REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO**: A235/16**

DPP REF NO: JPV2007/098

GLD CASE NO: SS 103/07

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

Tbakaka

29 August 2025

DATE SIGNATURE

In the matter between:

MATHEBULA DANIEL **APPELLANT**

Versus

THE STATE **RESPONDENT**

JUDGMENT

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 29 August 2025.*

A. Introduction

1. The Appellant was charged in the Regional Court sitting in Soweto on the charges of Kidnapping and Rape in contravention of Section 3 of the sexual offences Act, 32 of 2007.

2. He entered a plea of not guilty. He was convicted as charged. Following the conviction, the case was transferred to the High Court for sentence, pursuant to section 52(1) of the Criminal Law Amendment Act 105 of 2007. Mabuse AJ (as he then was) sentenced the Appellant to a term of eight years' imprisonment for count 1 and to life imprisonment for count 2. The sentences were ordered to run concurrently.

3. The Appellant was represented by legal counsel throughout the trial and pleaded not guilty, explaining his actions. He claimed that he had consensual sexual intercourse with the complainant; the incident took place at his residence, specifically in his bedroom.

4. The appeal contests both the convictions and sentences. Additionally, the Appellant has sought condonation for submitting the appeal late.

5. The Respondent opposed this application, arguing that the court *a quo* had not erred in its decision. It contended that the court *a quo* considered all relevant factors when convicting and sentencing the Appellant and that the sentence imposed was fair and appropriate in the circumstances.

6. On 11 September 2007, an application for leave to appeal, utilising a standard form, was completed, apparently in the Appellant's own handwriting. This document was submitted to the head of Johannesburg Prison, Medium B, on 17 September 2007.

7. On 27 November 2013, Mabuse AJ granted leave to appeal. The order does not specify whether the leave was granted in relation to the conviction and/or the sentence. It appears that the leave to appeal was granted to the Supreme Court of Appeal; however, there is no record evidence to substantiate this. The delay in prosecuting the appeal, according to the Appellant's heads of argument, was due to the registrar's inability to locate the recording of the application for leave to appeal.

8. This court finds it difficult to understand how the absence of a transcript of a granted leave to appeal can cause a delay of 11½ years in an appeal. It is also difficult to understand how it took six years for the application for leave to appeal to be examined. Consequently, the Appellant has already spent nearly 21 years in prison by the time this appeal is heard.

9. In this instance, the court grants the application for condonation, acknowledging that the delay was not attributable to any misconduct on the part of the Appellant but rather arose from administrative challenges. This judgment concedes that external factors may influence the promptness of proceedings and emphasises that fairness should be paramount in assessing the circumstances related to the application.

B. POINT IN LIMINE

10. The preliminary issue raised by the Appellant in the heads of argument submitted on his behalf concerns the absence of evidence in the record indicating whether the judge who sentenced the Appellant adhered to section 52. Additionally, it is argued that the judge did not consider or scrutinise the verdict of the magistrate.

11. In this regard, reference is made to S v Swartz 2002 (2) SACR 1 (C), where the court, in discussing the duties of the court upon a referral for sentence in terms of section 52, said:

> Before the High Court can impose a sentence, it must consider the record of the proceedings to establish whether they were in accordance with justice. If the High Court is so satisfied, it can proceed with the hearing. If not, it must request reasons for the

conviction from the regional court. Thereafter, the procedures set out in s 52(3)(b) to e(i) and (ii) of the Act must be followed.

12. Appellant further contends that, there is no evidence from the record or from the judgment on sentence that the court received and considered the record of the regional court, and the high court did not, as required by section 52(2)(b), make a formal finding of guilty before he sentenced the Appellant.

13. The Respondent asserts that Mabuse AJ, at the commencement of the sentencing proceedings, duly informed the Appellant of the current procedural stage. He stated: “Accused, we now have reached the stage where the court has to consider and thereafter impose an appropriate sentence.” The Respondent maintains that the court would not have arrived at this stage if it had not reviewed the record and confirmed that the proceedings were conducted in accordance with justice.

14. The Respondent further asserts that the application for leave to appeal was heard on 27 November 2013, and it was submitted by the same legal counsel who is presently raising a *point in limine.* The application for leave was founded on two grounds: firstly, an application for condonation of the late filing of the application, and secondly, an application challenging the conviction. There is no indication within this application that the issue of non-confirmation or the question of whether the proceedings were conducted in accordance with justice was ever raised, either as a ground of appeal or as a *point in limine.* Nevertheless, all the aforementioned points clearly demonstrate that the proceedings were conducted in accordance with the act; consequently, the issue raised in point *limine* lacks merit and should be dismissed.

