

SOUTH AFRICA / JUDGMENT

Kgwete v S (A116/2014) [2025] ZAGPPHC 338 (28 March 2025)

[2025] ZAGPPHC 338

COURT

North Gauteng High Court, Pretoria

BEFORE

Mazibuko, Munzhelele

CASE / FILE NUMBER

A116/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: A116/2014

1.

REPORTABLE: YES / NO

2.

OF INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED: YES/NO

DATE

28 March 2025

SIGNATURE

In

the matter between:

THABO

KGWETE

Appellant

and

THE

STATE

Respondent

The

matter was heard in open court. The judgment is handed down electronically by circulation to the parties' legal representatives by email and uploading to Caselines. The date of the judgment and order is deemed to be 28 March 2025.

JUDGMENT

Mazibuko AJ (Munzhelele J concurring)

INTRODUCTION

- [1] The appellant was arraigned before the Springs Regional Court ("the trial court") on one count of rape of a minor child, aged eight years, read with the provisions of section 51(1) of Schedule 2 of the Criminal Law Amendment Act[1], ("the CLAA"), and one count of contravening section 49(1) of the Immigration Act, 13 of 2002.
- [2] The appellant was duly informed of the implications of section 51(1) of the CLAA in relation to the offence he faced, and he confirmed his understanding thereof. He was legally represented throughout the proceedings.
- [3] In respect of the charge of contravening the Immigration Act, the appellant pleaded guilty and was accordingly convicted by the trial court on 5 October 2023. He pleaded not guilty to the charge of rape and provided no explanation. On 22 November 2023, he was convicted of rape.
- [4] On 16 February 2024, the trial court sentenced the appellant to two years' imprisonment for contravening
- the Immigration Act, and life imprisonment for rape. Additionally, he was declared unfit to possess a firearm. His name was entered into the National Register for Sex Offenders in terms of section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[2]. Furthermore, he was declared unsuitable to work with children in terms of section 120 of the Children's Act[3].
- [5] Aggrieved by the trial court's decision, the appellant filed a notice of appeal against both conviction and sentence. He has an automatic right of appeal to the High Court upon giving notice in terms of section 10 of the Judicial Matters Amendment Act[4].

THE DECISION OF THE COURT A QUO

- [6] The issue before the court a quo was whether the complainant had satisfactorily identified her assailant.
- [7] The trial court was satisfied that the complainant was a truthful witness, notwithstanding that, in certain respects, her testimony was unsatisfactory. It held that the contradictions in her evidence were not material to the extent that they warranted its rejection. Despite her young age, her testimony was found to be reliable in all material respects. The trial court rejected the appellant's version, finding him to be a dishonest witness.

GROUND'S OF APPEAL

- [8] In respect of the conviction, the appellant contends that the trial court erred in:
- [8.1] finding that the State proved its case beyond a reasonable doubt;
 - [8.2] rejecting the appellant's version as not being reasonably possibly true, despite partial corroboration by the complainant's stepmother;
 - [8.3] failing to attach sufficient weight to material contradictions in the State's case;
 - [8.4] finding the complainant to be a credible witness; and
 - [8.5] concluding that the identity of the appellant was proven, despite the presence of two security officers who were on duty at M[...] Flights.
- [9] In respect of the sentence, the appellant submits that the effective sentence of life imprisonment is unduly harsh and induces a sense of shock. The trial court erred in:
- [9.1] failing to impose a lesser term of imprisonment;
 - [9.2] over-emphasising the seriousness of the offence and the interests of the community at the expense of the appellant's personal circumstances;
 - [9.3] finding that no substantial and compelling circumstances existed to justify a deviation from the prescribed minimum sentence; and
 - [9.4] failing to take into account that, at the time of the offences, the appellant was still in his youth and a first-time offender.

ISSUE

- [10] The issue for determination in this appeal is whether the trial court correctly found that the complainant had properly identified her assailant on the night in question and whether it correctly applied the cautionary rules in assessing the evidence of the complainant, who was both a child witness and a single identifying witness.

