

SOUTH AFRICA / JUDGMENT

Tebe v The State (A163/2024) [2025] ZAFSHC 221 (21 July 2025)

[2025] ZAFSHC 221

COURT

Free State High Court, Bloemfontein

BEFORE

Daniso, Ntshulana

CASE / FILE NUMBER

A163/2024

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IN THE HIGH COURT OF

SOUTH AFRICA,

FREE STATE DIVISION,

BLOEMFONTEIN

Not reportable

Case no: A163/2024

In

the matter between

TSHITSO

SABASTIAN TEBE

APPELLANT

And

THE

STATE

RESPONDENT

Neutral

citation: Tebe v

The State (A163/2024) [2025] ZAFSHC 221

(21 July 2025)

Coram: Daniso J et
Ntshulana AJ

Heard: 21 July 2025

Delivered: 21 July 2025

Summary: Appeal against sentence and conviction
of trial court – assessment
of version of the accused – assessment of the application of
the single witness rule by trial court – assessment
of
substantial and compelling circumstances warranting sentence other
than life imprisonment.
ORDER
1
Condonation for the late noting and
prosecution of the appeal is granted.
2
The appeal against conviction and sentence
is dismissed.

JUDGMENT

Ntshulana AJ (Daniso J concurring)

Introduction

- [1] This is an appeal against conviction and sentence. On 20 November 2013, the appellant, Mr Tshitso Sabastian Tebe, was convicted by Regional Court Magistrate Greyvestein on a charge of rape read with the provision of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act), read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, having been legally represented during his trial.
- [2] He was sentenced to undergo life imprisonment and the court a quo also ordered that his name be entered into the register for sexual offenders in terms of s 50 of the Act.
- [3] Accordingly, and in terms of s 309(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA) read with ss 10, 11 and 43(2) of the Judicial Matters Amendment Act 42 of 2013, the appellant has an automatic right to appeal against both his conviction and sentence. The appeal is opposed by the State.
- [4] Before turning to the issues to be considered in this appeal, there is a preliminary issue which needs to be addressed. The appeal is about ten years late and, as result, it is accompanied by an application for condonation.

- [5] The principles applicable in the determination of applications of this nature are trite: condonation the court has a discretion to grant condonation in the interests of justice having regard to the degree of lateness, the explanation for the delay, the prospects of success in the appeal, prejudice to either party and their interest in the finality of the matter.
- [6] The explanation for the delay is set out in the appellants founding affidavit. He attributes the delay to his trial attorney on the basis that he failed to file the appeal despite being instructed to shortly after the appellant was sentenced. The appellant states that, in 2017, he was assisted by the officials from the correctional services to file an appeal again, nothing came out of that process. Then, in 2019, he sought assistance from the Legal Aid South Africa and, due to the Covid-19 pandemic, it was only 2022 that he was able to consult with his Legal Aid attorney. The court transcripts became available on 30 August 2023 and the appeal was then lodged on 15 November 2023.
- [7] The delay of ten years is extreme. Despite the substantial ineptitude, the appellant's explanation for the delay is woefully inadequate. There is no explanation for the delay of the period 2013 to 2017 and 2018 to 2019 and, it is a publicly known fact that the Covid-19 outbreak was in the year 2020. The shutdown began on 27 March 2020, thereafter there were different levels of lockdown. There is also no explanation regarding the further delay of three months after the transcripts were obtained. Except to fleetingly aver that the appeal has prospects of success, no attempt has been made to explain the basis upon which this conclusion is arrived at.
- [8] I however take into account that condonation is not opposed by the State and that no prejudice has been indicated. It also appears that both parties do have an interest in the finality of the matter. Therefore, to avoid unnecessary further delays, condonation for the late filing of the appeal is granted.

