



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES ☒ NO
(2) OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3) REVISED
DATE: 13 June 2025
SIGNATURE: [REDACTED]

Case No. A338/2023

In the matter between:

MLOTA, BUTI

APPELLANT

And

THE STATE

RESPONDENT

Coram: Millar J et More AJ

Heard on: 22 May 2025

Delivered: 13 June 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 13 June 2025.

ORDER

It is Ordered:

- [1] The appeal is upheld.
- [2] The sentence of the court *a quo* is set aside and replaced with a sentence of 15 years imprisonment.

JUDGMENT

MILLAR J

- [1] On 8 September 2023, the appellant was convicted on a single charge of rape. He was thereafter, on 5 October 2023, sentenced to life imprisonment. The appeal before this court is against the sentence only.¹
- [2] The appeal against the sentence was argued on the basis that the minimum sentence of life imprisonment was shockingly harsh and disproportionate to the offence for which the appellant had been convicted and sentenced.

¹ The appeal is before this court by virtue of the provisions of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 in terms whereof there is an automatic right to appeal where a minimum sentence of life imprisonment has been imposed by virtue of section 51(1) of the Criminal Law Amendment Act 105 of 1997.

- [3] The appellant was charged with rape read together with the provisions of section 51(2) of the Criminal Law Amendment Act.² The offence in question occurred on 29 October 2022.
- [4] Initially when the charges were put to the appellant, he was informed about the minimum sentencing provisions that *"section 51 sub section 2(a) makes provision for a minimum sentence of 15 years imprisonment in [the] case of a first offender, 20 years in [the] case of a second offender, and 25 years in [the] case of [a] third offender or subsequent offender"*.
- [5] Before the appellant pleaded, the court *a quo* then sought clarification from the prosecution on whether *"there is any relationship between the accused and the complainant."* When the prosecutor responded in the affirmative, the court then proceeded to inform the parties that in terms of an amendment³ to the Act, *"if parties were married to each other, or have lived or are living with each other, or are the parents of a child, or they are family members, or were engaged, or share the same residence, or in a close relationship or they share or shared the same residence, the minimum sentence is life imprisonment, I am not sure you are aware of that?"*
- [6] Having been informed of the amendment and its application, the prosecution then informed the court *"They are family members. May I please amend the charge."* The court *a quo* then proceeded to inform the appellant that *"Sir kindly be informed that the charge of rape is read with the provisions of section 51(1) of schedule 2 of the Criminal Law Amendment Act 105 of 1997. Meaning on conviction the Court is bound to sentence you to life imprisonment unless there are substantial and compelling circumstances which will justify a lesser sentence."*

² 105 of 1997.

³ The amendment came into effect on 5 August 2022.

- [7] The appellant indicated that he understood. Thereafter, the appellant was asked to plead, and he entered a plea of not guilty. His legal representative confirmed to the court that the plea of not guilty was in accordance with his instructions.
- [8] The charge sheet was never formally amended (although the amended charge as formulated by the court *a quo* was put to the appellant in court) and furthermore, no opportunity was sought nor given to either the prosecution or the defence to properly consider, before the appellant pleaded, the amended charge. After the appellant pleaded the trial proceeded.
- [9] Section 35(3)(a) to (o) of the Constitution specifies that every accused has a right to a fair trial. This right is broader than the specific rights set out in the subsections of the Bill of Rights.⁴ Specifically, section 35(3)(a) guarantees the right 'to be informed of the charge with sufficient detail to answer it'. Whether the accused's substantive fair trial right, including his ability to answer the charge was impaired, will depend on 'a vigilant examination of the relevant circumstances'.⁵
- [10] In *S v Ndlovu*⁶ the court held that where the State intends to rely upon the sentencing regime created by the Act, a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the chargesheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences. It is at least a requirement that the accused be given sufficient notice of the state's intention to enable him to conduct his defence properly.

⁴ *S v Zuma and Others* 1995 2 SA 642 (CC) at para [16].

⁵ *S v Legoa* 2003 (1) SACR 13 (SCA) at para [21].

⁶ 2003 (1) SACR 331 (SCA) at paras [12] – [13].