STATE'S CASE

Conviction

- [11] To establish the appellant's guilt, the State relied on the evidence of the complainant, Ms. T[...] M[...], Ms. Palesa Gladys Mofokeng, and Constable Jessica Mogadime.
- [12] It was common cause that the complainant was eight years old at the time of the offence. The State's application in terms of section 170A of the Criminal Procedure Act[5], ("the CPA") was granted, allowing the complainant to testify via closed-circuit television (CCTV) with the assistance of an intermediary, Ms. Geraldine Ngobeni.
- [13] In terms of section 164 of the CPA[6], the complainant was duly admonished before giving evidence.

Testimony of the Complainant

- [14] The complainant testified that at approximately 20:00, she was playing with her sisters on the first floor of M[...] Flats. The passage was unlit. Her sisters then left for the second floor, where their home was situated. At that moment, an unknown man approached her from behind, grabbed her, and pulled her into his flat, identified as flat number 10.
- [15] As he pulled her inside, she saw his face and recognised him as Thabo. She had seen him on multiple occasions, particularly when he washed dishes in the communal kitchen and when he used the toilet. She knew him to be employed as a security officer at Dusty Moon Flats, a residential complex near her home. At the time of the incident, she was carrying a cellphone with the flashlight switched on.
- [16] Inside the flat, she observed a stove, a couch, a bed, and a refrigerator. The man undressed both himself and the complainant, placed her on the bed, and raped her while she was lying on her back. Thereafter, he instructed her to get dressed and leave.
- [17] The complainant returned home in distress, crying and experiencing pain. She immediately reported the incident to her stepmother and led her to the flat where the offence had occurred. They then proceeded to the police station to lay a charge of rape. The complainant was subsequently taken to a medical facility for examination.
- [18] Following an application by the State, the complainant was brought to court in the company of the intermediary and a police officer to identify her assailant. Upon entering the courtroom, she visibly trembled, began crying, and pointed at the appellant as the perpetrator of the offence.
- [19] During cross-examination, she clarified that she had initially made an error regarding the flat number, confirming that the correct flat was number 8, not 10. She further testified that the appellant resided with another man, who was a teacher at a Muslim school. However, that individual was not present in the flat on the night of the incident.

Testimony of Ms. T[...] M[...] ("Ms. M[...]")

- [20] Ms. M[...] testified that she is the complainant's stepmother. On the night in question, upon returning home after having her hair done, she found the complainant crying and complaining of pain in her vaginal area. The complainant informed her, and later the police, that she had been raped by a man from Lesotho, whom she described as bald on the top of his head but with hair on the sides. She further stated that this man resided on the first floor of their block of flats and was employed as a security guard. She recounted that he had pulled her into his flat, undressed both himself and her, and raped her. She also mentioned that both she and her assailant had their cellphone flashlights turned on during the incident.
- [21] Ms. M[...] further testified that the appellant's flat was visible from their own flat when the curtain was drawn. The complainant pointed out flat number 8 as the location of the offence. The appellant resided in that flat with another man, a Lesotho national. Based on the complainant's description, Thabo matched the physical characteristics she provided. At the time of his arrest, the appellant's hairstyle was still the same as the one described by the complainant. The complainant was medically examined at the Far East Rand Hospital Crisis Centre.

Testimony of Constable Jessica Mogadime ("Constable Mogadime")

- [22] Constable Mogadime testified that she is a member of the South African Police Service with five years of experience. On 9 March 2023, she conducted an informal identification parade to determine whether the complainant could identify her assailant. Upon arrival at the holding cells where the lineup was conducted, the complainant, while visibly shaking and crying, pointed at the appellant as her assailant.

DEFENCE CASE

- [23] The appellant testified in his own defence and did not call any witnesses. He admitted that he knew the complainant, as they resided in the same block of flats. However, he denied seeing her on the day of the alleged incident.
- [24] The appellant stated that he finished work at 18:00 on the day in question and proceeded to Corner Tavern to watch a soccer match between Orlando Pirates and Kaizer Chiefs. He returned to his flat at approximately 20:00, where he found Relebogile and another man, a Malawian national, with whom he shared the residence. He further stated that he was employed as a security officer at M[...], not Dusty Moon Flats. He described the contents of his flat, stating that he had a two-plate stove, a bed, and a large bag in which he stored his clothing. He denied raping the complainant.
- [25] During cross-examination, the appellant stated that he had previously worked at M[...] Flats before transferring to M[...] Flats. He explained that he and Relebogile worked in shifts and did not work on weekends. He further asserted that the security guard employed at D[...] M[...] Flats was an individual named Ben, a Nigerian national who resided in flat number

10. He maintained that on the day in question, he was with Amos at Corner Tavern, watching the soccer match.

DISCUSSION

- [26] An appeal court will only interfere with the trial court's factual findings where the trial court has materially misdirected itself.

