



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable/Not Reportable

Case no: A170/2024

In the matter between:

THULANI NONGWANA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Thulani Nongwana v The State* (Case no A170/2024)
(DDMMYY)

Coram: CLOETE, J AND MPHEGO AJ

Heard: 1 August 2025

Delivered: 8 August 2025

Summary: The appellant herein has exercised his automatic right to bring an appeal to this court against the life imprisonment sentence imposed on two counts of rape (counts 3 and 4), which sentence was imposed on 9 May 2024 by the Worcester Regional Magistrate's Court. The appeal against the sentence of life imprisonment imposed on the two counts of rape (counts 3 and 4) is dismissed.

ORDER

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1. The appeal against the sentence of life imprisonment imposed on the two counts of rape (counts 3 and 4) is dismissed.
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JUDGMENT

Mphego AJ (Cloete J concurring):

Introduction and background

[1] This is an appeal where the appellant has exercised his automatic right of appeal¹ to the life imprisonment sentence imposed by the trial court (Worcester Regional Magistrate's Court) for the two counts of rape of an adult female victim on 3 September 2018. The appellant was also convicted and sentenced for the kidnapping and assault of the victim.

[2] This appeal is confined to the sentence imposed for the two counts of rape of the victim and does not extend to the convictions themselves or to the sentences for kidnapping or assault. In relation to the two counts of rape, the appellant was found to have committed an offence in terms of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the Sexual Offences Act') and was convicted.

[3] The conviction by the trial court invoked s 51(1) of the Criminal Law Amendment Act 105 of 1997 ('the minimum sentence legislation') which prescribes imprisonment for life unless in terms of s 51(3) of the minimum sentence legislation,

¹ In terms of s 309(1)(a) of the Criminal Procedure Act.

the trial court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed, in which case the trial court shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

[4] The proven facts emanating from the trial court record are as follows:

a) The appellant and the victim were not known to each other before the day the appellant committed the crimes. They met for the first time on the day in question at Danny's Tavern in Worcester.

b) In the early hours of 3 September 2018, the victim left the tavern with a male friend, Nyaniso, and was waiting outside his house when the appellant, who had followed them from the tavern, approached her. The appellant confronted the victim about Nyaniso, questioning why she was with a 'foreigner' (Nyaniso). The appellant requested the victim to leave with him.

c) The victim refused to leave with the appellant. In response, the appellant forcefully grabbed her hand, pulled her away from the gate where she was waiting, and began to assault her in full view of other persons in that street. The victim screamed for help but her cries were ignored by the people in that street.

d) The appellant deprived the victim of her freedom of movement by forcefully taking her to his house against her will. At his house, the appellant instructed the victim to undress. When she refused, he assaulted her further. The appellant undressed the victim (leaving her vest and bra), pushed her onto the bed, and, after overcoming her resistance through further assault, raped her by vaginal penetration. Later that morning, the appellant raped the victim again, once more using force and without her consent. The appellant then walked the victim half way home. The victim, who was visibly bruised from the assault later reported the crime to the police station. The victim did not willingly give consent to the sexual intercourse.

e) During the ordeal, the appellant assaulted the victim with open hands, fists, and head-butted her, causing visible injuries including swelling and bruises to her face, body, and thighs.

[5] The victim's version of events as presented by the respondent at the trial court was overwhelmingly corroborated by a medical report and photographs showing fresh bruises and swelling consistent with her account of the assault and rape, as well as the testimony of witnesses called by the respondent.

[6] At the time of sentencing, the trial court was presented with the following factors: (1) the appellant was a young (26 year old) first time offender with potential for rehabilitation; (2) the appellant lost his father when he was 7 (seven) years old; (3) he lost his mother in the year 2018 (4) he carried out the crime while under the influence of alcohol; (5) he was gainfully employed and supported his extended family and (6) has 'taken responsibility' for his actions as set out in the pre-sentence report. It was acknowledged that the victim suffered physical injuries (swelling and bruises), but it was pointed out that there were no serious or lasting injuries.

[7] It was argued on behalf of the appellant that, while none of the individual factors might amount to substantial and compelling circumstances on their own, when considered cumulatively, they justified a deviation from the minimum sentence of life imprisonment.

[8] In turn, the respondent made submissions to support the imposition of the prescribed minimum sentence of life imprisonment for the rape convictions. The respondent presented a case focusing on the severity of the crimes committed, the impact on the victim, and the need for a stringent sentence to reflect the gravity of the crimes and to serve as a deterrent. The respondent argued that the appellant's actions were premeditated and opportunistic, showing a clear intent to harm and violate the victim and that the appellant's behaviour during the trial, including his lack of genuine remorse and attempts to evade arrest, further demonstrated his culpability and the need for a severe sentence. The submissions by the respondent were supported by victim impact statements and a pre-sentence report.

