

SOUTH AFRICA / JUDGMENT

E.M v S (Appeal) (A55/2023)

[2025] ZAWCHC 309 (18 July 2025)

[2025] ZAWCHC 309**COURT**

Western Cape High Court, Cape Town

BEFORE

Van Leeve, Ndita

CASE / FILE NUMBER

A55/2023

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****WESTERN****CAPE DIVISION, CAPE TOWN****Case No: A55/2023****In****the matter between:**

E[...]
M[...]
Appellant
and
THE
STATE
Respondent

Coram:

Van Leeve, AJ (Ndita,
J concurring)
Heard

on:

23 May 2025

Delivered on:

18 July 2025

JUDGMENT

Van Leeve, AJ (Ndita, concurring)

INTRODUCTION

[1] The Appellant was charged and convicted in the Caledon Regional Court of the following charges:

Count 1: Rape

Count 2: Rape

The allegations on the first count were that during 2019, the Appellant unlawfully and intentionally had sexual intercourse with the first complainant, AGK, a minor girl child born on 18 February 2019, by inserting his penis inside her vagina without her consent. Likewise on the second count the State alleged that the Appellant had sexual intercourse with LD, also a minor girl child born on 6 April 2009, by inserting his penis inside her vagina without her consent. The complainants would thus have been 12 and 10 years old respectively when the offences were allegedly committed

[2] The appellant pleaded not guilty to both charges, and after evidence was led, he was convicted on both counts. The convictions brought the matters within the ambit of Section 51 of Act 105 of 1997, Schedule 2 of Part 1, prescribing a sentence of life imprisonment unless the court finds substantial and compelling circumstances justifying a

departure from the aforesaid sentence. The court a quo, having found no substantial and compelling circumstances justifying a departure from the ordained minimum sentences, imposed a sentence of life imprisonment on each count and both sentences were ordered to run concurrently. He now appeals against both conviction and sentence in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (“the CPA”) (automatic appeal).

The point in limine

[3] The Appellant raised a point in limine to the effect that this matter is not ripe for a hearing as the record of the proceedings is incomplete, thus no determination can be made on the merits. It is common cause that several words in the record are indistinct or unclear. When the court a quo was requested to assist with the reconstruction of the record, it simply wrote the missing words into the record, something that is impermissible. As set out in *S v Zenzile* 2009 (2) SACR 407 (WCC), the magistrate should have reconstructed the record in the presence of all the relevant parties. It is a fact that the presiding officer in this matter has since retired.

[4] Counsel for the Respondent, Advocate N Ajam, contended that the record of appeal, as it stands is sufficient for a proper adjudication of the matter as enough has been transcribed to understand the evidence. Counsel for the Appellant, Advocate de Jongh argued that the record is inadequate for the determination of this appeal.

[5] In *S Chabedi 2005(1) SACR 415 (SCA) Brand JA*, restated the principles applicable to incomplete records of proceedings thus:

*“[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible (see, eg, *S v Collier 1976(2) SA 378 (C) at 379A -D* and *S v S 1995 (2) SACR 420 (T) at 423 b -f*).*

[6] The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.”

[6] It must be stated from the outset that in the matter at hand, it is not impossible to discern the evidence as the summary of the evidence by the magistrate (which has not been assailed by the Appellant) gives a full understanding of all the issues pertinent to the determination of this appeal on both the merits and sentence. To this end, the remarks of the Constitutional Court in *S v Schoombee and Another 2017 (2) SACR 1 (CC) at para 29* are apposite.

“Where the record of an appeal on an imperfect record will not prejudice the Appellants, their convictions need not be set aside solely on the basis of an error or omission in the record or an improper construction. This principle is practical and sensible and just.”

[7] It is my judgment that in this matter, the record, although imperfect, is sufficient for the purposes of a proper adjudication of this appeal on both the conviction and sentence. Thus, it is not necessary to remit the matter to the magistrate for a proper construction of the record.