15. Section 52(1) and (2) of the Criminal Law Amendment Act 105 of 1997, prior to its repeal in December 2007, provided as follows:

> *52(1) If a regional court, after it has convicted an accused of an offence referred to in Schedule 2, following on*
>
> *(a) a plea of guilty; or*
>
> *(b) a plea of not guilty,*

but before sentence is of the opinion that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a regional court in terms of section 51, the court shall stop the proceedings and commit the accused for sentence by a High Court having jurisdiction.

(2)(a) Where an accused is committed under subsection(1)(a) for sentence by a High Court the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court and the plea of guilty and any admission by the accused shall stand unless the accused satisfies the Court that such plea or such admission was incorrectly recorded.

(b) Unless the High Court in question-

(i) is satisfied that a plea of guilty or an admission by the accused which is material to his or her guilt was incorrectly recorded; or

(ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence.

The Court shall make a formal finding of guilty and sentence the accused as contemplated in section 51. [emphasis added]

16. Section 52(3) is relevant where an accused pleaded not guilty in the lower court and is referred for sentencing in terms of section 51. It provides:

(3)(a) Where an accused is committed under subsection(1)(b) for sentence by a High Court the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court.

(b) The High Court shall after considering the record of the proceedings in the regional court sentence the accused, and the judgment of the regional court shall stand for this purpose and be sufficient for the High Court to pass sentence as contemplated in section 51: Provided that if the judge is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice he or she shall without sentencing the accused obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused.

(c) If a judge acts under the proviso to paragraph (b), he or she shall inform the accused accordingly and postpone the case for judgment, and if the accused is in custody, the judge may make such an order with regard to the detention or release of the accused as he or she may deem fit.

16. Section 52 was repealed with effect from 31 December 2007, and section 51 was amended to give the regional magistrates' court jurisdiction to impose the minimum sentences set out in the Act.

17. In my view, the requirements in section 52(3) are not merely a formality. The procedure necessitates a review of proceedings before the lower court before the sentence is carried out. The proviso to subsection (3)(b), which articulates that "... *if the judge considers that the proceedings are not in accordance with justice or that there exists doubt concerning their conformity with justice,"* mirrors the proviso found in automatic review procedures outlined in section 304 of the Criminal Procedure Act, 1977. The sentencing judgment contains no indication that the judge responsible for sentencing the Appellant was aware of the duties and responsibilities imposed upon him by section 52 (3).

18. The opening statement of the judgment regarding sentencing, which indicated that the stage had been reached where the high court was required to consider and impose an appropriate penalty, suggests that the court did not regard its role as solely reviewing the proceedings conducted by the regional court. In my view, there was an irregularity in proceedings held in terms of section 51(2)(a) read with section 52(3). However, such irregularity does not necessarily invalidate the proceedings either held before the lower court or in the high court. This court, sitting as a court of appeal, can determine whether the proceedings were conducted in accordance with justice. In my view, it is clear form a consideration of the record that the proceedings before the lower court, were in accordance with justice. The irregularity, therefore, does not render the proceedings invalid. Accordingly the point in limine is dismissed.

C. Grounds of Appeal

In summary, the basis of the appeal, as argued on behalf of the Appellant, is that:

(a) The court a quo failed to apply the cautionary rule adequately when dealing with the complainant's evidence.

(b) The court erred in determining that the complainant's evidence was credible and reliable.

(c) The duration of life imprisonment is shockingly inappropriate.

(d) The court a quo erred in not considering the time spent by the Appellant while awaiting trial.

(e) The court erred by overemphasizing the following factors: the seriousness and prevalence of the offence, and the fact that society's interests can only be served through imprisonment.

(f) Had the court not overemphasized those factors, it should have found substantial and compelling grounds to justify a more lenient sentence based on the Appellants' circumstances.

AD CONVICTION

Appellant's version

19. The Appellant was charged and convicted of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[1] ("Sexual Offences Act") in that, he unlawfully and intentionally committed an act of sexual penetration with a female, ("complainant"), by penetrating her vagina with his penis more than once without her consent. He was further charged and convicted of kidnapping.

20. The Appellant's evidence was that the complainant and her husband ("Patrick") were tenants at his parental home on the day of the alleged offence on 30 August 2004. He testified that he was occupied with fixing a car when Patrick arrived, saying that he would visit again later.

21. When Patrick returned, he took out about 750 milliliter's of beer, which they both drank. They sat on a sofa while his wife, about four meters away, watched TV and drank liquor. The appellant then went to his bedroom and lay on the bed because the child was crying. When his wife entered, she saw him lying there

[1] 32 of 2007 ("Sexual Offences Act").

and left. She later returned to the dining room and sat on a different sofa, next to Patrick rather than the one she had previously occupied. He watched through a gap in his door.

