

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: A17/2024

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: No

08/09/2026

DATE

SIGNATURE

In the matter between:

Fischer Malvin

v

The State

Heard: 25 May 2026

Delivered: 08 September 2026

JUDGMENT

Yacoob J (Mabesele J concurring):

1. Mr Fischer was convicted on 26 July 2023 on one count of rape of a minor, and subsequently sentenced to life imprisonment on 20 September 2023, in the

Regional Court, Randfontein. He appeals both conviction and sentence in terms of s 309(1) of the Criminal Procedure Act, 51 of 1977 (the CPA), which grants a right of automatic appeal.

2. Mr Fischer does not dispute that he and the complainant had sexual intercourse on the day in question, but contends that she was his girlfriend and the encounter was consensual. He also contends that the complainant misrepresented her age to him.
3. The state called four witnesses: the complainant, the complainant's grandmother, Ms Motaung who the court found was for all intents and purposes the "first report", and Dr Ohanson who examined the complainant.
4. The complainant testified that she was 15 years old at the time of the incident. At the time when she testified she was 17 and in Grade 12. She testified that she was travelling from Durban to Johannesburg by taxi, and arrived in Randfontein around 07:00 in the morning of 08 January 2022. She wanted to call her grandmother but was unsuccessful so decided to walk towards "the bridge". A man appeared and ordered her at knifepoint to go with him to his place of residence. There were no people along the route. She was carrying her bags.
5. When they reached his place, the man ordered her to put her bags down and undress. She did not say anything as she was afraid. He undressed himself still holding the knife and she took off her clothes and shoes. He pushed her onto the couch, still holding the knife. The man then inserted his penis into her vagina and "did up and down movements", still holding the knife. She tried to push him away but was afraid of the knife. The penetration was very painful. He then stood up and said that they must take a bath.

6. While the man was pouring water for the bath, she managed to lock him in the bathroom and ran away. She found another man outside, who helped her with her bags. She told him she had been raped but he was not interested. She then went to a nearby garage with her bags and told the woman there what had happened and asked her to telephone her grandmother. She was crying.
7. When the complainant's grandmother arrived after being telephoned, the complainant and her grandmother went to the police. Thereafter they went to the perpetrator's place but he was not there. They then went to hospital where she was examined and tested, and given counselling. She did not tell the doctor who raped her because she did not know the perpetrator, she met him for the first time on that day.
8. On a later date she was collected by the police and went and pointed out the perpetrator who was arrested. This was Mr Fischer.
9. Under cross-examination, she was asked whether she told Mr Fischer what school she went to and where she lived. She said she had not, and was asked to explain Mr Fischer's statement that he knew that she was in Grade 11 at Jan Viljoen School and that she lived in Greenhills. She could not.
10. It was put to the complainant that she knew Mr Fischer and they had been in a relationship since 2021. She denied this. She said that she did not phone her grandmother because her phone was off and had not arranged to be met the previous night because she did not think the phone would be off. She denied that she had arranged with Mr Fischer to be met by him at the taxi rank. She had met him on her way, close to the KFC, which was near where he stays. She could not

run away because she carried three heavy bags. She denied that Mr Fischer carried the bags.

11. The complainant denied Mr Fischer's version as put to her: that she agreed to have sex with him, and that they watched movies, he made food, she bathed and only then had sexual intercourse. It was also put to her that he then told her he was going to his baby's grandmother's funeral and that this caused an argument between them. She denied all of this. She asserted that the whole of Mr Fischer's version was made up of lies.

12. The complainant's grandmother testified that the complainant was the granddaughter of her elder sister but that she was also the complainant's grandmother. On 08 January 2022 she was on her way to work, in a taxi near the station, when she received a telephone call from a number she did not know. When she answered a woman told her she was at the Total Garage with the complainant. The woman told her that the complainant was crying and had been raped, and that she had bags. The woman said she had told the complainant to go to the police but the complainant told her that she wanted her grandmother first. The grandmother then alighted from the taxi and requested an Uber to take her to the Total Garage, since it was too far for her to go on foot. When she got to the Total Garage, she found the complainant who was still crying. They then went to the police station. A police officer spoke to the complainant alone.

13. It was only a few days later that the complainant told her grandmother what had happened. She said that she alighted from a taxi at the station and was walking on the route she would usually use when going to school. She was accosted by a

male person with a knife who made her go with him to a block of flats where he lived, where she was raped.

14. The complainant's grandmother explained that the complainant's mother and grandmother live in KwaZulu-Natal and that on 08 January 2022 the complainant was returning from visiting her grandmother. When she received the phone call it was between 07:00 and 07:30 in the morning. There were no taxis on weekends from Randfontein to Greenhills where they live, so she would have to walk. The complainant could not request an Uber because her phone was off. The complainant's grandmother knew the complainant was coming on that day but not at what time because the phone was not working. The grandmother was also going to work on that day. The walk would have been about an hour.

