

SOUTH AFRICA / JUDGMENT

Mtalingoane v S (Appeal) (CA32/2024)

[2025] ZANWHC 138 (7 August 2025)

[2025] ZANWHC 138**COURT**

North West High Court, Mafikeng

BEFORE

R D Hendricks, S.W Malane

CASE / FILE NUMBER

CA32/2024

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Source record**IN THE NORTH WEST HIGH****COURT, MAHIKENG****CASE NO: CA32/2024****Reportable: NO****Circulate****to Judges: NO****Circulate****to Magistrates: NO****Circulate****to Regional Magistrates: NO****In the matter between:**

MPHO
ALBERT MTALINGOANE
Appellant
AND
THE
STATE
Respondent
DATE
OF HEARING
: 06 JUNE
2025
DATE
OF JUDGMENT
: 07
AUGUST 2025
FOR THE
APPELLANT
: ADV.
MASUKU

FOR THE
RESPONDENT
: ADV.
ZAZO

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand-down is deemed to be 10h00 on 07 August 2025.

ORDER

Resultantly, the following order is made:

- (i) The appeal against sentence is dismissed.
- (ii) The sentence of life imprisonment is confirmed.

Summary

Section 51 (1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended. Sentence of life imprisonment for rape - when is it an appropriate sentence. Failure to make any ancillary orders that the name of the appellant (accused) be entered in the National Register for Sexual Offenders Act; and the appellant (accused) be declared unsuitable to interact with children.

HENDRICKS JP

Introduction

- [1] The appellant, Mr. Mpho Albert Motalingoane, was arraigned before the Regional Court, Klerksdorp on a charge of rape in contravention of Section 3 of the Sexual Offences and Related Matters Act 32 of 2007 (SORMA) read with the provisions of Section 51 and Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1997 (CLAA). It was alleged that he sexually (vaginally) violated a 14 year old girl. He pleaded guilty and was sentenced to life imprisonment. This appeal is against the sentence only.
- [2] The facts as succinctly outlined in the plea explanation tendered in terms of Section 112 (1) (b) of the Criminal Procedure Act 51 of 1977, as amended (CPA), and other evidence, is that on the night in question, the complainant was asleep in the safety and sanctity of

her bedroom, in her place of abode. The appellant broke in an attempt to steal some valuables. He entered into her bedroom while he was armed with a knife. She was awoken. He then threatened to stab her with the knife. He then kidnapped her and took her to his place, where he sexually violated her. A case of rape was reported and investigated. The appellant was charged and attended court, but the case was subsequently withdrawn because the results of the DNA samples that were taken, was awaited from the laboratory services.

- [3] After a passage of approximately six (6) years, the matter was finally tried. In what appears to be a plea bargain, charges of housebreaking with intent to steal and kidnapping where not proffered against the appellant. He tendered a guilty plea on the charge of rape only. The sentence of life imprisonment is assailed on the premise or bases that it is harsh and shockingly inappropriate; and that the trial court erred in not finding that there exist substantial and compelling circumstances, in terms of the provisions of Section 51 (3) and (6) of the CLAA, that warrants a deviation from imposing life imprisonment as a sentence.
- [4] Furthermore, the trial court erred in over-emphasizing the seriousness of the crime and the interests of society and in the process under-emphasizing the personal circumstances of the appellant as an accused person. The contention is that the trial court failed to consider the personal circumstances collectively as opposed to individually. The personal circumstances of the appellant are: that he pleaded guilty which is a sign of remorse and contrition; that he is the father of a 4 year old minor child who stays with his mother; that he maintained his child; that he comes from a harsh background of poverty; that he achieved standard 10; that he is 33 years of age; that although he has a previous conviction of robbery which he admitted, he is a first offender of the crime of sexual violence.

- [5] In *S v Malgas*[1] the following is stated:

“[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary –

A Section 51 has limited but not eliminated the courts’ discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.

H In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

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

J In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the legislature has provided.

[6] In *S v Matyityi*[2] the following is stated:

"[11] I turn now to the central issue in the appeal, namely whether, given the facts of this case, the trial court was correct in its conclusion that substantial and compelling circumstances as contemplated by that expression were indeed present. S v Malgas is where one must start. It, according to Navsa JA, is 'not only a good starting point but the principles stated therein are enduring and uncomplicated' (DPP KZN v Ngcobo). Malgas, which has since been followed in a long line of cases, set out how the minimum sentencing regime should be approached and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. To paraphrase from Malgas: The fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer 'business as usual'. A court no longer had a clean slate to inscribe whatever sentence it thought fit for

the specified crimes. It had to approach the question of sentencing conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed unless substantial and compelling circumstances were found to be present.”

