



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable: Yes

Appeal No: A16/2025

In the matter between

NICO DAMBUZA

and

THE STATE

APPELLANT

RESPONDENT

Neutral citation: *Dambuza v S* (A16/2025) [2025] ZAFSHC 224 (31 July 2025)

Coram: Daffue J et Parks AJ

Heard: 28 July 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date for hand down is deemed to be 31 July 2025 at 16h00.

Summary: Sentence – whether there are substantial and compelling circumstances justifying a lesser sentence than life imprisonment in respect of rape (count 1) – whether Regional Court had jurisdiction to impose life imprisonment in respect of count 2: rape where charge sheet referred to Part III of Schedule 2 of Act 105 of 1997 – prescribed minimum sentence at the time was 10 years' imprisonment – on appeal: life imprisonment confirmed in respect of count 1 - sentence in respect of count 2 set aside and 15 years' imprisonment imposed.

ORDER

- 1 The late filing of the notice of appeal is condoned.
 - 2 The appeal in respect of the sentence imposed in count 1 is dismissed.
 - 3 The appeal in respect of the sentence imposed in count 2 is upheld.
 - 4 The sentence of life imprisonment in respect of count 2 is set aside and replaced with the following:
 - '1. the accused is sentenced to 15 (fifteen) years' imprisonment;
 2. the sentence is antedated to 26 November 2015.'
-

JUDGMENT

Parks AJ (Daffue J concurring)

[1] The appellant was convicted in the Regional Court sitting at Koffiefontein on two counts of rape. On 26 November 2015 he was sentenced to life imprisonment in respect of each count.

[2] The appellant enjoyed an automatic right to appeal, having been sentenced to life imprisonment. His notice of appeal, encapsulating an application for condonation and his founding affidavit, drafted on his behalf by the Bloemfontein Justice Centre, was filed on 29 February 2024, nearly 10 (ten) years after being convicted and sentenced. I considered the scant reasons for condonation which are really unpersuasive. However, the merits of the appeal shall be considered.

[3] The appellant only appeals against the sentences imposed on the following grounds :

- a) the court *a quo* over-emphasised the seriousness of the crime, particularly insofar as the complainant in count 1 did not sustain serious physical injuries;
- b) the appellant was kept in custody for more than three years;
- c) the appellant's personal circumstances, considered with the factors mentioned *supra*, constitute substantial and compelling circumstances which justify a deviation from the

applicable minimum sentence;

d) the court *a quo* erred when it imposed life imprisonment in respect of count 2 as it lacked jurisdiction to do so.

[4] The respondent opposed the appeal in respect of count 1, but not in respect of count 2. The appellant's counsel submitted that the sentence in respect of count 2 ought to be reduced to 15 (fifteen) years' imprisonment. Although the respondent's counsel submitted in his heads of argument that the sentence should be reduced to 10 (ten) years' imprisonment (the prescribed minimum sentence for rape at the time), he submitted during oral argument that a more appropriate sentence would be 15 (fifteen) years' imprisonment, as submitted by appellant's counsel.

[5] It is trite that an appeal court will in general interfere only if the trial court misdirected itself materially, as expressed in *S v Malgas*¹ where the court stated the following:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is, of course, entitled to consider the question of sentence afresh.'

[6] The appellant's counsel highlighted the following *dictum* in *S v PB*² in submitting that a different approach must be followed by a court of appeal when dealing with the trial court's finding that no substantial and compelling circumstances existed, than merely whether a material misdirection has been committed:

'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 sentences 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.'

¹ *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

² *Bailey v S* (454/2011) [2012] ZASCA 154 (1 October 2012); *S v PB* 2013 (2) SACR 533 SCA para 20.

Counsel's argument is sound, but the *dictum* relied upon goes much further, *ie* that courts are warned not to depart from prescribed minimum sentences 'for flimsy reasons'. More about this later.

