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REPUBLIC OF SOUTH AFRICA



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

Case Number: **A253/2023**
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
DATE 08 September 2026
SIGNATURE

In the matter between:

B[...] G[...] P[...]

Appellant

and

THE STATE

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation 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 **08 September 2026**

JUDGMENT

KUBUSHI, J

Introduction

[1] This is an appeal against sentence imposed by the Magistrate Court Tsakane (the trial court) on 1 August 2023. The sentence emanates from the conviction of the Appellant against three charges of rape of a minor child. The child, who is the complainant and biological daughter of the Appellant, was 13 years old at the time of the commission of the offences. The charges were read together with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997.

[2] The Appellant pleaded guilty to the said charges. Upon conviction the charges were taken together for purposes of sentence, and the Appellant was sentenced to life imprisonment. He was declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000, and his name was ordered to be registered in the National Register for Sex Offenders. He was further found unfit to work with children.

[3] The Appellant has an automatic right of appeal and has approached this Court appealing the sentence. It is submitted in the Appellant's heads of argument that the Appellant has made out a proper case for this Court to interfere with the sentence imposed by the trial court.

Factual Background

[4] In his section 112(1)¹ statement, the Appellant states that the event occurred when his daughter came to visit him at his home during the school holidays. They shared a bed during the three days of 27, 28 and 29 December 2020. While they were in bed, the Appellant took off her daughter's pyjamas and panty. He then kissed her and inserted his penis in her vagina

¹ Section 112(1) of the Criminal Procedure Act 51 of 1977.

without her consent. This he did on the three consecutive nights on the dates mentioned above.

[5] According to what is stated in the Victim Impact Report that was before the trial court, after the ordeal, the complainant borrowed a cell phone and notified her mother about the rapes. Her mother came to fetch the complainant and went to report the rapes at the Police Station. The complainant was taken to the hospital for examination. No physical injuries were noted in the medical report (J88) that was presented in court, but clefts were noted which according to what is noted in the J88 are indication of previous vaginal penetration by a blunt object, like an erect penis.

Legal Framework

[6] It is trite that an appeal court will not interfere with the sentence unless it is convinced that the sentencing discretion has been exercised improperly or unreasonably. The enquiry is not whether the sentence was right or wrong but whether the court in imposing it exercised its discretion properly and reasonably.

[7] The Supreme Court of Appeal in *S v Malgas* 2001 (1) SACR 469 (SCA) (*Malgas*) at para 12 thereof, stated that a court of appeal will not,

“in the absence of a material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court”.

[8] The word “misdirection” is defined in *S v Pillay* 1977(4) SA 531 (SCA) at p.535E-535G as follows:

“A mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's decision on sentence.”

The Issue for Determination

[9] The question therefore is whether the trial court materially misdirected itself when imposing the sentence it did against the Appellant. Put differently the question is whether the trial court exercised its discretion improperly or unreasonably when imposing the sentence against the Appellant.

Grounds of Appeal and Analysis

[10] The Appellant's submission is that the trial court misdirected itself in finding that substantial and compelling circumstances did not exist in this matter. The contention being that the trial court should have found that the fact that the Appellant is a first offender, pleaded guilty and is remorseful, spent a period of 30 months in custody awaiting trial and the complainant having suffered no serious physical injuries constitutes substantial and compelling circumstances justifying departure from the prescribed minimum sentence of life imprisonment.

[11] It was argued on behalf of the Appellant that the trial court conceded that the Appellant was remorseful. The contention was that the trial court should have conceded such factor for rehabilitation purposes. This factor, according to the Appellant, should have been considered cumulatively with the other mitigating factors to conclude that there were substantial and compelling circumstances warranting deviation from the prescribed minimum

sentence. It was then argued that the trial court having not done so, was, thus materially misdirected. This argument was fortified by reliance on the judgment in *S v Nkomo* 2007 (2) SACR 198 (SCA) at para 31 where it was found that there is hardly a person of whom it can be said that there is no prospect of rehabilitation; and in *S v Khumalo* 1984 (3) SA 327 (A) (*Khumalo*) para 16, where that court remarked that:

"it is the experience of prison administrators that unduly prolonged imprisonment, far from contributing towards reform, brings about the complete mental and physical deterioration of the offender".

