SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

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

Not reportable
Case no: A206/2025

In the matter between
LEREKO JOSEPH MOROKE **APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Moroke v The State* (A206/2023) [2025] ZAFSHC 266 (29 August 2025)
Coram: Lekokotla AJ *et* Mhlambi ADJP
Heard: 4 August 2025
Delivered: 29 August 2025
Summary: Criminal law – sentencing – minimum sentence – substantial and compelling circumstances.

ORDER

The appeal against the sentence imposed by the magistrate is dismissed.

JUDGMENT

Lekokotla AJ (Mhlambi ADJP Concurring)

[1] The appellant was charged with assault with intent to cause grievous bodily harm, in that on 1 September 2018 near Thabong, in the district of Welkom, the appellant

intentionally and unlawfully assaulted M[...] M[...] by hitting her with clenched fists and hitting her with a chain or other action with the intent to cause her grievous bodily harm. This was count 1.

[2] The appellant was also charged with raping the complainant, in contravention of the provisions of s 3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (read with the provisions of s 51(1) of Criminal Law Amendment Act 105 of 1997), in that on 1 September 2019, he unlawfully and intentionally committed acts of sexual penetration with the complainant who was 19 years old at the time, by inserting his penis into her vagina without her consent, more than once. This was count 2.

[3] The accused appeared before the honourable Magistrate Lefenya at the Welkom Magistrates Court and pleaded not guilty to both charges.

[4] In his plea explanation in terms of s 105 of the Criminal Procedure Act 51 of 1977, in respect of count 1, the appellant admitted to arguing with the complainant, and that the argument escalated to a physical altercation. However, he testified that he only assaulted the complainant once with an open hand on the face. In respect of count 2, the appellant admitted to having had sexual intercourse with the complainant once, which he contends was consensual. He stated further that he was surprised when the police came to arrest him for rape on 2 September 2018.

[5] At the conclusion of the trial, the appellant was found guilty and convicted of the following:

‘Count 1: Assault with the intent to do grievous bodily harm and sentenced to 3 years imprisonment;
Count 2: Contravention of the provisions of Section 3 of Act 32 of 2007 (read with the provisions of Section 51 (1) of Act 105 of 1997) and sentenced to life imprisonment.’

[6] The learned magistrate ordered that the sentence in count 1 would run concurrently with the sentence in count 2.

[7] In terms of s 10 of the Judicial Matters Amendment Act 42 of 2013, the appellant

enjoys an automatic right to appeal. The appellant's notice of appeal was filed before this court on 19 September 2024, wherein the appellant noted an appeal against the sentence imposed by the court *a quo* on 17 September 2024 in respect of both counts.

[8] The matter is now before court on appeal against sentence imposed by the court *a quo* on 17 September 2024. The basis for the appellant's appeal is that the sentence imposed by the court *a quo* was shockingly harsh and severe and that the learned magistrate erred in placing too much emphasis on the crime and the interests of the community without considering the appellant's personal circumstances.

Appeal against sentence

[9] In *S v Rabie*,[1] the then Appellate Division held as follows in relation to sentence:

'1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -
(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and
(b) should be careful not to evade such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".
2. The test under *(b)* is vitiated by irregularity or misdirection or is disturbingly inappropriate.'[2]

[10] It is trite that the imposition of sentence is pre-eminently a matter that falls within the discretion of the trial court. Consequently, a court of appeal can only interfere with the sentence of the trial court where it is satisfied that the trial court's sentencing discretion was not judicially and properly exercised. That is, where there was a misdirection on the part of the trial court in the imposition of the sentence[3] or when the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate.[4]

[11] The principles set out above serve as guidelines on whether to interfere with the finding of the magistrate on sentence.

---

[1] *S v Rabie* 1975 (4) SA 855 (A) (*Rabie*) at 857D-E.
[2] This test set out in *Rabie* was confirmed by the Supreme Court of Appeal in *S v Romer* [2011] ZASCA 46; 2011 (2) SACR 153 (SCA).
[3] See *S v Blank* 1995 (2) SACR 62 (A); *S v Kgosimore* [1999] ZASCA 63; 1999 (2) SACR 238 (SCA); *S v Obisi* 2005 (2) SACR 350 (SCA) and *Moswathupa v S* [2011] ZASCA 172; 2012 (1) SACR 259 (SCA).
[4] Op cit fn 12.