- [11] In *S v Mashinini*,⁷ the court set aside a sentence of life imprisonment and replaced it with ten years imprisonment and held that:

"To my mind the solution to this legal question lies in s 35(3) of the Constitution. Section 35(3)(a) of the Constitution provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This section appears to me to be central to the notion of a fair trial. It requires in clear terms that, before a trial can start, every accused person must be fully and clearly informed of the specific charge(s) which he or she faces. Evidently, this would also include all competent verdicts. The clear objective is to ensure that the charge is sufficiently detailed and clear to an extent where an accused person is able to respond and, importantly, to defend himself or herself. In my view, this is intended to avoid trials by ambush."

- [12] In *S v Mabaso*,⁸ it was held that:

"Form must obviously not be placed above substance. Ultimately, the question is whether the accused had a constitutionally fair trial, which will include the sentencing stage. Whether this right has been infringed will require "a vigilant examination of the relevant circumstances". If an accused is not advised adequately in the charge-sheet of the intention to apply the Act, then the enquiry becomes one as to whether he was advised otherwise, either by such notification being given by the state when he is required to plead, or possibly the application of the Act being raised mero motu by the presiding magistrate or judge, or knowledge of the application of the Act on the part of an accused being evident from his plea explanation, or some other source. But proper and adequate notification should not be assumed lightly. The constitutional imperative of a fair trial must be shown to exist, not assumed . . . What seems clear is that a minimum prescribed sentence cannot be imposed where the charge-sheet makes no reference to the Act, and neither the accused nor the legal representatives had any advance warning that such minimum legislation would be sought to be made

⁷ 2012 (1) SACR 604 (SCA) at para [11].

⁸ 2014 (1) SACR 299 (KZP) at para [74] – [76].

6
applicable . . . Where notification of whatever form is given, the further enquiry is whether such notification is adequate to establish that an accused had a fair trial.”

[13] The court held further:

“I am of the view that this requirement necessarily also entails that an accused must be appraised of the particular provisions upon which reliance shall be placed, that is the particulars of the offence as it appears in the relevant Part of Schedule II to the Act, as well as the sentence that will follow in the event of a conviction. It will be of very little assistance to an accused facing a rape charge to know that he might face a life sentence, but not to know that this is because it is contended that he had raped the same complainant twice, or because the complainant was under the age of 16 years, or whichever other provision might find application. A lack of such detail will not ‘enable him to conduct his defence properly’.”⁹

[14] In *S v Baloyi*,¹⁰ it was stated that: ‘a minimum sentence imposed will stand only if the accused had been properly appraised in the charge-sheet and informed by the court of the relevant provisions of the CLAA before the trial begins. Furthermore, the state will not be relieved of the duty to prove planning or premeditation) before the verdict. In that event, the accused will be made aware of which evidence will be led and the kind of sentence likely to be imposed. That will allow the accused to prepare his defence and cross-examination of the state witnesses accordingly.’

[15] The charge was properly put and explained to the appellant at least insofar as the consequences of a conviction would be. He was legally represented but neither the State nor the appellant sought an opportunity to properly consider the import of the amended charge. This much is apparent from the conduct of the proceedings.

⁹ *Ibid* at para [76].

¹⁰ 2022 (1) SACR 557 (SCA) at para [25].

[16] Of course, this aspect is only relevant insofar as the establishment of whether there was any 'relationship' between the parties for purposes of sentencing is concerned even though the evidence may have straddled both the conviction and sentencing parts of the proceedings.

[17] Two questions arise in this appeal:

[17.1] The first is whether the imposition of the minimum sentence of life imprisonment was permissible.

[17.2] The second is whether there were any substantial or compelling circumstances justifying a deviation from the imposition of the minimum sentence.

MINIMUM SENTENCE OF LIFE IMPRISONMENT

[18] Part 1 of schedule 2 to the Criminal Law Amendment Act, insofar as it relates to rape mandates a minimum sentence of life imprisonment in circumstances:

"(b) where the victim –

(iv) is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused;"

[19] A "domestic relationship" as defined in the Domestic Violence Act¹¹ and germane to the present case:

"means a relationship between a complainant and a respondent in any of the following ways:

¹¹ 118 of 1998.

