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**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A317/2024

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

Date: 29 September 2025

In the matter between:

MZWANDILE PHILLIP MASIMA

Appellant

and

THE STATE

Respondent

Summary: Sentencing: Improper to take charges with different minimum sentencing requirements together for purposes of sentence. Improper for a trial court to antedate a sentence. These and other misdirections rectified in upholding an appeal against sentence.

ORDER

The appeal is upheld insofar as the sentences imposed are altered to read as follows:

- I. In respect of the charge of rape the accused is sentenced to 25 years imprisonment.

2. In respect of the charge of assault with the intent to do grievous bodily harm, the accused is sentenced to 10 years imprisonment.
3. The sentences are to run concurrently and are antedated to 11 October 2023.

JUDGMENT

The matter was heard in open court and authored by the Judge whose name is reflected herein and was handed down electronically by circulation to the parties' Legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of handing-down is deemed to be 29 September 2025.

DAVIS. J (MORE AJ (Ms) concurring)

Introduction

[1] In this matter the appellant had pleaded guilty in the court a quo to a count of rape of a 16 year old girl and to having assaulted her with the intent to do grievous bodily harm.

[2] The two counts were taken together for purposes of sentence and the appellant was sentenced to life imprisonment. In addition, the court a quo, in passing sentence on 11 October 2023, antedated the sentence to 19 December 2021, being the date since which the appellant had been incarcerated after his arrest.

[3] The appellant appeals the sentence imposed, claiming that it is shockingly inappropriate.

Relevant facts

[4] No evidence was led by the State and the facts therefore appear only from the appellant's plea explanation, tendered in terms of section 112(2) of the

Criminal Procedure Act (the CPA)¹.

[5] The plea explanation is as follows:

"COUNT 1

I admit that on the 19th of December 2021 and at or near Etwatwa in the Regional Division Gauteng, I as the accused did unlawful and intentionally, on one occasion committed an act of sexual penetration with a female to wit H[...] M[...] S[...] (16 years old by penetrating her vagina with my penis without her consent.

I admit further that I am guilty of contravening the provisions of section 3 read with section 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual offences and Related Matters) 32 of 2007 read with sections 256, 257 and 281 of the Criminal Procedure Act 51 of 1977; the provisions of section 51 and 5 of schedule 2 of criminal Law Amendment Act 105 of 1977, as amended as well as sections 92(2) and of the Criminal Procedure 51 of 1977.

I admit that on the day I question 1 was at my neighbour's residence for the better part of the day enjoying alcoholic beverages at their traditional wedding. At around 01h00 I proceeded home to retire for the day.

Upon my arrival I noted that the complainant's door was slightly ajar and I then proceeded to join her in bed. I began to rub her on her thigh area but she got up clearly in shock about what was unfolding. She was visibly shaken about what I was doing and began resisting my advances by pushing me off I managed to subdue her by assaulting as will be described in count 2 below.

¹ 51 Of 1977.

I took off my pants, locked the door and took off the complainant's underwear off and inserted my penis in her vagina, as I was on top of her. She tried to scream but I managed to successfully muffle her mouth with my hands.

I had sexual intercourse with complainant without a condom until I climaxed. Shortly thereafter, the complainant asked if I could get her a glass of water, to which I complied.. Upon my return from the kitchen I found that she had escaped through the window in her bedroom.

I then went to sleep in my bedroom and woke up the day and went about my day. I was confronted by a relative about this whole ordeal the next day and was advised to hand myself to the police, as the community was being mobilized to take the law into their hands.

I was subsequently detained and arrested and hence my appearance before the honourable court.

I admit that when I inserted my penis into the complainant, I knew what I was doing and was mindful of the consequences thereof

My attorney has advised me of the contents of the J88 and the 212 statement and confirm the findings therein and have no objection that it forms part of the proceedings as an exhibit.

COUNT2

I admit further that on the 19,11 of December 2021 and at or near Etwatwa in the Regional Division Gauteng seated at BENONI, I as the accused did unlawfully and intentionally assaulted Hlengiwe Mbali Sikhosana 16 years old by pushing, pulling and strangling her with the intent of causing her grievous bodily harm.

I admit that I am guilty of assault with the intent to do grievous bodily harm read with section 266 of the Criminal procedure Act 51 of 1977 and section 51(2)(b) of the Criminal Law Amendment Act 105 of 1997.

I admit that on the day in question while engaging in the rape of the complainant as described supra, I intentionally and unlawfully pushed her onto the bed and pulled her by her arms and hair in bid to get her to comply with my demands of having non-consensual sex with her. I further placed my hands around her neck and strangled her in bid to get her to keep quiet as I was raping her. My sole intent was to cause grievous bodily harm as described in the J88.

My attorney has advised me of the contents of the J88 and confirm the findings therein and have no objection that it forms part of the proceedings as an exhibit.

I concede further that I had the requisite intention at all material times to commit the aforementioned crimes. I therefore concede that I have no valid defence for the actions.