Summary of evidence

- [9] I now turn to the appeal. The conviction arose from the incident which occurred on 6 January 2010. The State alleged that the complainant was walking down the street in Turflaagte when she was accosted by the appellant. He grabbed or pulled her by the wrist and took her to his home where he raped her. The complainant's sister, K[...] M[...] M[...], who had been looking for her for some time, ultimately found her in the street walking with a limp as if she was in pain. When the complainant saw her sister she started crying and told her that she had been raped by the appellant.
- [10] The complainant testified through an intermediary and her birth certificate (Exhibit B) and medical reports contained in the J88 forms (Exhibit C) were handed into court record and accepted by the appellant as accurate. The complainant was born on 4 April 1995 and was 14 years at the time of the incident. The complainant reported the incident to her sister within five (5) minutes after the incident. According to her sister M[...] M[...] the complainant was crying, walking funny and her dress had a blood spot.

- [11] According to the evidence of the forensic nurse and Dr Kotze the injuries recorded in Exhibit C (J88) are consistent with the evidence of the complainant that sexual intercourse did take place. Doctor Kotze stated that the abrasion of the fossa navicularis is a specific sign of penetration. Professor Calitz testified and concluded that the complainant is mentally disabled but was a competent witness and knew the difference between right and wrong.
- [12] The complainant told the court that, on the day of the incident, she was on the road at Phase 6 Turflaagte visiting a family member on the same road when she was called by the appellant, who took her to his home. On the way to his house, the appellant was holding her on her wrist. At the appellant's house, the appellant removed her clothes, undressed her and did things to her and, as a result, her private part was painful. She further testified that he threatened her with knife and said she must not tell anyone about the incident. At a later stage, she left and walked home and met her sister.
- [13] Upon meeting her sister, she immediately reported the incident to her and she immediately took her to the appellant and confronted him about the incident. After she confronted the appellant, they went and reported the matter to the police and appellant was apprehended. Her sister, M[...] M[...], testified that the complainant made the first report to her and she also observed that the complainant was crying, walking funny and her dress had a blood spot. Under cross-examination, the complainant confirmed and/or maintained her version. She denied the appellants version that nothing happened between them on the day of the incident at appellant's home. She also maintained her version regarding the threat by the appellant on the day in question. M[...] M[...] corroborated the complainant's version in every material respect.
- [14] The appellant testified that he did not know the complainant prior to the day of the incident and that he met the complainant on the street, proposed his love to her and the complainant agreed. That they then went to his home where they sat in the sitting room, listened to music, later the complainant left and nothing happened.
- [15] It was pertinently put to the complainant, by the appellant's legal representative, that, after she and appellant sat in the living room, listening music, she had left without anything happening. Record P. 27, L. 18 to P. 28, L. 20, P. 34, and L. 11 – 16. The State applied to have appellants warning statement handed in as an exhibit. It was done so by agreement and marked as 'EXHIBIT D' (record: P.36, L.17 to P. 37, L.12. Only during this evidence, did appellant testify that they had kissed too, clearly following the contents of his warning statement. This was however new evidence and it was not put to the complainant either. Record: P.130, L. 14 – 22, P. 136, and L.5 – 8.
- [16] Also, the following new evidence, which was not put to the complainant either, was given by appellant:
- (a) He met complainant in the street and an arrangement was made to meet up following her visit to her sister's place; Record: P. 127, L. 1 – 20

- (b) The reason why she had left his place after her visit, was because appellant's mother would be returning home soon. He then took her halfway and she said she would see him the next day; Record: P.128, L. 1 – 18
- (c) On his own version, he did not enquire the complainant's age from her, as he had an interest in her. This interest, also new, was that he had proposed a relationship to her at their meeting, as he thought she would be his

children's mother in future. Record: P. 131, L. 8 – 14, P. 133, L. 16 to P. 136, L.4

This very version changed in re-examination to him maybe in future would tell the complainant that he wants to propose love to her. Record: P. 142, L.18 to P. 143, L.7.

[17] The court a quo rejected the appellant's version and convicted him.

Issues

[18] Three main issues were raised before us in challenging the conviction of the appellant:

- (a) Whether or not the court a quo erred in rejected the appellants version and accepting the state version.
- (b) Whether or not the court a quo correctly applied the single witness rule in respect of the evidence of the complainant. The need for caution in evaluating the evidence of children.
- (c) Whether or not the court a quo erred in concluding that the medical evidence was conclusive regarding the question of penetration Exhibit C.
- (d) Whether or not the court a quo erred in not finding that substantial and compelling circumstances exist, which would enable deviation from the prescribed minimum sentence of life imprisonment.
- (e) Whether or not the court a quo erred to enter the appellant's name in the register for sexual offenders.