FACTS

[8] The incidents occurred at the home of Ms A[...], the grandmother of the complainant AGK during 2019. AGK testified about an occasion when she was sleeping next to her grandmother. Her grandmother was asleep and drunk. The Appellant closed her mouth, pulled down her tights and panties, pulled down his pants to his knees and inserted his penis

into her vagina. She testified further that he was interrupted when her aunt knocked at her door. The Appellant got off her and gave her money before opening the door for her aunt. On another occasion, she and LD were asleep on the couch. She heard LD calling her for help. At that point, LD was in the Appellant's bedroom. She went to the bedroom and found the Appellant on top of LD. When she told him to stop, he chased her away. LD testified that someone had picked her up while she was asleep on the couch with AGK. She realised it was the Appellant when he took her to his bedroom. In his bedroom he pulled down her tights, panties and inserted his penis into her vagina. She called out to AGK who came to the bedroom who chased her away but later let LD go. She went back to the couch to sleep. She told A[...] A[...] what he did to her.

- [9] The two complainants, AGK and LD, were 12 and 10 years old at the time of the incidents. As a result, they were unable to consent to sexual intercourse. The Appellant pleaded not guilty and his defence was that of a bare denial.
- [10] Both children did not tell anybody about these happenings occurring at the grandmother's house.
- [11] The story came to light after LD became ill and was diagnosed with syphilis and tested positive for HIV. After that, she reported what had happened to her to Warrant Officer Du Toit. Warrant Officer Du Toit had an interview with AGK, who confirmed that LD had slept over at her house after being locked out of her own home. She confirmed that the accused was the only person who had sexual intercourse with them and that he had given them R50.00 each.
- [12] AGK told the court that her grandmother was drunk on one of the occasions. LD told the court that the adults were at the tavern and that is why she went to sleep at AGK's home.
- [13] They were often alone in the house with the accused. The medical evidence for sexual assault on both complainants was positive.
- [14] Ironically the Appellant tested positive for both syphilis and HIV, which are both sexually transmitted diseases.

The Grounds of Appeal

- [15] As discernible from the notice appeal, the Appellant assails the findings of the magistrate, more particularly the credibility findings made in favour of the complainants to the effect that they were honest, reliable and credible witnesses. In a nutshell, they are the following:

15.1 That the magistrate erred in not taking into proper account the evidence of Dr Scholtz to the effect that sexual intercourse must have happened repeatedly, which is contradictory to the evidence of LD to the effect that it took place only once. Moreover, the evidence of Jacolien Windvogel indicating that LD was hesitant to talk and just kept quiet should have been properly considered.

15.2 The magistrate erred in not criticizing the complainants for not immediately reporting the rape incidents.

15.3 The court erred in finding that it could understand the children's reluctance to open up about the incident.

15.4 The magistrate erred in finding that the version of the accused is highly improbable and therefore rejected his evidence as not being reasonably possibly true.

[16] With regard to sentence, the Appellant raises several grounds on the basis of which it attacks the trial court for not having found no substantial and compelling reasons to depart from the life sentence ordained by the legislature. These are the following:

16.1 The magistrate paid very little regard to the Appellant's personal circumstances or under-emphasised them.

16.2 The fact that the Appellant has no relevant previous convictions should have counted in his favour.

16.3 The sentence imposed is overly harsh and over-emphasises retribution.

16.4 The Appellant spent two years and eight months in custody awaiting trial and received no credit from the Department of Correctional Services.

Analysis

[17] It is settled law that in a matter such as the present, this court's powers to interfere on appeal with the findings of fact of the trial court are limited in the absence of demonstrable and material misdirection. Where there is no misdirection on fact, the presumption is that its findings are correct, and the appellate court will only interfere with them if it is convinced that they are wrong. This court is also mindful of the fact that in *R v Dhlumayo* and another 1948 (2) SA 677 (A) it was held that a court on appeal should not anxiously seek to discover reasons adverse to the conclusions of the trial court.

[18] I deem it expedient to deal with the ground of appeal that states that the complainants ought to have been criticized for not reporting the rape incidents. This contention is unfortunate because in *Monageng v The State* [5900/06] [2008] ZASCA 129 Maya JA (as she then was) aptly remarks as follows on this issue:

"[23] Much was made by the Appellant's counsel of the complainant's ability to act normally after the rape and her delayed in reporting it. It has been firmly established in a number of studies on the impact of violence, including rape, against women that victims display individualised emotional responses to the assault. Some of the immediate effects are frozen fright or cognitive dissociation, shock numbness and disbelief. It therefore is not unusual for a victim to display a façade of normality."