22. While watching through the window pane, he then saw Patrick's hand on his wife's thighs. He intervened by hitting both of them, causing Patrick to run out of the house. Later, he called his sister to come and see what Patrick was doing.

23. While he was at his house shortly after the confrontation with Patrick, the complainant arrived and returned a hairdryer. It was then that the Appellant explained to her what her husband had done. Afterwards, he took the complainant to the bedroom, where they spent the night together. The appellant denied having raped the complainant and testified that their sexual encounter that evening was consensual. He denied having gone to the complainant's residence.

Complainant’s version

24. The complainant, Ms. Grace Baloyi, told the court that she knew the Appellant, as she had once been a tenant at the Appellant`s residence, but she had never been in love with him.

25. She testified that on the evening of 30 August 200, at approximately 23h00, the appellant arrived at her house. She and her husband tried to close the door against the Appellant as he attempted to force his way inside the house. The Appellant kicked the door three times. Eventually, the door opened, and she saw him holding a knife. She asked him what was happening, and he said he did not want to talk to her but wanted to speak to her husband. The act of forcefully opening the door was deliberate and unlawful. The Appellant, who was armed with a knife, restrained the complainant’s hands and forced her to accompany

him to his dwelling against her will. She submitted to the Appellant because she did not want her husband to get injured.

26. Upon arriving at the appellant’s house, he told his wife that he was going to sleep with the complainant and she should sleep in her sister's room.

27. Then the Appellant pulled the complainant into his bedroom and closed the door. All these events occurred in the presence of the Appellant`s wife and sister. Thereafter, the Appellant threw the complainant onto the bed, and at that stage, he was still holding the knife.

28. He started undressing her, produced his penis and inserted it into her vagina. She was struggling and pleading with the Appellant to release her. The Appellant then withdrew his penis and again inserted it into her vagina. That happened three times. She asked the Appellant to release her.

29. After the Appellant had raped her, the complainant left his house and returned to her residence. Upon her arrival, she reported to her husband that the Appellant had raped her. They proceeded to Moroka Police Station, where she formally lodged a complaint of rape against the Appellant. She was subsequently transported to Chris Hani Baragwanath Hospital for a medical examination. The doctors' findings were that the gynaecological examination revealed a torn hymen and the presence of bruising, and their conclusion was that these signs indicated recent sexual intercourse. The complainant testified that she did not consent to the sexual intercourse with the appellant.

Analysis and Legal Principles

30. It was argued on behalf of the Appellant that it is reasonably plausible to conclude that the complainant consented to engaging in sexual intercourse because both parties aimed to make a point and that their sexual encounters were motivated by a desire to spite their spouses. It was further argued that the complainant was

the only witness regarding the rape allegation. As a result, the court a quo did not properly apply the cautionary principle when evaluating the complainant's evidence.

31. Counsel representing the State asserted that the Appellant was correctly convicted by the court a quo, maintaining that no irregularities were apparent. The evidence proved beyond a reasonable doubt that the Appellant participated in the kidnapping and rape of the complainant. Furthermore, it was asserted that the contradictions should not be analyzed in isolation. When evaluated alongside the evidence regarding kidnapping, the contradictions may not be deemed material, and the complainant's testimony was substantiated in significant respects.

32. In the case of *Mkhize*,[2] the court held as follows:

> *"The approach to be adopted by a court of appeal when it deals with thbe factual findings of a trial court is trite. A court of appeal will not disturb the factual findings of a trial court unless the latter has committed a material misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it if it is convinced that the decision is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it would uphold it."*[3]

33. It is trite that the onus rests on the State to prove the accused's guilt beyond a reasonable doubt. If his version is reasonably possibly true, he must be acquitted.

34. In terms of section 208 of the Criminal Procedure Act[4] ("CPA"), the court is permitted to accept the evidence of a single witness contingent upon its adherence to pertinent criteria. The cautionary rule requires the court to consciously remind itself to exercise prudence in evaluating evidence that established practices have indicated should be approached with scepticism. Secondly, the court must

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[2] *Mkhize v S* [2014] ZASCA 52 (14 April 2014) ("*Mkhize*").
[3] *Id* at para 14.
[4] 51 of 1977.

employ supplementary safeguards that minimise the likelihood of erroneous conclusions drawn from questionable evidence.

35. The complainant was considered a competent and credible witness, and her testimony was considered satisfactory in all respects. His evidence was also corroborated by another witness (Sibongile). In contrast, the court assessed the Appellant as lacking credibility and persuasiveness, characterising him as evasive and generally unimpressive.