[12] The offences the Appellant is convicted of are mandated by the provisions of section 51(1) of the Criminal Law Amendment Act which prescribes a sentence of life imprisonment in the absence of substantial and compelling circumstances.

[13] In *Malgas* at para 9 the court stated that

"There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely, by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration."

[14] In accordance with *S v Zinn* 1969(2) SA 537 (A) at 540 G the factors traditionally considered in assessing an appropriate sentence are stated as follows:

"What has to be considered when imposing sentence is the triad consisting of the crime, the offender and the interest of society."

[15] What the Appellant presented before the trial court to be substantial and compelling circumstances warranting deviation from the prescribed sentence was

15.1 The long period of incarceration of two years awaiting trial.

15.2 The Appellant was a first offender and pleaded guilty which indicates that he showed remorse and took responsibility for his actions.

[16] The trial court having considered the totality of the merits of the offence, found that the lengthy period of incarceration, the Appellant being a first offender and the plea of guilty are not substantial and compelling circumstances to deviate from the prescribed minimum sentence.

[17] In coming to such a conclusion, the trial court considered the triad, namely the personal circumstances of the Appellant, the seriousness of the offence and the interests of society.

[18] In regard to the personal circumstances the trial court considered all the factors that were contained in the pre-sentencing report that was before it, and the submission made on behalf of the Appellant. The Appellant was 35 years old at the time of the commission of the offences. He was married and had four children aged 3, 12, 14, and 17 years respectively. Although he was not staying with the children, he took care of their financial needs. He passed grade 12 but could not further his studies due to lack of financial support. He was raised by an extended family as his mother was considered too young at the time the appellant was born. He is a first offender. He pleaded guilty and was said to be remorseful and further accepted responsibility for his actions. He had spent a period of 30 months in custody awaiting trial.

[19] As regards the seriousness of the offence, the trial court considered the general impact of rape on the victim as stated in *S v Chapman* 1997(3) SA 341 (SCA) at page 344 J, as a serious offence humiliating, degrading, and brutal invasion of the privacy, dignity and the person of the victim. The trial court, naturally, accepted that the rape of a child is a heinous crime, which is why the law-maker saw it fit to place this type of rape in the category of crimes attracting a minimum sentence of life imprisonment in the absence of substantial and compelling circumstances.

[20] The trial court considered that even though no long-lasting physical trauma is suffered by the child, it is reasonable to assume that the child may have suffered emotional trauma, the effect of which may survive longer than bruises or broken bones and may even be permanent.

[21] The fact that the Appellant raped the complainant, his own child on three consecutive days, weighed heavily on the trial court. This the court considered to be more shocking and heinous as the child has a natural trust in its parent to protect and safeguard it and not cause it harm.

[22] The third aspect considered was the interest of society and specifically of the complainant. In this respect the trial court considered three consequences to minor children that are recognised by the courts. Firstly, that children often suffer immediate physical and psychological harm. Secondly, children who have been sexually abused may never be able as an adult, to form a loving, caring relationship with another adult. Thirdly, children who have been sexually abused are prone to become abusers themselves when they reach adulthood. The trial court concluded on this basis that the harm occasioned to children by adult sexual offenders is a cause for great concern because children are robbed of their youth and innocence.

[23] The court also considered what was reported in the Victim Impact Report that the complainant dreamt of the accused coming for her and gets impregnated by him. She blamed herself and has become irritable and even had suicidal thoughts. She indicated that she misses her grandmother and uncle who she said used to take care of her better than her mother. She experienced a lack of concentration at school which led her to repeat Grade 8 and refrained from attending life orientation classes because of the discussions of sex and rape in those classes. She could no longer associate with her friends because of the annual traditional ceremony, which was attended only by virgins, she, no longer being a virgin, could not attend.