[7] The first ground of appeal, *ie* that the court *a quo* over-emphasized the seriousness of the crime in that the complainant in count 1 did not sustain serious physical injuries is without merit. Section 51(3)(aA) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act) reads as follows :

'(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;
- (ii) an apparent lack of physical injury to the complainant;
- (iii) an accused person's cultural or religious beliefs about rape; or
- (iv) any relationship between the accused person and the complainant prior to the offence being committed.'

[8] Notwithstanding the peremptory meaning of the word 'shall', the Supreme Court of Appeal reminded us in *S v SMM*³ that a 'proper interpretation of the provision does not preclude a court sentencing for rape to take into consideration the fact that the rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate sentence.' In *casu*, the undisputed medical evidence showed tears in the genitalia of both complainants. Furthermore, I am of the view that the condition of the complainant in count 1, being pregnant at the time of the incident, is a material factor to be considered. After the appellant had raped her by inserting his penis into her vagina, he penetrated her vagina with four fingers and threatened to kill the foetus. As indicated in the victim impact statement, she blamed herself for the occurrence and even distanced herself from the child that she has with the appellant. Clearly, this shows how the incident has affected her emotionally.

[9] The second ground relates to the appellant's period of detention awaiting trial. It was not three years as submitted, but just over two years. The appellant was sentenced in 2015 and not 2017 as submitted. In *Radebe v S*⁴ Lewis JA held that the test is not whether the

³ *S v SMM* [2013] ZASCA 56; 2013 (2) SACR 292 (SCA) para 26.

⁴ *Radebe v S* [2013] ZASCA 31 para 13.

period of detention on its own constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed, *ie* whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.

[10] The third ground of appeal deals with the appellant's personal circumstances. I shall deal with this later herein.

[11] Appellant's counsel submitted that the court *a quo* incorrectly sentenced the accused to life imprisonment in respect of count 2. She submitted that the court *a quo* could impose a maximum sentence of 15 (fifteen) years' imprisonment and that this would be an appropriate sentence. She relied on *S v Ndlovu*⁵ quoting from paragraph 46:

'In the light of this, I can do naught but conclude, inexorably, that the regional court did not have jurisdiction to impose life imprisonment in terms of s 51(1) of the Minimum Sentencing Act. Mr Ndlovu was convicted of rape, read with s 51(2); accordingly, the regional court was required in terms of s 51(2) to impose a minimum sentence of 10 years (as he was treated as a first offender). The regional court's jurisdiction was limited in terms of s 51(2) to imposing a maximum sentence of 15 years.'

[12] The State relied, in the charge sheet, on Part III of Schedule 2 which provided at the time for a prescribed minimum sentence of 10 (ten) years in respect of first offenders, subject thereto that the Regional Court might impose a maximum sentence of 15 (fifteen) years in such case. The court *a quo* decided to impose life imprisonment in respect of count 2 in the following circumstances. It convicted the appellant on two counts of rape, committed a week apart, on two siblings. During argument before judgment the prosecutor submitted in Afrikaans – the language used by him throughout the proceedings as all witnesses including the accused testified in Afrikaans – that Part III of Schedule 2 was applicable, but upon discussion with the learned regional magistrate and as he insisted, the prosecutor changed his mind and agreed with him. It is not certain whether Mr Magabe, who appeared for the appellant in the court *a quo*, understood the aforesaid discussion, but in his address in English to the court *a quo* - he throughout the hearing conducted the proceedings in English – he never mentioned this aspect and was also never asked for his submission in this regard. The learned regional magistrate concluded his judgment by referring to the conviction in respect

⁵ *Ndlovu v S* (CCT174/16) [2017] ZACC 19 (15 June 2017); *S v Ndlovu* 2017 (2) SACR 305 (CC) para 46.

of count 2 as a Part III of Schedule 2 offence, but immediately thereafter held that the conviction on count 1 must be taken into consideration and therefore, the conviction on count 2 should automatically fall within the ambit of Part I of Schedule 2, the effect being that the prescribed minimum sentence of 10 (ten) years' imprisonment became a prescribed minimum sentence of life imprisonment.