36. In my view, the submission that Appellant was falsely implicated by the complainant because she feared her husband’s reaction to her spending the night with the Appellant, was unpersuasive. The Appellant’s evidence was replete with inconsistencies and implausible assertions. In my view, there was no misdirection upon which it could be said that the Appellant was not properly convicted.

37. This proposition put forward by the Appellant was contested by a witness, Sibongile Maluleke, who testified that she was acquainted with the Appellant and was aware that he habitually visited the complainant's husband at their residence. She informed the court that on the day in question, the Appellant was engaged in an argument with the complainant's husband due to observing his wife kissing the complainant's husband in their dining area. Subsequently, he inquired of Patrick, the complainant's husband, about the reason for such conduct, after which Patrick fled the scene.

38. She further told the court that the Appellant then decided to swap wives, meaning his wife and the complainant. At that time, the Appellant's wife had a suitcase full of clothes and was being forced to stay with the complainant’s husband. The Appellant then knocked on the complainant's door, but it was not opened. The Appellant threatened to break down the door if they refused to open. He then kicked open the door while holding a knife in a threatening manner. When the door was opened, the Appellant said to the complainant, "Sorry, I'm not looking

for you, but I want to kill Patrick." The complainant then stepped out of the shack and asked the Appellant to explain what had happened inside the house.

39. This court accepts the State’s submission that the trial court determined that the state witnesses presented the sequence of events clearly and accurately. Furthermore, the Appellant’s challenge to the conviction lacks merit, and his guilt has been established beyond a reasonable doubt.

40. The Magistrate did not err in concluding that the evidence presented was sufficient to establish his guilt on the charges laid against him. The Appellant went to the complainant’s residence with the intent to confront the complainant’s husband regarding an alleged relationship with his wife. Upon failing to locate the husband, he subsequently detained the complainant with the apparent intention of engaging in sexual misconduct as an act of revenge.

41. At the time, the Appellant was in possession of a knife when he grabbed and pulled the complainant into the house and threw her onto the bed. The complainant`s evidence was that the sexual intercourse occurred more than once, with at least two-minute intervals between each event. The sexual intercourse involved the Appellant withdrawing his penis and re-inserting it multiple times, with each instance ending in ejaculation.

42. The Appellant argued that the sexual intercourse happened only once, despite the complainant saying it happened three times. He also denied visiting the complainant’s house, claiming she had visited him alone to bring a hairdryer.
43. This court's view is that the Appellant engaged in sexual intercourse with the complainant on three separate occasions. The complainant was clear in her assertion that the intercourse occurred more than once, despite her feelings of fear during the events. She was consistent in her testimony, confirming that the Appellant had sexual intercourse on three occasions, each lasting about two minutes and ending with ejaculation, with each session separated by a two-minute interval also ending with ejaculation.

44. The account provided by the complainant concerning two minutes of intercourse followed by two minutes of breaks on each of the three occasions appears to be highly credible.

45. It is important to note that the complainant's level of fear was intensified due to being restrained by an individual wielding a knife. It is evident that the Appellant consistently harboured the intent to commit assault, notwithstanding the fact that the second and third incidents occurred shortly after the initial incident and at the identical location.

46. The court concurs with the magistrate's ruling that the Appellant engaged in multiple instances of penetration of the complainant, and such determinations are indisputable.

47. It is not necessarily true, as submitted by the Appellant, that every identified contradiction results in the dismissal of the evidence. The lower court. Correctly found that. The complainant and other witnesses remained consistent and credible throughout cross-examination and the complainant never contradicted herself during the cross-examination. It also found that it was clear that the complainant did not harbor any motive to misrepresent facts. Even though she had sufficient opportunity to do so, she never had any motive to falsely implicate the Appellant.

48. In *Mkohle,*[5]*,* it was held that:

> "*…contradictions per se do not lead to the rejection of a witness's evidence… they may simply be indicative of an error", in addition. not every error made by a witness affects his credibility; in each case, the trier of fact must make an evaluation, considering such matters as the nature of the contradictions, their number and importance, and*

[5] *S v Mkohle* [1989] ZASCA 98; 1990 (1) SACR 95 (A).

their bearing on other parts of the witness's evidence."[6]

49. In our legal framework, the burden of proof means that the state must prove the accused's guilt beyond a reasonable doubt. The accused is entitled to an acquittal if there is a reasonable doubt about their innocence.[7] The accused must also verify the truth of their explanation. However, a conviction cannot be based solely on an unlikely explanation; the court must establish the explanation's falsehood beyond a reasonable doubt.[8] Additionally, the court must assess all evidence collectively, rather than in isolation.