- [7] Much emphasis was placed on the fact that the appellant pleaded guilty and did not waste the trial court's time and spared the complainant the trauma to relive her ordeal by testifying and be subjected to cross-examination about it. Although a plea of guilty may under certain circumstances be a sign of remorse and contrition, one has to look at the surrounding circumstances to determine whether an accused is indeed truly remorseful or whether he pleads guilty as he does not have any other alternative, but to plead guilty as a result of the strength of the State's case. This case is a classic example of the latter.
- [8] After the arrest of the appellant, he did not confess to the commission of the crime. He attended court without any intimation that he want to plead guilty to the crime. The case was withdrawn and a period of six
- (6) years passed before he was again arraigned before court. By then, the DNA results was available which positively linked the appellant. In the face of the conclusive DNA evidence, the appellant had no alternative but to admit his guilt. This is not a genuine show of remorse or contrition.
- [9] In *S v Matyityi*, supra, the following is stated about true and genuine remorse or contrition at paragraph [13]:

“[13] Remorse was said to be manifested in him pleading guilty and apologising, through his counsel (who did so on his behalf from the bar) to both Ms KD and Mr Cannon. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. The evidence linking the respondent to the crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend,

there was DNA evidence linking him to the crime scene, pointings-out made by him and his positive identification at an identification

parade. There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and

acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her

change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case.”

(my underlining)

I echo the same sentiments.

- [10] The aggravating facts and features of this case by far outweigh the mitigating factors and personal circumstances of the appellant. The complainant was asleep at night in the safety and sanctity of her house. The appellant broke into the house and invaded her safety and sanctity. This was done in an attempt to steal some valuables in the house. This in itself shows that the appellant had no respect for the property of the complainant and others in her homestead. This is also a violation of the privacy and safety of the complainant. The appellant has a previous conviction of robbery which shows that he has no respect for someone else's property.
- [11] Furthermore, the appellant was armed with a dangerous weapon, to wit a knife, which he used to threaten the complainant. He forcefully abducted the complainant and took her to his place, where he sexually violated (raped) her. This clearly proves premeditation. The complainant was by then a minor of 14 years of age.
- [12] Rape is a violation of the privacy of a woman. Rape is a very serious offence constituting as it is humiliating, degrading and crucial invasion of the privacy, the dignity and the person of the victims. The right to dignity, privacy, and the integrity of every person are basic to the ethos of the constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes

without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The

appellant showed no respect for their lives[3]. This quote is equally applicable in the present case.

- [13] Viewed holistically, I am unconvinced that the personal circumstances cumulatively taken are substantial and compelling to warrant a deviation from the prescribed sentence of life imprisonment. Rape of women and young girls is a pandemic which engulfs not only the North West Province but the country as a whole. This scourge must be stopped. I am of the considered view that there is no misdirection that can be found with the imposition of the sentence of life imprisonment by the learned Regional Magistrate. Even with the absence of any misdirection aside, I am convinced that the sentence of life imprisonment under the circumstances of this case is an appropriate, fair and just sentence. The appeal against sentence should consequently fail.

[14] There was no ancillary order(s) made by the Regional Magistrate. It was not ordered that the name of the appellant must be entered into the National Register of Sexual Offenders; nor was it ordered that the appellant is declared undesirable to interact with children in terms of the Children's Act. Similarly, was no order made that the victim be consulted by the Parole Board, when parole is considered. The record does not reflect that any of these ancillary orders were even considered by the presiding Regional Magistrate. As to why this was not considered, will remain a mystery. As court of appeal we are confined to the four corners of the record.

Order

[15] Resultantly, the following order is made:

- (i) The appeal against sentence is dismissed.
- (ii) The sentence of life imprisonment is confirmed.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

I agree

S.W MALANE

ACTING JUDGE OF THE HIGH COURT,

[1] 2001

(1) SACR 469 (SCA).

[2] 2011 (1) SACR 40 (SCA)

[3] See: *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA).

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