[24] The trial court considered that under such circumstances, families have often been torn apart and rendered dysfunctional. In this matter the mother of the complainant had become oversensitive and cried a lot, which the trial court concluded was indicative of self-blame. The complainant wrote a long letter to her mother blaming her for what happened. At the time of drafting the report the social worker noted that the complainant and her family still required professional intervention which was difficult to be attained because of the family financial constraints.

[25] Having considered all these factors, the trial court concluded that on a balanced consideration, it could not find the presence of substantial and compelling circumstances and imposed a sentence of life imprisonment. It is however argued by the Appellant that the trial court erred in not considering the possible rehabilitation of the Appellant because if it had done so, it would have found that there are substantial and compelling circumstances.

[26] The court in *Khumalo* at para 16 when discussing the issue of possible rehabilitation remarked as follows:

"The trial judge said that he had accorded due weight to the offenders' "personal circumstances and in particular your relative youth." He did not say that he had regard to their possible rehabilitation. That does not mean that he had ignored it. In connection with the possible rehabilitation of an offender, I want to add the following. Firstly, in similar cases it has been said that the possibility that the offender may be rehabilitated does not signify that a long term of imprisonment is the only fitting sentence and that the sentence of death is accordingly excluded. The possibility of rehabilitation also does not mean that a short term of imprisonment is the only fitting sentence even though other factors may indicate a longer term. Rehabilitation is one of a number of factors which the judge has to consider together when passing sentence. Secondly, if in the course of a prisoner's detention it should appear to the prison authorities that the sentence which had been imposed, was so long that it hampered them in their efforts to rehabilitate him, they should consider the necessity for remission of sentence or parole."

[27] From perusal of the record, it is apparent that the trial court accorded due weight to the Appellant's personal circumstances, and in particular that he was a first offender and had spent about 30 months in custody awaiting trial. It is indeed so that the trial court did not mention rehabilitation in its judgment, but the fact that it accepted that the Appellant showed remorse and took responsibility for his action serves as an indication that it did not ignore the possible rehabilitation of the Appellant. Besides, rehabilitation is one of a number of factors which the court has to consider together with other factors when passing sentence.

[28] I can find no fault in the manner in which the trial court cumulatively considered all the factors that were before it. The trial court went at length to consider all the personal circumstances of the Appellant. In particular, it accepted that the Appellant was remorseful and took responsibility for his actions. However, that was not the end of the matter. It had to further balance the personal circumstances of the Appellant against the gravity of the offence

and the interest of society. It thus concluded, correctly so in my view, that the gravity of the offence as well as the interest of society outweighed the personal circumstances of the Appellant.

[29] The trial court was correct to have come to such a conclusion. Both the gravity of the offence and the interest of society are self evident in the circumstances of this matter. The complainant was a child of 13 years; she was raped by her own father who should be protecting her instead of harming her. Not only was she raped once but she was raped on three consecutive days. She was vulnerable. Appellant states in his section 112 statement that the child was confused, and he could tell that she did not know what was happening or understand and that he took advantage of her. The trial court's reliance on *Chapman* and its acceptance that the rape of a child is a heinous crime, which led the lawmaker to place this type of rape in the category of crimes attracting a minimum sentence of life imprisonment in the absence of substantial and compelling circumstances, is correct.

[30] The impact of the offences on this minor child is enormous. As the trial court found, even though no long-lasting physical trauma is suffered by the child, it is reasonable to assume that the child may have suffered emotional trauma, the effect of which may survive longer than bruises or broken bones and may even be permanent. Additionally, the trial court found, rightly, that the harm occasioned to children by adult sexual offenders is a cause for great concern because children are robbed of their youth and innocence. The Supreme Court of Appeal in *S v Mahomotsa* 2002 (2) SACR 435 (SCA) (*Mahomotsa*) stated at para 11 that

