

REPUBLIC OF SOUTH AFRICA



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

(1) REPORTABLE: YES/ NO

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

(3) REVISED

26th August 2026

DATE

SIGNATURE

Case No: A323/2023

In the matter between:

DOUGLAS SETHOSA

Appellant

and

THE STATE

Respondent

JUDGMENT

Coram: **STRIJDOM J and MATJELE AJ**

INTRODUCTION

1. This is an appeal against both conviction and sentence arising from proceedings in the Regional Court, Pretoria North.
2. The appellant, Mr. Douglas Sethosa, was convicted of two counts of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA), two counts of kidnapping, two counts of assault and two counts of theft. He was sentenced to life imprisonment on each of the two rape counts, together with terms of imprisonment in respect of the remaining offences.
3. The appellant enjoyed an automatic right of appeal by virtue of the sentences of life imprisonment imposed by the Regional Court. The appeal is directed against both the convictions and sentences.
4. Two distinct enquiries arise. The first concerns whether the State proved the appellant's guilt beyond reasonable doubt. The second concerns whether, notwithstanding the correctness of the convictions, the Regional Court was legally entitled to sentence the appellant to life imprisonment on the two rape counts.
5. Having considered the record, the evidence and the submissions of both parties, I am satisfied that there is no basis to interfere with any of the convictions.
6. The sentences of life imprisonment stand on a different footing. For reasons that follow, the court a quo materially misdirected itself regarding the version and application of section 51 of the Criminal Law Amendment Act 105 of 1997 ("the CLAA") applicable when the offences were committed.

THE APPEAL AGAINST CONVICTION

7. The appellant's principal contention is that the trial court erred in accepting the evidence of the complainants and rejecting his version that the sexual intercourse was consensual.

8. It was common cause that sexual intercourse occurred. The DNA evidence was admitted by consent, as were the J88 medical reports relating to the complainants. The central issue was accordingly consent.
9. In determining that question, the evidence cannot be fragmented. It must be evaluated holistically, having regard to its strengths and weaknesses, the probabilities and the evidence of the appellant.
10. In **S v Hadebe and Others 1997 (2) SACR 641 (SCA)** it was reaffirmed that, absent demonstrable and material misdirection, the factual findings of a trial court are presumed correct, and an appellate court will interfere only where the recorded evidence demonstrates that those findings are wrong. Similarly, **S v Francis 1991 (1) SACR 198 (A)** emphasises the limited powers of an appellate court to interfere with credibility findings, particularly because the trial court had the advantage of observing the witnesses while they testified. These principles are relied upon by the State.
11. I find no material misdirection in the trial court's assessment of the evidence.
12. Although the complainants were single witnesses concerning what occurred during the respective rapes, section 208 of the Criminal Procedure Act 51 of 1977 permits a conviction upon the evidence of a single competent witness. **S v Sauls and Others 1981 (3) SA 172 (A)** makes clear that there is no formula for evaluating such evidence. The court must consider its merits and demerits and determine whether, notwithstanding any shortcomings, it is satisfied that the truth has been told.
13. In the present matter, significant aspects of the complainants' accounts were independently corroborated.
14. In respect of the first complainant, Mr Mashiyane confirmed that she emerged from the bushes dirty and crying and reported that she had been raped. Her mother similarly confirmed that she was crying, dirty, had grass in her hair and did not have her school bag.

15. A fellow scholar, Poppy Mashiane's evidence supported the complainant's account of the circumstances in which the taxi was stopped and contradicted the appellant's version concerning a pre-arranged meeting. Tshepo Ndlovu provided further corroboration concerning the complainant's cellphone, which was traced to the appellant and contained photographs connected to the complainant's family.
16. The medical and other evidence also established that the first complainant had sustained injuries.
17. These circumstances were inconsistent with the appellant's suggestion that the sexual encounter was consensual. The trial court was accordingly entitled to reject his version where it conflicted with the credible evidence accepted by the court.
18. Having considered the evidence in its totality, I am satisfied that the State proved the appellant's guilt beyond reasonable doubt. There is therefore no basis to disturb the rape convictions. Same applies to the convictions on the remaining counts of assault, kidnapping and robbery or theft. No material misdirection has been demonstrated which would justify appellate interference.
19. The appeal against conviction must consequently be dismissed.