- [20] It is not in dispute in the present matter that there was no evidence presented of any relationship between the appellant and the complainant, either by 'consanguinity'¹² or adoption.
- [21] What is left, is a relationship by 'affinity',¹³ a 'voluntary social relationship'. The evidence in this regard was confined to the evidence of the complainant when she referred to the appellant as "*my uncle*" and "*he is my mother's sibling*" during her evidence. The appellant for his part testified that he was her uncle.
- [22] Ordinarily, a relationship such as that described in the evidence by both the complainant and the appellant would be a relationship established either through consanguinity or adoption. Since both consanguinity and adoption can only be established through evidence, it would be improper to find any such relationship on the basis that the parties referred to each other in this way, absent evidence.
- [23] In South Africa however, the use of the term 'uncle' by the complainant or 'niece' by the appellant are not necessarily used only within the context of a relationship by either consanguinity or adoption. The terms are widely used, in the case of a younger person referring to an older person as 'uncle' as a term of respect and deference. It similarly occurs when women are referred to as 'aunty' or older persons as 'granny' or 'grandpa'. This custom is prevalent throughout South Africa.

¹² "*consanguinity*" – relationship by blood from a common ancestor. Shorter, 6th Edition, Oxford University Press, 2007 at Vol. 1 page 494. See *Daffy v Daffy*, 2013 (1) SACR 42 (SCA) at para [8] where the court eschewed consanguinity on its own as being sufficient to establish a domestic relationship.

¹³ Shorter Oxford English Dictionary page 37.

[24] However, it may be that the relationship between the parties, as described by them, existed by way of affinity. For there to be any finding of such a relationship by affinity, there must be evidence led establishing this.

[25] It is the evidence of the complainant together with the appellant, which establishes that in the present case, there was no relationship by 'affinity' between her and the appellant and that even if there had in the past been any such relationship, it was no longer extant on 29 October 2022 and had not been for at least a year.

[26] The evidence of the complainant was as follows:

"PROSECUTOR: *The accused is your uncle how was the relationship between you and the accused before he was arrested?*

MS. . . .: *No, Your Worship, we there was nothing, Your Worship, between the two of us. I never spoke to him and he never spoke to me.*

COURT: *Do you mean before the incident?*

MS. . . .: *Your Worship, before the incident we were no longer on speaking terms."*

[27] The evidence of the appellant was as follows:

"PROSECUTOR: *How often did you visit the complainant?*

ACCUSED: *I had not been visiting Your Worship, the complainant, Your Worship for a year. I was no longer going to her place."*

- [28] It is clear from the evidence that even if there had been a prior relationship by affinity, such a relationship had voluntarily come to an end at least a year prior to 29 October 2022.
- [29] In the circumstances, it was not established beyond a reasonable doubt that at the time of the commission of the offence, the complainant and the appellant were in a 'domestic relationship' – by 'affinity'.
- [30] In the absence of any evidence of such a relationship, it was not open for the court *a quo* to impose a minimum sentence of life imprisonment.¹⁴ The correct minimum sentence which was to be considered for imposition by the court *a quo*, absent substantial and compelling circumstances, was one of 15 years imprisonment. This was the minimum sentence of which the appellant was originally informed before the amendment of the charge.

WERE THERE ANY SUBSTANTIAL OR COMPELLING CIRCUMSTANCES?

- [31] The appellant was 47 years of age at the time of sentencing. He is a married man with four children and five grandchildren. He lived together with his wife, children and grandchildren and was the main bread winner for the family. Additionally, he was a first offender. Against these circumstances, are weighed the offence of which he has been convicted and its consequences for the complainant.
- [32] The test for the application of minimum sentences is well established. In *S v Malgas*,¹⁵ it was held that:

¹⁴ *S v Bogaards* 2013 (1) SACR 1 (CC) at para [41].

¹⁵ 2001 (1) SACR 469 (SCA) at para [25].

11

"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 standardized response that the Legislature has ordained."

[33] None of the personal circumstances of the appellant are exceptional or can be said to be "*substantial or compelling*" to justify a deviation from the imposition of minimum sentence of 15 years imprisonment.¹⁶

[34] In the circumstances and for the reasons set out above, it is ordered:

[34.1] The appeal is upheld.

[34.2] The sentence of the court *a quo* is set aside and replaced with a sentence of 15 years imprisonment.


A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I, agree


B MORE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

¹⁶ *S v Vilakazi* 2009 (1) SACR 552 (SCA).

HEARD ON:

22 MAY 2025

JUDGMENT DELIVERED ON:

13 JUNE 2025

COUNSEL FOR THE APPELLANT:

ADV. F VAN AS

INSTRUCTED BY:

LEGAL AID PRETORIA

REFERENCE:

X106336062601

COUNSEL FOR THE RESPONDENT:

ADV. E MFUNISA

INSTRUCTED BY:

DPP PRETORIA

REFERENCE:

SA 70/2023