[13] It became clear during sentencing that the court *a quo* relied upon the Supreme Court of Appeal judgment in *S v Ndlovu*⁶ in order to sentence the appellant in respect of count 2 to life imprisonment. In all fairness to the court *a quo* who relied on this judgment, it was set aside by the Constitutional Court⁷ and consequently, the Regional Court's sentence in that matter was substituted after imposition of sentence by the court *a quo* on 26 November 2015. In *S v Khoza and another*⁸ the Supreme Court of Appeal held that, as a general rule, fair-trial rights require that an accused person should be informed at the outset of the trial of the provisions of the Minimum Sentences Act (or other provisions relating to an increased sentencing regime) which the State intends to rely upon or which are applicable. The appellant *in casu* should not have heard for the first time at judgment stage that he faced life imprisonment in respect of count 2.

[14] Section 51(1) of the Minimum Sentences Act provides that a regional court or a high court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life. Part I (a)(iii)(bb) of Schedule 2 specifies the circumstances in which the offence of rape will attract the sentence of life imprisonment. In terms of that provision, the sentence of life imprisonment becomes applicable where rape is committed 'by the accused who . . .

(bb) has been convicted by the trial court of two or more offences of rape or offences of rape and compelled rape, irrespective of-

(aaa) . . .

(bbb) . . .

(ccc) whether the accused has been sentenced in respect of any such offence of which the accused has so been convicted;'.⁹

⁶ *S v Ndlovu* [2014] ZASCA 149.

⁷ See footnote 5.

⁸ *S v Khoza and Another* [2018] ZASCA 133; 2019 (1) SACR 251 (SCA) paras 11-14; See also *S v Livanje* [2019] ZASCA 126; 2020 (2) SACR 451 (SCA) paras 21, 23 and 30; *Mthanti v The State* (Case no 859/2022) [2024] ZASCA 15.

[15] When I consider the cases mentioned *supra*, namely *Ndlovu v The State*, *S v Khoza and another*, *S v Livanje* and *Mthanti v The State*, I find that the court *a quo* has misdirected itself when the appellant was sentenced to life imprisonment in respect of count 2. I repeat that the appellant was not informed at the onset of the proceedings, or at any time before the closure of his case, that he might face a sentence of life imprisonment upon conviction, nor was he charged with an offence that is listed in Part I of Schedule 2 of the Minimum Sentences Act that warrants the imposition of life imprisonment.

[16] Both counsel for the State and the appellant were in agreement that the sentence of life imprisonment in respect of count 2 should be set aside. They eventually agreed during oral argument that this court should impose a sentence of 15 (fifteen) years' imprisonment. Their concessions were well made and I am in agreement therewith. As was the case with Mr Ndlovu in the aforesaid judgment, the appellant's right to a fair trial was infringed when, after he had been charged with rape read with one minimum sentencing provision, namely s 51(2) read with Part III of Schedule 2, he was sentenced under a different, harsher, minimum sentencing provision, namely s 51(1) read with Part I of the same Schedule.

[17] In *S v C*⁹ the court held the following regarding rape offences:

'Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim - he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life - a fate often worse than loss of life. Society demands protection in the form of heavy and deterrent sentences from the courts against such atrocious crimes.'

[18] The Supreme Court of Appeal held in *S v Chapman*¹⁰ in 1997, which is more than 25 years ago:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. . .

The Courts are under a duty to send a clear message to the accused, to the other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.'

⁹ *S v C* 1996 (2) SACR 181 (CPD).

¹⁰ *S v Chapman* 1997 (2) SACR 3 (SCA) at 5 b-e.