[9] In heads of argument, the respondent's counsel emphasized the seriousness and prevalence of rape, referencing case law (*S v Vilakazi 2009 (1) SACR 552 (SCA)*), underlining the gravity of the crime of rape and that the circumstances of the offender necessarily regress into the background when determining an appropriate sentence.

[10] The respondent argued that the appellant's lack of genuine remorse, the violence involved, and the vulnerability of the victim were aggravating factors. The respondent also highlighted that the appellant's late admission of guilt (only to the probation officer, not in court) should not be considered a mitigating factor, and that alcohol consumption could not excuse or mitigate the offences.

[11] The respondent argued that the absence of previous convictions; youthfulness, or lack of lasting physical injury do not, on their own, constitute substantial and compelling circumstances to justify deviation from the minimum sentence and that other courts have consistently upheld life imprisonment in similar cases, even where the appellant was a first offender or relatively young, especially where aggravating factors such as violence, lack of remorse, and the vulnerability of the victim are present.

The trial court findings

[12] The trial court highlighted the brutal nature of the assault associated with the two counts of rape, the physical and psychological trauma inflicted on the victim, the appellant's conduct after committing the crime, including evading arrest and providing misleading information about his whereabouts and the lack of genuine remorse.

[13] The trial court found that the aggravating circumstances far outweighed the personal circumstances of the appellant and ultimately concluded that there were no substantial and compelling circumstances that justified deviating from the prescribed minimum sentence of life imprisonment for the rape charges. The court found the appellant's late admission of guilt to be more an expression of regret than true remorse.

[14] The trial court acknowledged that the appellant was a first offender and relatively young at the time of the offence. However, it found that these factors, while relevant, did not in themselves constitute substantial and compelling circumstances sufficient to deviate from the prescribed minimum sentence for such serious offences.

[15] The trial court noted the appellant's employment and support of his family, but found that these circumstances were outweighed by the gravity of the offences and the impact on the victim.

[16] The trial court was not persuaded that the appellant's late admission of guilt to the probation officer amounted to genuine remorse. It found that this admission came only after conviction. The trial court distinguished between regret and true remorse, finding the former to be present in this case.

[17] The trial court rejected the argument that intoxication was a mitigating factor, noting that the appellant was not so intoxicated as to be unaware of his actions, and that he continued to violate the victim after sobering up.

[18] The trial court expressly referred to s 51(3)(aA) of the minimum sentence legislation, which provides that an apparent lack of physical injuries to the victim does not constitute a substantial and compelling circumstance justifying a lesser sentence. The trial court held that, while the absence of lasting injury could be a mitigating factor in the overall assessment, it could not, either alone or cumulatively with the other factors, justify a deviation from the minimum sentence.

The appeal

[19] This court, sitting as an appeal court is not at liberty to impose what it considers to be the correct sentence simply because it would have chosen differently. Instead, it is guided by well-established principles which prescribe that it will only interfere with a sentence imposed by the trial court if there has been a material misdirection such as a failure to consider relevant factors, or if there has

been over- or under-emphasis of certain factors, or an error in principle or if the sentence is so startlingly or disturbingly inappropriate that it induces a sense of shock².

[20] This court is not entitled to simply make its own value judgment as to what sentence it would have imposed unless it first finds that the trial court erred in its approach or reasoning. The traditional ‘material misdirection’ test remains the standard for appellate interference, even in minimum sentence cases³.

[21] In the recent judgment of this division by Sher J⁴ (with Le Grange J concurring), he explained that an appellate court should only interfere with the sentencing court’s value judgment if it is shown that the sentencing court erred in its assessment i.e, if there was a material misdirection in identifying or weighing the relevant circumstances. He explained that the function of the appellate court is supervisory. It must respect the sentencing court’s value judgment unless it is shown to be wrong due to a material misdirection. Only then is the appellate court entitled to make its own value judgment as to whether substantial and compelling circumstances exist. I am in agreement with this school of thought.

The grounds of appeal advanced on behalf of the appellant

[22] Mr Sebueng on behalf of the appellant submitted that the cumulative effect of the factors justifies a deviation from the prescribed minimum sentence of life imprisonment. He submitted that, the factors collectively, together with the pre-sentencing report, support the appellant's justification for a deviation from the prescribed minimum sentence of life imprisonment. He expressed that he would shy away from advancing a narrative that the trial court misdirected itself but that this court could consider the appellant’s circumstances and come to a different sentence especially in the light of *S v PB* 2013 (2) SACR 533(SCA) which held that the circumstances of offenders need not be exceptional in nature in order to be

² See *S v Malgas* 2001 (2) SA 1222 and *S v Dodo* 2001 (1) SACR 594 (CC).