15. It was put to the grandmother that she lives near Greenhills cemetery, which she denied. It was also put to her that there would have been lots of people around between 07:00 and 07:30 in the morning. She denied this also, saying it was not the case on the weekend. She denied that the complainant and Mr Fischer were in a relationship and said that if that was the case she would not have found the complainant crying and the complainant would not have insisted that she be there. She denied that her granddaughter had had any relationship with Mr Fischer.

16. The grandmother explained that the complainant's narration to her about how she escaped was that she locked Mr Fischer in the bathroom and ran away.

17. Ms Motaung, the first report, testified that she was at work at the Total Garage on the morning of 08 January 2022. She saw a girl with a man who seemed to be Malawian, who was with one of her colleagues who is Malawian. She had gone to collect a key from inside the shop when she noticed the girl crying. She asked the

man what was happening, and the man asked her to help because he did not understand the language the girl was speaking in. She asked the girl what was happening and the girl told her she had been raped. The girl had luggage with her, so she asked her where she had come from. The girl informed her she had been on a trip to Durban. She had been on her way home on a route past the BP Garage, towards the bridge. She was accosted by a man with a knife who made her go to some flats near the Total Garage, where she was raped. The girl told her she had managed to lock the man in the bathroom, then took her belongings and left the flat.

18. Ms Motaung then told her supervisor, who asked her why did she not just go to the police station, but Ms Motaung told her supervisor the child/ girl is traumatised. She asked the girl if she knew numbers of anyone she could contact, and she gave her a number which Ms Motaung thought was of the girl's mother. When Ms Motaung called the number, the "mother" was at the station, and asked where she was. The "mother" then arrived quite quickly. She explained what had happened and the complainant and "mother" left to the police station. The "mother" first asked the girl if she knew the flat where she had been taken, and the girl replied that she did. The girl was in a state of shock and crying when Ms Motaung found her. It is clear that the person to whom Ms Motaung referred as "the girl" was the complainant, and that the person Ms Motaung thought was the complainant's mother was actually her grandmother who testified.

19. Dr Ohanson testified that she examined the complainant at the Crisis Centre in Leratong Hospital around 14h00 on 08 January 2022. The complainant was accompanied by her grandmother and the police. The version she reported she

was told by the complainant is consistent with what is set out above. She found that there were abrasions in the complainant's vulva, active bleeding, and clefts on the hymen. She noted no other injuries. She was not in a position to say whether there was forced penetration, but only that there was penetration. Where she said forced on the J88, that simply meant that something had been pushed in. The injuries were consistent with sexual intercourse in a fifteen year old girl. The complainant appeared calm when she saw her. That was not unusual.

20. Mr Fischer testified that he knew the complainant and he had been dating her for two years. He met her at the taxi rank around 07:15 on the morning of 08 January 2022, which was a Saturday. She was carrying three bags. He assisted her with two bags and they went to his place, in a block of flats near the KFC and old age homes in Randfontein. They went to relax at his place, they watched movies and were eating, and they ended up having consensual sexual intercourse. He then told her he had to be at a funeral at 09:30 that morning and he took a bath. The funeral was of his baby's mother's aunt and they started arguing when he told her that. He told the complainant he was no longer with the mother of baby. He testified that the complainant was asking because she knew that he had a baby mother. The complainant pushed him around. He then went to take a bath and she locked him in the bathroom. When he broke the door open the complainant was gone. He then went to the funeral. He was arrested on 18 March 2022.

21. Mr Fischer testified further that he telephoned the complainant after the incident on 08 January, and that he also saw her, but she did not tell him she had made a case against him. He saw her when her school had a strike and he was not sure if it was March or May or June, but before he was arrested. However this was not

put to the complainant in cross-examination. According to Mr Fischer the complainant had told him she was 18 years old and doing her last year at school. He then found out she was in grade 11 and she later told him that. He knew she was arriving at the taxi rank on 08 January because she contacted him. He denied threatening her with a knife. He suggested that the complainant laid a false charge because he was going to the funeral of the aunt of the mother of his child. She had already known that he had a child.

22. According to Mr Fischer his flat was not on the way to the complainant's home. He testified that there were lots of people on the street that morning. Mr Fischer denied that there had been sexual intercourse without consent and stated that it was not the first time they had had sexual intercourse. They had had sexual intercourse more than ten times before that. This too had not been put to the complainant.

23. When questioned by the court, Mr Fischer said he would see her around the school, at sporting events and other things. They would celebrate valentine's day and birthdays. However Mr Fischer did not know the complainant's birthday. He also did not know her address, but stated that he knew where she lived. He said that he had been there but had not gone inside. He had never met the complainant's people. He thought she was 18 years old when they met, although she would have been either 13 or 14, depending on when exactly the alleged relationship began. According to Mr Fischer the complainant told him she was 18.