[19] Mathopo AJ, reiterated in *S v Tshabalala and another*¹¹ the pandemic involving women and children, dealing particularly with rape, as follows:

'This scourge has reached alarming proportions in our country. Joint efforts by the courts, society and law-enforcement agencies are required to curb this pandemic. This court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender-based violence in order to safeguard the constitutional values of equality, human dignity and safety and security.'

[20] Mocumie JA said the following in *Maila v The State*:¹²

'Rape of women and children is rampant in South Africa. It has reached alarming proportions despite the heavy sentences that courts impose. South Africa has one of the highest rape statistics in the world, even higher than some countries at war. The country's annual police crime statistics confirm this: in 2019/2020, there were 42 289 rapes reported as well as 7 749 sexual assaults. This translates into about 115 rapes per day.'¹³

The learned justice of appeal reiterated that courts should, through consistent sentencing of offenders who commit gender-based violence against women and children, not retreat when duty calls to impose appropriate sentences, including prescribed minimum sentences.

[21] The appellant committed a brutal and barbaric rape on his ex-girlfriend and the mother of his child. He not only tied her to a tree, but raped her twice as found by the court *a quo*. As if to show his arrogance and disrespect for women in general and the complainant in count 1, he devised a plan and raped her sister a week later. The short space of time within which the appellant has committed the respective offences shows that he has no regard for other people's rights. He has shown no remorse and violated the victims most horrendously. Both complainants sustained not only physical, but also gynaecological injuries. Initially he denied sexual intercourse with any of the two complainants, but changed his story when the DNA results were obtained. Bearing in mind the seriousness of the offences, it is required that the elements of retribution and deterrence should come to the fore and that the rehabilitation of

¹¹ *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48 (11 December 2019); *S v Tshabalala and another* 2020 (2) SACR 38 (CC) para 63.

¹² *Maila v The State* [2023] ZASCA 3 (23 January 2023) para 57.

¹³ The court relied on statistics by Amanda Gouws 'Rape is endemic in South Africa. Why the ANC government keeps missing the mark' 9 August 2022, Mail & Guardian, <https://mg.co.za/opinion/2022-08-09-rape-is-endemic-in-south-africa-why-the-anc-government-keeps-missing-the-mark/>.

the appellant should be accorded a smaller role as emphasised by the Supreme Court of Appeal in *S v Kekana*.¹⁴

[22] The appellant's personal circumstances are not out of the ordinary. He was 23 years old when sentenced, unmarried, a first offender and employed as a farm labourer. He is the father of a four-year old child who is in the custody of the biological mother who he has raped. He has been in custody awaiting trial from shortly after commission of the offences until sentenced on 26 November 2015. His highest scholastic qualification is standard 3. When his counsel was asked to tabulate what she regarded as substantial and compelling circumstances, she could not add to the above. The appellant's personal circumstances shall bow to the interests of society. I am satisfied that these factors, either individually or cumulatively, do not represent substantial and compelling circumstances to allow this court to deviate from the prescribed minimum sentences. Furthermore, the minimum sentence of 10 (ten) years in respect of count 2 should be increased to 15 (fifteen) years, the maximum that the court *a quo* could have imposed at the time.

ORDER

[23] The following order is issued:

- 1 The late filing of the notice of appeal is condoned.
- 2 The appeal in respect of the sentence imposed in count 1 is dismissed.
- 3 The appeal in respect of the sentence imposed in count 2 is upheld.
- 4 The sentence of life imprisonment in respect of count 2 is set aside and replaced with the following:
 - '1. the accused is sentenced to 15 (fifteen) years' imprisonment;
 2. the sentence is antedated to 26 November 2015.'

I concur and it is so ordered.


C PARKS AJ


JP DAFFUE J

¹⁴ *Kekana v S* (37/2018) [2018] ZASCA 148 (31 October 2018); *S v Kekana* 2019 (1) SACR 1 (SCA) para 39.

Appearances

For the Appellant:

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Legal Aid South Africa

For the Respondent:

M Strauss

Director of Public Prosecutions

Bloemfontein