[12] Accordingly, the issue to be decided by this court is whether the life imprisonment sentence imposed by the trial court in respect of rape, on multiple occasions, and three years for assault with intent to cause grievous bodily harm, are in fact shockingly inappropriate or demonstrate a misdirection and indiscretion on the part of the learned magistrate. If she did, this court would have the right to interfere by setting aside such sentence and substituting it with what it considers an appropriate sentence. If not, then the sentence imposed by the trial court will stand.

[13] *S v Zinn* (*Zinn*)[5] states that when engaging in this endeavour, this court must have regard to the interest of the society, the seriousness of the crime and the personal circumstances of the appellant.[6] In addition to the *Zinn* factors, the court must also consider the recognised objectives of sentencing being prevention, rehabilitation, deterrence and retribution.

[14] In *S v Malgas* (*Malgas*),[7] the Supreme Court of Appeal (SCA) held that, in the absence of substantial and compelling circumstances, a sentencing court is entitled to depart from imposing the prescribed minimum sentences, if it is of the view that having regard to the nature of the offence, the personal circumstances of the accused, and the interests of society, it would be disproportionate and unjust to do so. Therefore, a court of appeal will only interfere with a sentence if it is shockingly inappropriate or if an irregularity occurred during sentencing.[8]

[15] In *Bailey v S*,[9] the SCA held as follows:

'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

---

[5] *S v Zinn* 1969 (2) SA 537 (A).
[6] Ibid.
[7] *S v Malgas* [2001] ZASCA 30; [2001] 3 All SA 220 (A); 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA) (*Malgas*).
[8] Ibid para 12.
[9] *Bailey v S* [2012] ZASCA 154; 2013 (2) SACR 533 (SCA) para 20.

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.'

[16] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 prescribes life imprisonment for rape since the complainant was (previously) in a domestic relationship, as defined in s 1 of the Domestic Violence Act 116 of 1998, with the accused; and/or it involved the infliction of grievous bodily harm.

[17] The evidence that was given by the complainant was that the appellant hit her with a clenched fist on the left eye, on other parts of her body multiple times; strangled her with a chain that is used to lock doors and hit her with the smaller chain that he wears around his neck. The complainant also testified that the appellant also raped her three or four times. Even though the appellant had initially indicated that he had sexual intercourse with the complainant only once, he later changed and testified that he had sexual intercourse with her twice.

[18] When it comes to the sentence imposed by the learned magistrate on the appellant, the appellant's contention is that the trial court misdirected itself in imposing life sentence in respect of count 2, on the basis that it was too harsh and that consequently it should be reduced to a lesser period.

Substantial and compelling circumstances

[19] In *Malgas*, the SCA held that, for circumstances to qualify as substantial and compelling, they need not be 'exceptional' in the sense that they are seldom encountered or rare.[10] In *S v Pillay*,[11] the court went on to state that nor are they limited to those which diminish the moral guilt of the offender. Also, that where a court is convinced, that after consideration of all the factors, an injustice would be done if the minimum sentence is imposed, then it can characterise such factors as constituting substantial and compelling circumstances and deviate from imposing the prescribed minimum sentence.[12]

---

[10] *Malgas* para 10.
[11] *S v Pillay* [2018] ZAKZDHC 11; 2018 (2) SACR 192 (KZD) para 10.
[12] Ibid para 11.

[20] In *S v Vilakazi*,[13] the court explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial or compelling circumstances. Ultimately, in deciding whether substantial and compelling circumstances exist, one must look at traditional mitigating and aggravating factors and consider the cumulative effect thereof. When sentencing, a court takes into account the personal circumstances of an accused. However, only some of these carry sufficient weight to tip the scales in favour of the accused to impact on the sentence to be imposed. Often the fact that the accused is young and is a first offender has the effect of reducing a sentence, as there is potential for the offender not to repeat the crime and to be rehabilitated.[14]

[21] Counsel for the appellant stated that the factors listed in paragraphs 3.1 to 3.10 of the notice of appeal against sentence and paragraphs 3.1 to 3.8 of her heads of argument amounted to substantial and compelling circumstances for the learned magistrate to deviate from the prescribed minimum sentence of life imprisonment in respect of count 2. She contended that the learned magistrate misdirected herself in imposing life imprisonment against the appellant as she did so without considering those personal circumstances.

