the complainant's interests above all other considerations. The impact of an offence upon its victim is an integral component of a proportionate sentence.

[93] The court further considered the probation officer's assessment that the appellant did not accept responsibility, continued to maintain that the intercourse had been consensual, presented risk factors and was not candid in the information which he provided. The appellant had also been convicted and sentenced in September 2016 for another offence of rape. The latter conviction did not constitute a previous conviction at the time when the present offences were committed. It was

nevertheless relevant to the probation officer's assessment of his risk profile and prospects of rehabilitation, provided it was not used retrospectively to increase his moral blameworthiness for the present offences.

[94] The absence of remorse was also considered. An accused is entitled to plead not guilty, to put the State to the proof of its case and to maintain innocence on appeal. The exercise of those rights may not itself aggravate sentence. The Regional Court's reasoning is, however, more properly understood as recognising that the appellant's continued denial meant that genuine remorse and acceptance of responsibility could not operate as mitigating factors. On that basis, no misdirection is disclosed.

[95] In considering the seriousness of rape and the interests of society, the Regional Court referred to applicable case law.¹⁵ The Magistrate recognised both the prevalence and gravity of sexual violence and the need for deterrence and the protection of society. At the same time, it cautioned itself, with reference to *S v Rabie* 1975 (4) SA 855 (A), against approaching punishment in a spirit of anger. The judgment, read as a whole, does not reflect a sentence driven by indignation rather than principle.

[96] The Regional Court then considered the prescribed-sentence regime under s 51 of the Criminal Law Amendment Act 105 of 1997. The Magistrate recognised that the prescribed sentence was the point of departure but that it remained necessary to determine whether its imposition would be disproportionate in the circumstances of the particular case. She also expressly considered the period spent in custody awaiting trial.

[97] The appellant contends that the magistrate overemphasised the interests of the complainant and of society and failed adequately to differentiate between the individual offences. That submission is not borne out by the record. The court identified the mitigating circumstances, evaluated the appellant's prospects of rehabilitation, considered the degree of his participation as an accomplice and addressed proportionality. It also moderated the cumulative effect of the individual

¹⁵ Among others, to *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA), *S v Chapman* 1997 (3) SA 341 (SCA), *S v Banda* 1991 (2) SACR 352 (B), *S v Mhlakaza* 1997 (1) SACR 515 (SCA) and *S v Swart* 2004 (2) SACR 370 (SCA).

sentences by ordering that the sentences on counts 1, 2 and 3 run concurrently with the life sentence on count 4.

[98] Certain passages in the sentencing judgment are expressed in emphatic terms, including the magistrate's description of the case as among the worst that had come before her and her conclusion that the appellant should be removed from society. Those statements must be read in the context of the judgment as a whole. They followed, rather than replaced, a detailed consideration of the appellant's circumstances, the offences, the reports placed before the court and the governing authorities. They do not establish that the sentencing discretion was exercised capriciously or upon a wrong principle.

[99] The question remains whether, notwithstanding the absence of a material misdirection, the effective sentence is so disproportionate as to warrant interference. In my view, it is not. The complainant was kidnapped and transported to a secluded place; the appellant materially facilitated the rape perpetrated by his companions; and, after she had already endured that ordeal, he subjected her to two further rapes. His conduct displayed sustained callousness and a grave disregard for her dignity and bodily integrity. Against that background, the personal circumstances relied upon do not constitute substantial and compelling circumstances rendering life imprisonment unjust.

[100] The sentence is undoubtedly severe. Its severity, however, is commensurate with the exceptional gravity of the offences and the appellant's moral blameworthiness. The prescribed sentence was not imposed mechanically, nor is it disproportionate to the circumstances of the case. No material misdirection has been shown and the sentence is not shocking or disturbingly inappropriate. The appeal against sentence must accordingly fail.

ORDER

In the result, the appeal against conviction and sentence is dismissed.

E VAN DER SCHYFF

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

I agree

**N MAZIBUKO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

For the appellant:
Instructed by:

Adv L Augustyn
Legal Aid SA

For the fifth respondent:
Instructed by:

Adv A Coetzee
The Director of Public Prosecutions

Date of the hearing:

4 August 2026

Date of judgment:

19 August 2026