[24] It is further widely accepted that there are many factors which may inhibit a rape victim from disclosing the assault immediately. Children who have been sexually abused, especially by a family member, often do not disclose their abuse and those who ultimately do may wait for long periods and even until adulthood for fear of retribution, feelings of complicity, embarrassment, guilt, shame and other social and familial consequences of disclosure. Significantly, the newly passes Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides, in s 59, that ‘in criminal proceedings involving the commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of the offence and the reporting thereof’. Raising a hue and cry and collapsing in a trembling and sobbing heap is not the benchmark for determining whether or not a woman had been raped. There was thus nothing unusual about the complainant’s behaviour and her explanation for not immediately reporting the Appellant is plausible”

Likewise, that Dr Scholts was of the opinion that sexual intercourse happened more than once has no bearing on the determination of whether or the Appellant violated.

[19] With regard to the complainants being single witnesses and child witnesses, a double cautionary rule must be applied.

[20] In terms of section 208 of the CPA states “an accused can be convicted of any offence on the single evidence of a competent witness”. It is however a well-established judicial principle that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility.

[21] A double cautionary rule is applicable, because not only are the complainants’ single witnesses, but they are also child witnesses. I refer to the case of *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1021 (A) 1028 B-D, “That their 2 children were speaking of an incident which had happened five years before and the question must be asked whether their capacity of recollection may not be wholly unreliable. I think not. It is well known that children often have a vivid memory of an unusual incident. What happened to these two complainants is most unusual and this court has no doubt that they remembered the incidents.”

[22] The court a quo correctly valued the evidence of both complainants bearing in mind that they are single witnesses and child witnesses.

[23] The details of what took place are completely clear and concise.

[24] Counsel for the Appellant raises contradictions of what they perceive to be contradictions in the evidence of the two complainants. With regard to when and if they had told AGK’s grandmother can hardly be described as a contradiction since “the cat was let out of the bag” only once LD became ill. Whether or not AGK saw the Appellant penetrating LD or not is also not considered by this court as important. What she testified was that the Appellant was on top of LD.

- [25] The Appellant's version is a bare denial. He attempted to blame a Randall and a Tyrone, thereby saying that the complainants were both sexually active and he is not responsible for what had happened to the complainants.
- [26] The learned Magistrate provided a well-reasoned judgment, taking into account the cautionary rule applicable. I refer to the well-known decision of *S v Sauls* 1981(3) SA 172 (A) at 180G-H where Human J said the following:
- "The exercise of caution must not be allowed to displace the exercise of common sense."*
- [27] In this regard one complainant tested positive for HIV and syphilis and the other tested positive for syphilis.
- [28] The accused tested positive for both syphilis and HIV, both being sexually transmitted diseases.
- [29] I am satisfied that the trial court did not misdirect itself in any manner in convicting the Appellant. The findings it made are consistent with the evidence tendered and for this reason the finding that the State has proved its case beyond a reasonable doubt cannot be assailed.

SENTENCE

- [30] It is trite that sentencing is a matter pre-eminently in the discretion of the trial court and a court exercising appellate jurisdiction cannot, in the absence of material misdirection by the former court, approach the question of sentence as if it were a trial court and the substitute the sentence arrived at simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. When material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. (See also *R v Dhlumayo and another* 1948 (2) SA 677 (A); *S v Pieters* 1987 (3) SA 717 (A) at 727). A misdirection is material if the trial court has failed to take cognisance of factors that should have been taken into account or under-emphasises an accused's personal circumstances in relation to other relevant factors

(See *S v Brand* 1998 (1) SACR 296 (C) at 303 e-j).