- [27] To succeed on appeal, the appellant must persuade this court, on adequate grounds, that the trial court misdirected itself in accepting the evidence of the State and rejecting his version as not being reasonably possibly true. There are well-established principles

governing the hearing of appeals against findings of fact. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly

wrong.[7]

- [28] The appellant does not dispute that the complainant was raped; he denies that he was the perpetrator. In cases concerning identification

evidence, courts must exercise extreme caution, as wrongful convictions may arise from honest but mistaken identifications. People often resemble each other, and strangers can be mistaken for acquaintances. Therefore, in all cases hinging on identification, the

greatest care must be taken in evaluating the evidence.[8]

- [29] The appellant's conviction arose from events that occurred on a night when the passage was unlit. The State relied on the complainant's evidence, who was a child. Given that the complainant was both a single witness and a child witness, the cautionary rule applied.

- [30] The cautionary rule requires courts to approach the testimony of such witnesses with circumspection and to apply safeguards tailored to the specific reasons their testimony[9] may be unreliable. Courts must assess the reliability and credibility of a witness's testimony in the context of the case while being mindful of the concerns that necessitate caution.[10]

- [31] In terms of section 208 of the Criminal Procedure Act 51 of 1977 ("CPA"), an accused may be convicted on the single evidence

of any competent witness. However, it has been held that the testimony of a single witness must be "clear and satisfactory in every material respect," and where the single witness "has an interest or bias adverse to the accused," the evidence must be approached with particular caution.[11]

- [32] The trial court must weigh the evidence, assess its merits and demerits, and determine whether it is credible and reliable. Even where shortcomings, defects, or contradictions exist, the court must decide whether, despite these, the truth has been established.[12] The same principle applies to child witnesses, whose evidence must be approached with caution, [13] but not in a manner that deviates from the ordinary approach to assessing evidence in a criminal trial.[14]
- [33] In *S v Chabalala*, [15] the Supreme Court of Appeal held: "The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."
- [34] It was argued on behalf of the appellant that the complainant's evidence regarding the assailant's identity was unreliable. There were material contradictions between the complainant's evidence and that of her stepmother. The complainant also initially provided an incorrect flat number.
- [35] The evidence established that the complainant saw the assailant's face when he pulled her into his flat and recognized him as someone she knew. She had previously seen him washing dishes in the communal kitchen and using the toilet. She described his hairstyle and identified him as a security officer at D[...] M[...] Flats, a complex near her residence. She also stated that he lived with a teacher at a Muslim school. She identified the appellant to her stepmother, the police, Constable Mogadime, and the court while he was in the dock.
- [36] The complainant also described the interior of the appellant's flat. There was no evidence suggesting she had ever been inside before the incident. Although the items she described—such as a stove, couch, bed, and fridge—were not unique, there was no indication that her testimony was fabricated. Given that she could identify the objects within the flat, there is no reason she could not have correctly identified her assailant.
- [37] The complainant testified that after the appellant raped her, he instructed her to put on her clothes and leave. Despite experiencing pain and crying, she would have been aware of the flat from which she exited before returning home.
- [38] I agree with the trial court that the contradiction regarding whether the complainant entered the appellant's flat or merely pointed it out to her stepmother was immaterial. In the broader context of the evidence, the identification evidence outweighed this contradiction and did not undermine the State's case.
- [39] The trial court correctly exercised caution in evaluating the complainant's testimony, given that she was both a child and a single identifying witness. I concur with the trial court's finding that her evidence regarding both the commission of the offence and the identification of the appellant was reliable.