THE APPEAL AGAINST SENTENCE

20. Sentencing is pre-eminently a matter for the discretion of the trial court. An appeal court does not interfere merely because it would itself have imposed a different sentence.
21. In **S v Pillay 1977 (4) SA 531 (A)** it was held that appellate interference is justified where a material misdirection demonstrates that the sentencing discretion was not exercised properly or judicially.
22. The present matter involves such a misdirection. The error does not arise principally from the weight accorded to the appellant's personal circumstances. It arises from the court a quo's conclusion that the two rape convictions attracted the prescribed sentence of life imprisonment under section 51(1) of the CLAA.

The applicable version of the CLAA

- 23 The sentencing enquiry must begin with the legislation applicable **when the offences were committed**.
24. That is important because Part I of Schedule 2 has subsequently been amended. The current wording cannot retrospectively determine the sentencing consequences of earlier conduct.
25. Under the version applicable to the offences in issue, rape fell within Part I of Schedule 2, and thus attracted life imprisonment under section 51(1), only where one or more of the specified jurisdictional circumstances existed.
26. Those circumstances included, amongst others, rape where the victim was **under the age of 16 years**, rape involving the infliction of grievous bodily harm, specified circumstances involving repeated rape, and rape committed by a person falling within the particular repeat-offender provision then prescribed by the Schedule.
27. The statutory jurisdictional facts cannot be assumed merely because rape is, by its nature, an extremely serious offence. They must be established before the prescribed sentence attached to that particular category of rape may be invoked.

The rape of the first complainant

28. The first difficulty concerns the complainant's age. The first complainant was 17 years old at the relevant time. Under Part I of Schedule 2 as it then stood, the age-based category attracting life imprisonment concerned rape where the victim was a person **under the age of 16 years**. A 17-year-old complainant did not fall within that statutory age category.
29. It follows that the first rape could not attract life imprisonment merely on the basis of the complainant's age. The court a quo therefore erred insofar as it treated the complainant's age as bringing that offence within section 51(1).
30. This conclusion in no way diminishes the seriousness of the offence or the vulnerability of the complainant. It concerns the proper application of a penal statute.

31. Courts are obliged to impose severe punishment where the circumstances justify it, but the prescribed sentencing jurisdiction created by section 51 must be exercised within the boundaries established by Parliament.

The second rape and the repeat-offender provision

32. A further difficulty arises concerning the basis upon which the second rape was treated as attracting life imprisonment.

33. The fact that the appellant was ultimately convicted of two separate rapes did not, under the version of Part I applicable at the time, automatically mean that each conviction attracted life imprisonment merely because there were two rape convictions before the court.

34. The wording applicable at the time must be distinguished from later amendments to the CLAA. The applicable Part I provision referred, in the relevant repeat-offender category, to rape committed by a person who had been convicted of two or more offences of rape or compelled rape but had not yet been sentenced in respect of those convictions.

35. That statutory requirement was not established merely by the appellant being convicted, in the proceedings under appeal, of the two rape offences presently before this Court. Nor could one of the two offences retrospectively acquire the character of a qualifying repeat offence merely because the appellant was later convicted of the other in the same proceedings.

36. The jurisdictional requirements for life imprisonment must exist in accordance with the legislation applicable to the offence. They cannot be created retrospectively by the sequence in which verdicts are subsequently pronounced.

37. On the record before us, the statutory basis relied upon by the court a quo for imposing life imprisonment on this ground was therefore incorrect.

Notice of the minimum-sentence regime

38. There is an additional difficulty. The appellant contends that he was advised at the commencement of the proceedings that the applicable prescribed minimum

sentences for rape were 10, 15 and 20 years, depending upon his status as an offender, and was not warned that he faced life imprisonment under section 51(1).