50. The lower court appropriately determined that the witness in question possessed credibility. The court dismissed the Appellant's assertion that the complainant had falsely implicated him. It is evident that he commenced by assaulting the complainant's husband and chasing him, while maintaining his desire to prove a point by raping the complainant. Notably, the complainant had no prior acquaintance with the Appellant before this occurrence, eliminating any potential motive for the complainant to provide a false accusation.

51. One of this issue that arises in this appeal is whether the evidence proved that the Appellant was raped the complainant more than once, thereby triggering the provisions of s51(1) of Act 105 of 1997. The lower court, upon reviewing the evidence, notably concluded that the Appellant raped the complainant multiple times. In the matter of *S v Blaauw*,[9] the court held that:

> *"Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separated acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice…. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has*

[6] Id at 98F-G. See also *S v Oosthuizen* 1982 (3) SA 571 (T) at 576 G-H.
[7] *S v Van Der Meyden* 1999 (1) SACR 447 (W), quoted with approval in *Tshiki v S* [2020] ZASCA 92 at [44].
[8] *S v Shackell* [2001] ZASCA 72; 2001 (4) SA 1 (SCA) at [30].
[9] 1999 (2) SACR 295 (W).

formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place."[10]

52. In *casu,* the Appellant raped the complainant in various times. The complainant told the court that after every penetration, he would ejaculate as he was not using a condom. He committed several separate acts of rape. There is no indication that the intention to engage in sexual intercourse ceased immediately following the initial rape by the Appellant. This event constituted a series of sexual acts involving the complainant. The Appellant ejaculated after various encounters. In my view, it was therefore proven that the appellant raped the complainant more than one.

53. This Court is also satisfied that the state has established its case beyond a reasonable doubt concerning unlawful sexual intercourse and that the Appellant was correctly convicted of kidnapping and rape.

SENTENCE

54. The appellant was sentenced on 7 September 2007. He has accordingly already served almost 18 years of his sentence. The offence was committed on or about 30 August 2004, and the appellant was arrested soon thereafter. He was not granted bail and spent a period of three years in prison awaiting the finalisation of his trial. Accordingly, he has to date already been in prison for 21 years. This is a lengthy period and ought to have been considered in imposing sentence.

55. In my view, the sentencing court did not adequately consider the period of imprisonment the appellant had already served when it sentenced him. This should have been taken into account.

56. The appellant was born in 1971. He would have been 34 years old at the time the offences were committed, but he is now 54 years old. In my view, the

[10] Id at 300A-G.

sentence and period of imprisonment that the appellant has already served is commensurate with the crimes that he committed. Accordingly, in my view, his sentence of life imprisonment should be set aside and replaced with a sentence that would entitle him to be released imminently. On 7 September 2025 the appellant will have served 18 years of his sentence.

57. In my view, the aforesaid factors, cumulatively considered, constitute substantial and compelling factors warranting a departure from the prescribed minimum sentence of life imprisonment. An appropriate sentence would have been 18 years imprisonment. The revised sentencing takes into account all the facts and circumstances in relation to the offences the appellant committed.

58. According, the following order is made.

    1. The appellant's appeal against his conviction is dismissed.

    2. The appellant's appeal against his sentence is upheld, and the sentence of life imprisonment is set aside.

    3. The appellant is sentenced to 18 years imprisonment. The sentence is antedated to 7 September 2007.

    4. The appellant will accordingly have fully served his sentence on 6 September 2025, and he will be entitled to be released on this date.

Tbokako

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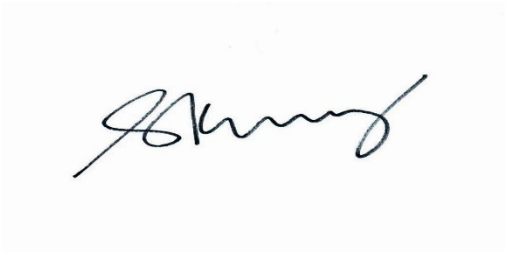
ACTING JUDGE T BOKAKO
ACTING JUDGE OF THE GAUTENG HIGH COURT, JOHANNESBURG



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JUDGE S KUNY

JUDGE OF THE GAUTENG HIGH COURT, JOHANNESBURG

PP

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ACTING JUDGE W KARAM

ACTING JUDGE OF THE GAUTENG HIGH COURT, JOHANNESBURG

Date of Hearing:	9 JUNE 2025
Date of Judgment:	29 AUGUST 2025

APPEARANCES

Counsel for the Appellant	ADV MZAMANE
Counsel for the Respondent	ADV MAKUA