³ See *S v Malgas* 2001 (2) SA 1222 and *S v Dodo* 2001 (1) SACR 594 (CC), which were endorsed by *S v Bogaards* 2013 (1) SACR 1 (CC) and more recently, a judgment of Sher J in this division *M.T v S* [2025] [ZAWCHC] 307 (25 July 2025) (WCC).

⁴ Sher J in *M.T v S* [ZAWCHC] 307 (25 July 2025) (WCC), a Full Court of this Division (Sher J, Le Grange concurring, Dickerson AJ dissenting).

accepted. Mr Sebueng however, did not present support for how the appellant's age and his background (raised by a single mother and the passing of his mother in 2018) assist the appellant when engaging in this exercise.

[23] In addition, he relied on *S v Rabie 1975 (4) SA 855 (AD)* in submitting that courts should strive to show mercy towards offenders as courts are not there to just punish but are there to unleash corrective punishment.

Arguments advanced by the respondent in opposition

[24] The respondent highlighted aggravating factors which it submits outweigh the mitigating factors, namely, the continuous assault and degradation of the victim, the ongoing psychological trauma and harm suffered by the victim and the extent of the injuries. The respondent painted a picture that the appellant is a 'chance-taker' who pushed boundaries with the victim until he got his way on that fateful day. The respondent submitted that the appellant took another 'chance' when he pleaded not guilty, arguing that the victim consented to having sexual intercourse with him, only to later advance 'remorse' and 'taking responsibility' as factors to be taken into account during sentencing proceedings. The respondent argued that the appellant has been crafty. In 2018 he tried to apologize to the victim after he realized he had to face the music. The respondent argued that the aforementioned indicates that the appellant is like a wolf in sheep's clothing and dangerous to society.

[25] The respondent highlighted that the trial court dealt with all the circumstances relating to the appellant and came to the correct conclusion that no such circumstances exist that could warrant a deviation from the prescribed minimum sentence.

[26] The respondent emphasized the role of the court hearing the appeal, that it will only interfere with a sentence if trial court erred in its consideration of relevant factors or the law relevant to sentencing; or if the trial court wrongly applied a legal principle and imposed a 'shockingly inappropriate' sentence. It was argued that there is no need for this court to interfere with the sentence of the trial court and that the magistrate correctly exercised discretion, taking into account the proven facts, the

nature of the offences, the applicable minimum sentence legislation, the appellant's personal circumstances, and the injuries suffered by the victim, both physically and psychologically.

Evaluation

[27] Having considered the totality of the record, the heads of argument and the parties' respective submissions, it is my respectful view that the appellant has not made a proper case as prescribed by well-established principles which dictate the instances in which this court may interfere with a sentence imposed by the trial court. I am not persuaded that there are grounds for this court to interfere with the sentence of the trial court. The appellant has not presented evidence of the trial court's errors or failures to consider relevant factors and over or under emphasize certain factors or how the trial court erred in principle.

[28] Instead, Mr Sebueng conceded that it cannot be said that there is a misdirection, let alone a material one, which points to a failure by the trial court to consider relevant factors or that the sentence is so startlingly or disturbingly inappropriate that it induces a sense of shock.

[29] In addition to this, I point out that this court has no duty to strive to show mercy towards the appellant as argued on behalf of the appellant, relying on *S v Rabie* 1975 (4) SA 855 (AD).

[30] The record, demonstrates a well-reasoned judgment of the trial court and I cannot fault the sentence imposed by that court. Furthermore, the submissions made by both counsel in regard to this appeal do not demonstrate misdirection of the trial court.

[31] The trial court meticulously considered whether the factors raised by the appellant constitute substantial and compelling circumstances sufficient to deviate from the prescribed minimum sentence for such serious offences. In argument, in this court, the circumstances of the appellant were again in the spotlight but I am not

convinced that such circumstances are compelling and that there was an irregularity in the trial court's consideration of such circumstances.

[32] It goes without saying that I do not find the trial court's sentence 'shocking, startling or disturbingly inappropriate.'

[33] **The following order is made:**

'The appeal against the sentence of life imprisonment imposed on the two counts of rape (counts 3 and 4) is dismissed.'

TR MPHEGO
ACTING JUDGE OF THE HIGH COURT

Cloete J (concurring)

JI CLOETE
JUDGE OF THE HIGH COURT

Appearances:

For the appellant : Adv M. Sebueng, Legal Aid, Cape Town

For the respondent : Adv E. Kortje, Directors of Public Prosecutions, Cape Town