24. Mr Fischer told the court that he and the complainant started having sex in November, then that it was four months after they began their relationship. He stated that the relationship began in February 2021. He also said that they did not start having sex in November 2021 because he was in prison in 2021. According

to him when he said they were in a relationship for two years it included the time after the incident.

25. The magistrate assessed the evidence and focused on the times that emerged from the various testimony, which essentially were common cause. He found that, if the complainant arrived around 07:00 in the morning and was at the petrol station by 07:30 that same morning, which was corroborated by the grandmother and Ms Motaung, Mr Fischer's version that they watched movies together and ate before having sex was inherently improbable. He also took into account that Mr Fischer did not know the complainant's birthday and had never met her family, despite an alleged relationship of two years.

26. The main basis of the appeal was that the complainant was essentially a single witness and a child, that the magistrate was required to apply the cautionary rule when assessing her evidence, and that he did not properly do so. The appellant relied on two judgments which deal with the inherent unreliability of child witnesses: *R v Manda* 1951 (3) SA 158 (A) and *S v Hanekom* 2011 (1) SACR 430 (WCC). Both these deal with the nature "young children" – in *R v Manda* children of 11, 5 and 3 years old, and *S v Hanekom* a child of 8 years old who was also the complainant and a single witness. In both those cases there was reason to come to the conclusion that the children's evidence was unreliable. None of those factors appear to be evident in this matter. There is a vast difference between

"lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a

statement that may not be true or entirely true, particularly where the allegation is of sexual misconduct”¹

in an 8 year old and the ability of a 15 year old to understand the nature of truth and the seriousness of court proceedings. It is also impossible for the court both to find that the complainant suffered from these deficiencies of youth, and to accept the defence version that she was sophisticated enough to have been in a relationship with him for two years and then act so vindictively as to lay a false charge of rape because she was angry with him.

27. In any event, the caution to be applied, where the witness is a child and where there is a single witness, does not mean that the witness’s evidence must be discarded. It must be examined carefully and with consideration of any corroboration. The caution is required because the evidence of the witness cannot be checked against any other evidence.² In this case, the magistrate did not rely on the evidence of the complainant alone, but on the conspectus of the evidence as it emerged. As pointed out by the court in *R v Mokoena*,³ corroboration can emerge from the circumstances and not simply from additional witnesses giving evidence on the same facts.⁴

28. The magistrate’s reliance on the timelines is a clear demonstration that the assessment of the evidence was done with consideration of independent corroboration. Mr Fischer’s own version was that he met the complainant at around 07:15 that morning. There would not have been time for the watching of movies

¹ *S v Hanekom* (above) at para [9].

² *S v Hanekom* (above) at para [8]; *R v Mokoena* 1956 (3) SA 81 (A) at 86.

³ 1956 (3) SA 81 (A).

⁴ At 86D-G.

and eating before ending up having sexual intercourse, when it is established that the complainant was at the petrol station by 07:30 that morning.

29. It is also clear that Mr Fischer's evidence was internally contradictory and unreliable. He had no knowledge of the complainant which could not have been obtained by observing her around the school, and his evidence was in fact that he spent much time around the school. He had her name, age and Grade incorrect. His version could then be disregarded as not reasonably possibly true.

30. The reports of the grandmother and Ms Motaung of the trauma displayed by the complainant also corroborate her version. There is no basis on which to disturb the magistrate's conclusion. The appeal against conviction must fail.

31. Regarding sentence, it was submitted that there were exceptional circumstances which supported a deviation from the prescribed minimum sentence of life imprisonment. The circumstances referred to are that it was a first offence, that Mr Fischer is 34 years old, was gainfully employed and has nine children. His family was shocked by the allegations against him and he had a girlfriend who he lived with who said he was a gentle person.

32. In *S v Malgas*,⁵ the Supreme Court of Appeal held that the reasons a court departs from the prescribed minimum sentence must not be flimsy;⁶ however, the need for a departure to be based on "substantial and compelling circumstances" also did not mean the circumstances must be "exceptional".⁷ A court must still consider all the things it would ordinarily consider when imposing sentence, but from the point

⁵ 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA).

⁶ At para [9].

⁷ At para [10].

of view of considering whether there is a basis on which to deviate from the prescribed minimum. However, an appeal court may only interfere in the sentence imposed by the trial court if it finds a material misdirection on the part of the trial court, or that the sentence imposed is “shocking” or “disturbingly inappropriate”.⁸

33. Taking into account the circumstances of this case as a whole, it does not appear that the trial court misdirected itself. The sentence does not induce a sense of shock. Nor, in the context of this case, do substantial and compelling circumstances emerge. There is no basis on which to disturb the sentence and that appeal too must fail.

34. For these reasons, the appeal is dismissed.



S YACOOB
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

For the Appellant: MP Milubi

Instructed by: Legal Aid South Africa

For the State: NW Makwela, Office of the DPP, Johannesburg.

⁸ At para [12].