39. The State accepts the general proposition that an accused must be warned, whether in the charge sheet or otherwise during the trial, that the State relies upon the minimum-sentence regime exposing him to life imprisonment. It contends, however, that the charge sheet referred to section 51, and that defence counsel subsequently referred to section 51(1) when addressing the court in mitigation.

40. In **S v Legoa 2003 (1) SACR 13 (SCA)** and **S v Ndlovu 2003 (1) SACR 331 (SCA)** the Supreme Court of Appeal emphasised the relationship between adequate notice of the enhanced sentencing regime and an accused person's constitutional right to a fair trial.

41. *Ndlovu* makes clear that where the State intends to invoke the minimum-sentence regime, fairness will generally require that this intention be pertinently brought to the accused's attention sufficiently early to permit the proper conduct of the defence.

42. Knowledge demonstrated by counsel during mitigation does not necessarily answer the question whether the appellant had adequate notice of the case and sentencing regime he was required to meet during the trial.

43. It is, however, unnecessary to decide the sentence appeal exclusively upon this procedural ground. The more fundamental difficulty is substantive: the court a quo applied section 51(1) to the two rape convictions upon an incorrect appreciation of the statutory jurisdictional requirements applicable when the offences were committed. This is more so that the learned Regional Magistrate found the accused not guilty of assault with intent to do grievous bodily harm, but common assault during the commission of the rape of the first complainant. Therefore 'rape involving the infliction of grievous bodily harm' that would bring the first rape within the life imprisonment regime, did not consequently apply.

Consequence of the misdirection

44. That error constitutes a material misdirection. Once a sentencing court materially misdirects itself in determining the statutory sentencing regime, the appeal court is at large to reconsider sentence.
45. This does not mean that the seriousness of the offences falls away. Rape is a grave violation of a person's dignity, bodily integrity and sexual autonomy. The circumstances surrounding these offences were serious, and substantial custodial sentences are plainly warranted.
46. The State correctly emphasised the circumstances in which the complainants were taken away from their destinations and the consequences of the offences. Those aggravating circumstances must nevertheless be considered within the correct statutory sentencing framework.
47. The appellant was a first offender. The State did not establish previous convictions. His personal circumstances included his age, four minor children, employment history and the period spent in custody before finalisation of the matter.
48. These considerations do not trivialise the offences. They are relevant to individualised and proportionate sentencing once the erroneous life-imprisonment regime is removed.
49. The sentences of life imprisonment imposed by the court a quo therefore cannot stand.

Appropriate substituted sentences

50. The setting aside of life imprisonment does not mean that lenient sentences are appropriate. The first complainant was 17 years old. She was particularly vulnerable and the circumstances surrounding the offence were aggravating.
51. The evidence concerning the first complainant also established physical injuries, although the precise statutory question whether those injuries amounted to the "infliction of grievous bodily harm" for purposes of Part I must not simply be

assumed from the seriousness of the assault. The State's heads describe abrasions, swelling and other injuries and relied upon them to contend that section 51(1) applied.

52. In respect of the other complainant, the circumstances of the rape similarly call for a substantial term of imprisonment.

53. The sentences must reflect the separate violations committed against two complainants while also ensuring that the cumulative sentence remains proportionate to the appellant's overall criminality. In determining appropriate sentences, the Court has considered the triad of the offences, the offender and the interests of society, together with the recognised purposes of punishment.

54. I am satisfied that substantial determinate terms of imprisonment are appropriate and that the sentences should be structured to reflect both the individual seriousness of the offences and their cumulative effect.

CONCLUSION

55. The trial court did not materially misdirect itself in evaluating the evidence relevant to conviction. The complainants' evidence was properly evaluated in the context of the evidence as a whole and was materially corroborated. The appellant's version was not reasonably possibly true. The appeal against all the convictions must therefore fail.

56. The sentences of life imprisonment imposed in respect of the two rape convictions are, however, vitiated by material misdirection.