[22] Some of the appellant's personal circumstances included his youth at the time of the offence, as he was only 22 years-old (and 29 years old at the time of sentencing); that he was single and has a six year old son whom he has a relationship with and was maintaining prior to incarceration; that he was only raised by his mother since his father was deceased and he therefore played no role in his upbringing. Furthermore, that he had a previous conviction for housebreaking, which he committed in 2012 and has not been incarcerated since; as well as the fact that he was originally released on bail.

[23] The appellant's abovementioned personal circumstances are not the only consideration for this court but have to be considered alongside the seriousness of the offence, the complainant's personal circumstances, the aggravating factors as well as the interests of the community.

---

[13] *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA).
[14] Ibid paras 54-60.

[24] Rape is a very serious offence that does not just leave physical scars but also leaves emotional scars, which, in certain circumstances, never heal. This court does not take this crime lightly. The scars that it has left the complainant are evident from the fact that she cried when she was being raped; also what she stated with her own mouththat she cried the following day when she recounted the events of the day. Even the physical injuries that she sustained from being beaten by the appellant with clenched fists, multiple times; being strangled by the appellant with a chain, similar to the ones that are used to lock doors and being beaten by a smaller chain that he wears around his neck, at different parts of her body are very serios injuries that this court cannot overlook. This, particularly because the appellant never took accountability for them.

[25] We have to consider that the complainant was younger than the appellant at the time of the commission of the offence. She was 19 years old at the time. The appellant had non-consensual sex with her on multiple occasions, which is his version where he testified that they had sexual intercourse twice. The appellant also inflicted serious injuries on the complainant through clenched fists, on multiple occasions, which he denied and said it was only once with an open hand. The complainant sustained serious injuries, both physical and gynaecological. This cannot be disputed.

[26] We also have to consider the fact that the appellant and the complainant were previously in a romantic relationship. This created a position of trust. This should count against the appellant by betraying that trust and causing such serious injuries. These are aggravating circumstances.

[27] Given how endemic gender-based violence is in South Africa, including, and especially rape, this court cannot turn a blind eye to the very serious offences that the appellant has committed against the complainant, which will no doubt have a lifelong impact on her.

[28] Therefore, the appellant has to demonstrate that the mitigating factors that he has highlighted are substantial and compelling, in order to convince this court to deviate from the statutorily prescribed sentence of life imprisonment in respect of count 2 and the exercise of her discretion in respect of count 1.

[29] In *Malgas*[15] it was held in relation to substantial and compelling circumstances,[16] that

'it suffices that they are ordinary circumstances which do not qualify as cogent or sufficiently weighty to offences for which the appellant was convicted'. At paragraph 26 of the same judgment, the SCA held as follows:

'The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.'

[30] In *Radebe v S*,[17] the court held as follows:

'If substantial and compelling reasons are present in cases of the rape of an under-aged child then it cannot be found only in the absence of physical injury. If regard is had to the triad of factors (which must also accommodate the impact on the· victim) then I would venture that something sufficiently extraordinary would have to be demonstrated by an accused in respect of his reduced moral blameworthiness, other personal circumstances. the circumstances surrounding the rape or. as unlikely as it may seem. possibly even the victim's circumstances in order to displace the opprobrium and moral turpitude which Informs the interests of society to punish in the manner reflected in the legislation in cases involving the rape of an under-aged child.'

[31] The appellant's legal representative was asked during the hearing to point out the specific factors listed above that alleviated the traditional mitigating circumstances to substantial and compelling circumstances, she conceded that she could not point out any. Instead, she highlighted alleged remorse as a factor that this court ought to consider. When this court pointed out that the appellant in fact demonstrated no remorse for any of the offences at all throughout the proceedings and that the first time that the word 'remorse' was mentioned was after he was found guilty of the offences.

---

[15] *Malgas* paras 20-22, 25 and 26
[16] Section 51(3) of the Criminal Law Amendment Act 105 of 1997.
[17] *Radebe v S* [2019] ZAGPPHC 406; [2019] 3 All SA 938 (GP); 2019 (2) SACR 381 (GP) para 53.