Ad conviction

[19] The identity of the appellant is common cause, this is clear and straight-forward from the evidence of all the witness including that of the appellant himself. The complainant reported the incident to her sister M[...] M[...] within five minutes and the appellant was confronted and arrested thereafter. There is not a shred of evidence that the appellant and the complainant had a love relationship of any kind prior to the date of incident and on the day of the incident. In any event, the complainant was a 14-year old child. There is no doubt in my mind that the learned magistrate correctly found out that the incident occurred.

[20] It is clear from the medical evidence of Dr Kotzer (Exhibit C) that sexual intercourse did take place. Dr Kotzer testified that an abrasion of the fossa navicularis is a specific sign of penetration. It should also be borne in mind that penetration beyond the labia majora is sufficient for purposes of sexual penetration as defined and provided for in the Act. The

direct evidence of the complainant is that the appellant took her to a room, removed her clothes and did funny things. She also mentioned that her private part or virginal was painful during this period (appellant doing funny things to her). If one takes the direct evidence of the complainant and her sister (first report) M[...] M[...] who observed that the complainant was crying, walking funny and her dress had a blood spot, one is left with no choice but to conclude that an incident of rape did take place.

[21] The learned magistrate was clearly aware for the need to apply caution in the evaluation of the evidence of the complainant, a 14-year-old child. The facts of this matter and the trial court's reasoning pertaining to conviction and sentence are clear and no need to repeat them in this judgment. The appellant has rendered an unmeritorious appeal. This fact is frankly considered by his counsel in the heads of argument. Correctly so because the evidence pertaining to the complainant's age and mental retardation was not gainsaid by evidence to the contrary.

[22] Our law has long held that the approach by an appeal court to findings of fact is that, in the absence of a demonstrable and material misdirection by the trial court, they are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.[1] I am satisfied from the evidence on record that no such misdirection was demonstrated.

[23] In my view, the trial court correctly rejected the version of the appellant as false beyond reasonable doubt. Given the credible evidence of the State witnesses, which covered all the elements of the crimes in question, the appeal against his conviction must fail.

Sentence

[24] Punishment is pre-eminently a matter for the discretion of the trial court. An appeal court can only interfere with sentence of the trial court if such sentence is validated by irregularity, misdirection or is so disturbingly inappropriate that it induces a sense of shock. [2]

[25] The complainant was 14 years old at the time of the incident and provisions of the Act accordingly find application. This provides for a minimum sentence for each rape to life imprisonment. To avoid this, substantial and compelling circumstances must be present. In *S v PB*, [3] Bosiello JA formulated the approach by a court on appeal against a sentence imposed under this legislation as follows:

‘What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This in my view, is so because the minimum sentence to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows

therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.’

[26] As Rogers J agreed, in *S v GK*,^[4] whether or not substantial and compelling circumstances are present is not a discretionary issue but rather involves a value judgment by the trial court. A court of appeal is only entitled to interfere if it is of the view that the lower court erred in its conclusion.

[27] In *S v Vilakazi*,^[5] Nugent JA said that ‘[i]t is enough for the sentence to be departed from that it would be unjust to impose it’. To

determine whether or not it would be unjust to impose the sentence the court is entitled to consider factors traditionally taken into account in sentencing, including mitigating factors.

[28] In *S v Nkomo*,^[6] Lewis JA held as follows:

‘But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing – mitigating factors- that lessen an accused’s moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of those need be exceptional.’

[29] I turn then to the central issue and consider all the circumstances available to the court a quo to assess whether it erred in the conclusion that no substantial and compelling circumstances were present. Put differently, was it unjust to impose life imprisonment in circumstances of this case?