57. In respect of the first complainant, who was 17 years old, the age-based life-imprisonment provision applicable at the time required the victim to be under 16 years. In respect of the other rape, the applicable repeat-offender provision was not triggered merely because the appellant was convicted of two rape offences in the same proceedings. The court a quo consequently applied the life-imprisonment provision on an incorrect statutory footing.

58. The subsequent amendments to Part I of Schedule 2 cannot retrospectively be applied to the appellant's offences. The present consolidated statute now contains materially broader provisions, including a different formulation concerning multiple rape convictions, but that wording was introduced only with effect from 5 August 2022.
59. The error was material and entitles this Court to interfere with sentence. The appeal against sentence must accordingly succeed to the limited extent that the sentences of life imprisonment imposed in respect of the two rape convictions are set aside.
60. This Court is at large to impose sentence afresh. In doing so, the Court remains mindful of the seriousness of the offences. The setting aside of the life sentences results from the incorrect application of the statutory sentencing regime and does not diminish the gravity of the rapes or their impact upon the complainants.
61. The appellant was a first offender. His personal circumstances included his age, responsibility for four minor children, his employment history and the period spent in custody before the matter was finalised. These circumstances must be balanced against the serious and aggravating circumstances in which the offences were committed.
62. The two rape offences were committed against different complainants and constituted separate invasions of their dignity, bodily integrity and sexual autonomy. Each offence therefore warrants a substantial custodial sentence in its own right.
63. Having considered the nature and seriousness of each offence, the interests of the complainants and society, the appellant's personal circumstances, the purposes of punishment and the principle of proportionality, a sentence of **15 years' imprisonment in respect of each rape conviction** is appropriate.
64. At the same time, the cumulative effect of the sentences must be considered. Sentencing is not a mechanical exercise in which individual terms of imprisonment

are simply accumulated without regard to the overall punishment ultimately imposed.

65. In order to achieve a sentence which adequately reflects the fact that two separate complainants were raped, while avoiding an unjust cumulative effect, **5 years of the 15-year sentence imposed in respect of the second rape shall run concurrently with the 15-year sentence imposed in respect of the first rape.**
66. The effective sentence in respect of the two rape convictions is consequently **25 years' imprisonment.**
67. In my view, that sentence appropriately balances the seriousness of the offences, the interests of society and the appellant's personal circumstances. It constitutes substantial punishment for two grave offences committed against separate complainants while remaining individualised and proportionate.

ORDER

68. In the result, the following order is made:

1. **The appeal against conviction is dismissed.**
2. **All the convictions of the appellant are confirmed.**
3. **The appeal against sentence succeeds only in respect of the sentences of life imprisonment imposed on the two counts of rape.**
4. **The sentences of life imprisonment imposed by the Regional Court in respect of the two rape convictions are set aside and substituted as follows:**
 - 4.1 **Count 5 – Rape: Fifteen (15) years' imprisonment.**
 - 4.2 **Count 9 – Rape: Fifteen (15) years' imprisonment.**
5. **Five (5) years of the sentence of fifteen (15) years' imprisonment imposed on Count 9 shall run concurrently with the sentence of fifteen (15) years' imprisonment imposed on Count 5.**
6. **The effective sentence in respect of Counts 5 and 9 is therefore twenty-five (25) years' imprisonment.**

7. The sentences imposed by the court a quo in respect of all the remaining counts are confirmed. The sentences of offences committed with Count 5 will run concurrently therewith, so will the sentences committed with count 9 run concurrently with its sentence.
8. In terms of section 282 of the Criminal Procedure Act 51 of 1977, the substituted sentences are antedated to the date upon which the appellant was originally sentenced.



JUDGE OF THE HIGH COURT

MATJELE AJ

I agree



JUDGE OF THE HIGH COURT

STRIJDOM J

APPEARANCES:

FOR THE APPELLANT: **ADV. MORE**

INSTRUCTED BY LEGAL AID, PRETORIA

FOR THE RESPONDENT: **ADV. WILSENACH**

INSTRUCTED BY: NATIONAL PROSECUTING AUTHORITY