“The learned judge meant, no doubt, that no serious or lasting physical injuries had been sustained and that no evidence as to the extent and likely duration of psychological damage was placed before the court. If, on the other hand, he meant to find that no physical injury or psychological damage whatsoever was done, he erred. While it may theoretically be possible that a victim of rape committed in the circumstances and manner I have described

may not suffer any psychological damage other than that experienced while the attack is taking place and in its immediate aftermath, it is in the highest degree unlikely. Where as here, the complainants were young girls, it is quite unrealistic to suppose that there will be no psychological harm. To quantify its likely duration and degree of intensity is of course not possible in the absence of appropriate evidence, but that does not mean that one should approach the question of sentence on the footing that there was no psychological harm." (Own emphasis)

[31] What is reported in the Victim Impact Report is telling. The report records that the complainant dreams about the Appellant coming for her and gets impregnated by him. She is blaming herself for what has happened and becomes irritable and even had suicidal thoughts. The complainant indicated that she misses her grandmother and uncle who she said used to take care of her better than her mother. She experienced a lack of concentration at school which led her to repeat Grade 8 and refrained from attending life orientation classes because of the discussions of sex and rape in those classes. She could no longer associate with her friends because of the annual traditional ceremony, which was attended only by virgins, she, no longer being a virgin, could not attend. What is of more concern is that the probation officer reports that the complainant and the mother require therapy which they might not be able to access because of financial constraints.

[32] The family life has been negatively impacted as a result of the conduct of the Appellant. The mother of the complainant has become oversensitive and cries a lot, which the trial court concluded was indicative of self-blame. The mother has trust issues now, even towards her husband who has been with the family since the complainant was six years. She is now suspicious of the husband's support towards the children and constantly asks the children if her husband has not displayed any unacceptable and/or suspicious conduct.

[33] Under these circumstances I am constrained to reject this ground of appeal out of hand.

[34] In the heads of argument, it was further argued that courts should be reluctant to readily impose a sentence of life imprisonment and that, life imprisonment should be reserved only for the worst of the cases and that a determinate sentence ought to have been imposed. The argument was substantiated by reference to the judgment in *Malgas* at para 25 (I), which laid down a determinative test as follows:

"if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal, and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

[35] In addition, the Appellant sought support for his submission in the judgment in *Mahomotsa* at para 18, where that court when dealing with the differences in the seriousness of offences held that:

"Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and subject to the *caveat* that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment."

[36] The Appellant contends that the sentence of life imprisonment in this matter is disproportionate to the crime, the offence and the interest of society on the basis that this is not a case where a sentence of life imprisonment should have been imposed because the injuries the complainant sustained do not warrant such a sentence.

[37] The Appellant seem to have ignored what the court in *Mahomotsa* at para 19 thereof stated when commenting about the degree of the seriousness of the offence. That court expressed itself as follows:

“One must of course guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, none the less all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty.”

[38] Even if it might be that this matter falls under the least of the horrendous matters, it is in our view horrendous enough to warrant the sentence of life imprisonment when the seriousness of the matter is considered as alluded to above.

[39] Furthermore, the probation officer states in the Pre-Sentencing Report that the Appellant was identified as a high risk and that should his unlawful behaviour not be addressed, he might re-offend. As the trial court found, in deciding what is an appropriate sentence, the plight of children in general and the principles and objects of sentencing must take precedence. As a result, in the absence of exceptional circumstances, in the case of adult offenders, the objectives of sentencing commonly referred to as denunciation, general and specific deterrents and the need to separate offenders from society, must take preference over the other recognised objectives of sentencing.

[40] I am in alignment with the manner in which the court in *S v C* 1996(2) SACR 181 (C) at 186 *d – f* defined rape, when that court said the following:

“Rape is regarded by the society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim, he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deeds often haunt his victim, and subjects her to mental torment for the rest of her life, a fate often worse than loss of life.”

[41] This ground of appeal falls to be rejected, as well.

[42] Having considered the Appellant’s grounds of appeal, I have not been persuaded that there has been any relevant material misdirection by the trial court, and the appeal ought, therefore, to be dismissed.

Order

[43] The following order is made:

1. The appeal on sentence is dismissed.
2. The sentence of life imprisonment is confirmed.

E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I concur

B.M.T MORE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Appellant : Adv J L Kgokane

For the Respondent : Adv C Pruis

Date of the hearing :25 August 2026

Date of judgment : 08 September 2026