[30] The appellant was 24 years old and had no previous convictions. It was argued that the appellant is not a hardened criminal, he is a candidate for rehabilitation and the offence would not be repeated again. (record: P215, L.9 – 25)

[31] The court a quo considered the seriousness of the offence or crime of rape, the prevalence thereof and the fact that the appellant showed no remorse. The complainant, as a 14-year old child, should have been able to trust that the appellant would protect her from harm being a member of community in their area. The appellant took an advantage of her vulnerability (mental retardation) and her tender age.

[32] The court a quo, in my view, was aware of the importance of taking a victim – centered approach on offences of this nature, as laid down in *S v Matyityi*.^[7] It considered this case. This is important to achieve proportionality and a balance between the interest of society and those of the appellant.

[33] Whilst it is regrettable that no victim impact report was presented to the court, we are of the view that, in the context of this particular case, the court a quo had sufficient facts before it to assess the proportionality and the other circumstances relevant to sentence.

[34] The appellant's refusal to take responsibility for his actions showed that he was someone who would not easily be rehabilitated. Not only did he rape his neighbour's child who has a mental disability, but also put her through the additional trauma of testifying and imputing dishonesty to her version in the process.

[35] Rape of a child under the age of 16 is a heinous and abhorrent crime, which is why the legislature has placed this type of rape in the category of crimes attracting a life sentence in the absence of substantial and compelling circumstances.

[36] In *S v Chapman*,^[8] it was correctly said that 'rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion

of the victim'. Despite the introduction of the minimum sentencing regime, there is no sign that these kinds of incidents are at a decline.

[37] In *S v Jansen*,^[9] the court aptly put it as follows:

'Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilized

society . . . The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets in any safety, where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behaves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our constitution. The community is entitled to demand of the police that they bring those who subvert these minimum aspirations before the courts and that the courts, in punishing such persons, should ensure that the sentence adequately reflect the censure which society should and does demand, as well as the retribution which it is entitled to extract.'

[38] Having carefully considered and examined all the circumstances of this case, we are not convinced or persuaded that the court a quo erred in coming to the conclusion that substantial and compelling circumstances which warrant a sentence other than life imprisonment

were not present. It cannot be said that the sentence imposed by the court a quo give rise to an injustice. Nor could the appellant point to any material misdirection's on the part of the learned Regional Magistrate Greyvestein. There is, therefore, no basis on which to interfere with the sentence. In my view, the prescribed sentence (in terms of part 1 of schedule 2) is indeed proportionate to the offence charged.

[39] As regards the consequential order the provisions of s 50(2)(a)(i) of the Act are not discretionary. Upon convicting a person for a sexual offence, the court must order that his name be included in the National Register for sexual offenders. There is no basis to interfere with the sentence, it reflects the gravity of the crime and it also speaks to the plight of the victims and the society at large.

Order

[40] In the result the court makes the following order:

1 Condonation for the late noting prosecution of the appeal is granted

2 The appeal against the conviction and sentence is dismissed.

NTSHULANA AJ

I concur

DANISO J

Appearances For the appellant S Kruger Instructed by Legal Aid South Africa, Bloemfontein For the respondent: M Moroka Instructed by: The Director of Public Prosecutions, Bloemfontein.

[1] See *S v Hadebe and Others* [1997] ZASCA 86; 1997 (2) SACR 641 (SCA) at 645E-F.

[2] *S v Rabie* 1975 (4) SA 855 (A) at 857D-F; see also *S v Petkar* 1988 (3) SA 571 (A) at 574C.

[3] *S v PB* 2013 (2) SACR 533 (SCA) para 20 (also cited as *Bailey v The State*

[2012] ZASCA 154).

[4] *GK v S*

[2013] ZAWCHC 76; 2013 (2) SACR 505 (WCC).

[5] *S v Vilakazi*

[2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) para 20.

[6] *S v Nkomo*

[2006] ZASCA 139; [2007] 3 All SA 596 (SCA); 2007 (2) SACR 198 (SCA) para 3.

[7] *S v Matyityi*

[2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA).

[8] *S v Chapman*

[1997] ZASCA 45; [1997] 3 All SA 277 (A); 1997 (3) SA 341 (SCA) at 344I-J.

[9] *S v Jansen* 1999 (2) SACR 368 (C) at 378G-379B.

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