- [40] The appellant claimed he arrived at his flat around 20:00. However, since the complainant testified that the incident occurred around the same time, this did not constitute an alibi. The appellant failed to call Relebogile or the Malawian national with whom he allegedly shared the flat to corroborate his version. Likewise, Amos was not called to confirm that they had watched the soccer match together.
- [41] It is trite law that the State bears the burden of proving its case beyond a reasonable doubt, while the accused need only provide a version that is reasonably possibly true. The trial court was correct in rejecting the appellant's version as not reasonably possibly true. The appeal against conviction is devoid of merit and must be dismissed.

SENTENCE

- [42] The appellant argued that the sentence of life imprisonment was disproportionate, as the trial court over-emphasized the seriousness of the offence and the interests of society while under-emphasizing his personal circumstances.
- [43] The appellant's counsel submitted that the appellant was 34 years old, unmarried, and had two minor children (aged fourteen and five). He was a first-time offender and the sole breadwinner, earning R3,000 per month as a security officer. He had limited education, having completed only grade 7, and had been in custody since his arrest on 27 February 2023.
- [44] The appellant contended that the trial court erred in finding no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment.
- [45] In *S v Motau*, [16] the court affirmed that sentencing is within the discretion of the trial court. An appellate court will only interfere where the trial court failed to exercise its discretion judicially or where the sentence is vitiated by irregularity or is disturbingly inappropriate.
- [46] The trial court's approach to sentencing was sound and cannot be faulted. There is no basis for interference with the imposed sentence.
- [47] The Supreme Court of Appeal in *S v Matyityi* [17] reaffirmed that prescribed minimum sentences are not to be departed from lightly. The court held: "Courts are not free to subvert the will of the legislature by resorting to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague hypotheses that appear to fit the particular sentencing officer's personal notion of fairness."
- [48] The trial court properly assessed both mitigating and aggravating factors and correctly found no substantial and compelling circumstances justifying a lesser sentence. The prescribed minimum sentence serves as the benchmark and should ordinarily be imposed in the absence of such circumstances.

[49] I conclude that the trial court exercised its sentencing discretion judicially. There is no basis for interference with the imposed sentence.

[50] Accordingly, I propose the following order:

Order:

[50.1] The appeal against conviction and sentence is dismissed.

N G M MAZIBUKO

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered

M MUNZHELELE

JUDGE OF THE HIGH COURT

Date of hearing:

20 February 2025

Judgment

delivered:

March 2025

Appearances:

For the appellant: Adv F Van As Attorneys for the appellant: Legal Aid South Africa For the respondent: Adv Khosa National Director of Prosecutions

[1] Act 105 of 1997.

[2] Act 32 of 2007.

[3] Act 38 of 2005.

[4] Act 66 of 2008.

[5] Section 170A of the Criminal Procedure Act (CPA): (1)(a) ‘Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness— (a) under the biological or mental age of eighteen years; to undue psychological, mental or emotional stress, trauma or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.’ (3)

(c) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place—which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.’

[5] Section 170A of the Criminal Procedure Act (CPA): (1)(a) ‘Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness—
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‘(3)

(c) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place—which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.’

[6] (1) Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth

[7] *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f. See also: *S v Monyane and Others* 2008 (1) SACR 543 (SCA) at para 15; *S v Francis* 1991 (1) SACR 198 (A) at 204e.

[8] *R v Shekelele* 1953 (1) SA 636 (T) 638G.

[9] Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed 2012) at p 546.

[10] *Mohale v S* (A634/2017) [2019] ZACC 376 (27 June 2019) at para [36].

[11] *R v Mokoena* 1956 (3) SA 81 (A) at 85H; *Sekoala v The State* (579/2022)

[2024] ZASCA 18 (21 February 2024).

[12] *S v Sauls & others* 1981 (3) SA 172 (A) at 180E–F; *Sekoala v The State* (579/2022) [2024] ZASCA 18 (21 February 2024).

[13] *S v V* 2000 (1) SACR 453 (SCA) at para [2].

[14] *S v Haupt* 2018 (1) SACR 12 (GP) at para [25].

[15] 2003

(1) SACR 134 (SCA) at [15]

[16] (A53/2023)[2023]ZAGPPHC 1272 (17 November 2023).

[17] S v Matyityi (2010) ZA SCA 127 2011 (1) SACR 40 SCA.

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Prepared on 11 October 2026 · Esheria