[32] In particular, in respect of count 1, the appellant always maintained his innocence and testified that he only hit the complainant once with an open hand as opposed to clenched fists on multiple occasions at different parts of her body. The appellant's testimony is inconsistent with the injuries sustained by the complainant, which were proven.

[33] In respect of the serious injuries that the complainant suffered around her neck, which are consistent with the complainant's testimony that he strangled her with a chain, the appellant testified that he does not own a chain. He could not explain how the complainant suffered those injuries. In fact, the appellant went as far as alleging that the complainant may have sustained the injuries elsewhere. This was despite the fact that there was no evidence that she might have sustained them elsewhere other than through the assault to cause grievous bodily harm, which was inflicted by him.

[34] Insofar as count 2 is concerned, the appellant maintained his innocence throughout the proceedings in the court *a quo*. He testified that he had consensual sexual intercourse with the complainant and that they had 'two rounds'. To demonstrate his lack of remorse, the appellant went as far as asking his friend Patric Kgosimeri to give testimony to try and discredit the complainant by alleging, in the main, that he was present during the majority of the times in the same room when the appellant and the complaint had sexual intercourse. This was during the week leading up to 1 September 2018, including specifically on 1 September 2018.

[35] This was the first time that this version was heard by the court *a quo*. This testimony contradicted the evidence that was given by the appellant. This demonstrates the lengths to which the appellant was willing to go to try and deny that he raped the appellant more than once on 1 September 2018.

[36] When all these issues were highlighted to the appellant's legal representative, she indicated that, even though they do not demonstrate remorse, she pointed out that she made the submission of remorse on instruction from the appellant. She also highlighted that, even though the appellant has a previous conviction of housebreaking with intent to steal in 2012, he has not been incarcerated again for another offence and that he was originally released on bail.

[37] The appellant's legal representative also asked that we consider, cumulatively, the personal circumstances of the appellant. Her contention was that all the aforementioned factors, taken together, amount to substantial and compelling circumstances that justify interference by this court to reduce the sentence imposed by the court a *quo* to a lesser sentence. When asked to address the court on the factors that the court should place reliance on when doing so, she pointed out the age of the appellant and that he has a minor child, whom he supports.

[38] We agree with the respondent's contention that, even though the age of the appellant should be considered, however, it should not be over emphasised as it needs to be considered in the context of other factors, including the seriousness of the offence and the interests of the community.[18]

[39] We are not convinced that any of the factors listed by the appellant amount to substantial and compelling circumstances which merit deviating from the prescribed statutory minimum sentence of life sentence in respect of count 2, which is rape as well as 3 years in respect of assault with intent to cause grievous bodily harm (count 1), which was imposed by the trial court. They are traditional mitigating circumstances, which were considered by the learned magistrate in imposing the prescribed statutory life imprisonment sentence in respect of count 2.

[40] Since this court can only interfere with the sentence imposed by the court *a quo* in case of a misdirection on the part of the learned magistrate, or that the sentence imposed by the trial court is vitiated by or is disturbingly inappropriate, we are unable to do so.

[41] In our view, the learned magistrate's decision to impose three years imprisonment in respect of count 1; and her failure to depart, in respect of count 2, from the prescribed minimum sentence on the basis of the factors listed by the appellant's legal representative, does not demonstrate misdirection on her part or that the sentence imposed by her is vitiated by or is disturbingly inappropriate in imposing life imprisonment

[18] *S v Obisi* 2005 (2) SACR 350 (SCA) para 14.

for rape on more than one occasion, which is a statutorily prescribed minimum sentence for this type of offence.

[42] Furthermore, the court *a quo* struck a proper balance between the seriousness of the crime, the interest of the society on the one hand, and the personal circumstances of the appellant on the other. Therefore, the sentence should stand.

[43] The appeal against the sentence imposed by the magistrate is therefore dismissed.

B D LEKOKOTLA
ACTING JUDGE OF THE HIGH COURT

I concur

J J MHLAMBI
ACTING DEPUTY JUDGE PRESIDENT

Appearances

For the appellant:	S Kruger
Instructed by:	Legal Aid South Africa, Bloemfontein
For the respondent:	NM Tshefuta
Instructed by:	Director of Public Prosecutions, Bloemfontein.