- [31] It will be recalled that a minimum sentence of life imprisonment was imposed on the appellant. The approach to minimum sentence ordained by the legislature as set out in *S v Malgas* 2001 (1) SACR 469 SCA is that the specified sentences are not to be departed from lightly or for 'flimsy reasons', and that matters such as 'undue sympathy' or 'aversion to imprisonment of offenders' are to be excluded. That said, the Supreme Court of Appeal explained this comment in *S v Swart* 2004 (2) SACR 370 (SCA) at paragraph 17 by stating that the court did not intend to suggest that the quality of mercy, an intrinsic element of civilised justice, should be altogether overlooked, but rather meant to emphasise that retribution and deterrence will come to the fore in relation to such crimes. It of course does not follow that simply because the circumstances attending a particular offence result in it falling within

one or the other of the categories delineated in the Act a uniform sentence must or should be imposed. (See *S v Mahomotsa* 2002 (2) SACR 435 SCA). The court a quo was enjoined to consider, as it did, whether substantial and compelling circumstances exist which justify a departure from the prescribed minimum sentence of life imprisonment.

[32] The accused's personal circumstances were as follows:

- (a) He is 38 years old adult male who is unmarried.
- (b) He has no children.
- (c) The accused's highest education is Grade 9.
- (d) Prior to his arrest, he was employed as a general labourer for 8 years and earned a salary of R1500 per week.

[33] The attorney for the accused argued that his personal circumstances should be considered as substantial and compelling and the fact that he was in custody for 2 years and 8 months before the matter was finalised. This he argued was sufficient for the court to deviate from the prescribed minimum sentence.

[34] The Appellant was found guilty of 2 counts of rape. In terms of section 51 of Act 105 of 1997 life imprisonment is the appropriate sentence. If there are compelling reasons for the court to deviate from the prescribed minimum sentence, then those circumstances must be placed on record.

[35] The Appellant's personal circumstances can hardly be described as substantial and compelling. There is nothing out of the ordinary about his personal circumstances.

[36] The fact that the Appellant was an awaiting trial prisoner for 2 years and 8 months is to my mind an insufficient reason to deviate from the prescribed minimum sentence. The period spent in custody by a prisoner is a factor to be taken into account in determining that circumstances exist such that a minimum sentence may be departed from. There is no rule as to how to determine what weight is to be given to that period. Each case must be decided having regard to all circumstances that justify a lesser sentence. (See *DPP v Gcwala* (295/13) [2014] ZASCA 44 (31 March 2014). In *S v Hadebe* 2013(2) SACR 165 SCA paragraph 14, the court emphasised that:

"Presentenced detention is merely one of the factors to be taken into consideration to determine whether the effective sentence imposed is proper to the crime committed and therefore justified."

[37] I refer to *S v Abrahams* 2002(1) SACR 116 (A) para 25 where Cameron JA stated:

"The prescribed sentence the Act contains plays a dual role in the sentencing ..."

[38] Effect was given by the learned Magistrate to the triad of *S v Zinn* 1969 (2) SA 537 (A) namely, the personal circumstances of the Appellant, the seriousness of the offence and the interest of society.

- [39] Counsel for the Appellant concedes that the facts of this matter are heart wrenching.
- [40] The circumstances under which these two complainants lived can be described as difficult. The children were often left without proper adult supervision. They are certainly children in need of care.
- [41] It seems to me that it is only once complainants enter the court system that social workers become aware of the circumstances and these child complainants may then be placed in better circumstances for e.g. foster care or children's institutions, which then begs the question, why must our children be traumatised to this extent before being removed from such shocking conditions.
- [42] Children who victims of social ills deserve support and, in my view, it would in their best interest of children if community organisations and social workers investigate the conditions in which our children live and then ascertain whether or not they are indeed in need of care (as provided in the Children's Act) before they are subjected to such horrific consequences such as rape.
- [43] The sentence imposed by the learned Magistrate is appropriate.

CONCLUSION

- [44] I have in this judgment found that the conviction of the Appellant in both counts is justified by the evidence, and therefore the trial court did not misdirect itself. In similar vein, the sentence imposed is equally justified. In the circumstances, the following order is issued:

[43.1] The Appeal against both conviction and sentence is dismissed.

Van Leeve, AJ

Acting Judge of the High Court

I concur

and it is so ordered

Ndita, J

Judge of the High Court

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