I knew that my conduct was wrongful, unlawful and punishable by the applicable laws of the Republic".

Ad sentencing

[6] The appellant had two previous convictions but they were unrelated in nature and committed a long time ago. The first was for theft committed in September 1996. From the sentence it can be deduced that this was not a serious offence. The appellant was sentenced to a fine of R600.00 or 6 months imprisonment, which sentence was wholly suspended. The second offence was that of possession of dagga in October 2015.

[7] Correctly, the learned magistrate did not afford these convictions

much weight. To all intents and purposes, the appellant was a first offender and was treated as such.

[8] The personal circumstances of the appellant were that he was 40 years old at the time of the rape and assault and had been in a long term relationship with the victim's mother for longer than 15 years. He has three minor children, who he cares for despite having no formal employment. He operated a car-washing business, earning about R2 800 per week.

[9] An extensive correctional services report recommended, after an examination of the appellant's stable income, familial relationships and fixed address, a sentence of correctional supervision in terms of section 276(l)(h) of the CPA.

[10] A victim impact report was also placed before the court a quo. The offences took place in the month of the victim's 17th birthday. She was then in grade 10. As a result of the emotional impact of the rape and assault, she failed that school year and dropped her clothing size from a 34 to a 28. The appellant had come into the victim's life when she was two years old and has since then played a positive and responsible father figure to her until the incidents in question. The victim has no memory of her biological father.

[11] The victim impact report correctly, in our view, concluded as follows: *"Rape is a violent and aggressive conduct geared towards belittling and humiliating vulnerable persons for selfish motives, with no regard of its long-term implications on the victim, her family and his own family ..."*.

[12] The reasoning of the magistrate regarding the imposition of the life sentence is somewhat convoluted. On the one hand she found no substantial and compelling circumstances justifying a deviation from the minimum sentencing regime, while at the same time she stated: "... *the court will show mercy*". Right after having made this statement, she then imposed the life

sentence.

[13] The magistrate also did not furnish any reasons for having taken the two charges together for purposes of sentencing.

[14] A further strange feature of the proceedings before the magistrate is the manner in which she had formulated the sentence in her inscription on the docket. While the oral pronouncement of the sentence in the record simply says "*the accused is sentenced to life imprisonment*", the aforementioned inscription reads as follows: "*Accused is sentenced to life imprisonment (25 years)*".

[15] In addition, as already mentioned, the magistrate added the following (both on record and on the docket) "*the sentence is antedated to 19/12/2021 being the date of arrest*".

Evaluation

[16] It is trite that sentencing falls within the discretion of the trial court and that a court of appeal may only interfere *with* such sentencing in instances where the trial court has misdirected itself or has committed serious irregularity in evaluating all the relevant factors relating to sentence².

[17] In the present matter, the learned magistrate has committed the following misdirections and irregularities:

- by antedating the sentence imposed; and
- by imposing a globular sentence for the two counts.

[18] In respect of antedating a sentence, section 282 of the CPA provides as follows:

² *S v Robie* 1975 (4) SA 855 (A) at 857 D- E per Holmes JA and *S v Salzwedel* 1999 (2) SACR 586 (SCA).

"Whenever any sentence of imprisonment imposed on any person on conviction for an offence is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of such offence in place of the sentence of imprisonment imposed on conviction or any other offence which is substituted/or that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction be antedated by the court to a specified date, which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed, and thereupon the sentence which was later imposed shall be deemed to have been imposed on the date so specified". [my underlining]

[19] Section 282 does not make provision for a trial court to antedate a sentence. While a trial court may, when imposing an appropriate sentence, take the period of incarceration awaiting trial into account as a factor, it cannot, by way of antedating, give "credit" as it were, for "time served". A sentence commences running on the date it is imposed and it is only on appeal or review that the appeal or reviewing court may antedate whatever sentence it imposes, and then only to the date of the imposition of the original sentence³.

[20] The imposition of a globular sentence does not per se amount to a misdirection, but it will be if there are two different minimum sentencing regimes applicable to the two different offences under consideration.⁴

[21] This is the position in the present matter. In respect of count 1, the charge sheet referred to the applicability of section 51(1) of the Criminal Law

³ *Director of Public Prosecutions, Gauteng Division, Pretoria v Plekenpol* (2017] ZASCA 151 (21 November 2017) at par 21 and *S v Hawthorne* 1980 (1) SA 521 (A).

⁴ *S v Thobela* 2020 (2) SACR 222 (GP).

Amendment Act⁵ (the CLAA) and in respect of count 2, reference was made to section 51(2)(b) of the CLAA. The different minimum sentences provided for in these sections were life imprisonment in respect of a rape of a minor and 10 years imprisonment in respect of the assault with the intention to do grievous bodily harm, committed by a first offender. Accordingly, the sentences to be imposed in respect of the two counts have to be separated and therefore reconsidered.

[22] In respect of the rape charge, the court is acutely aware of the scourge of this heinous crime in our society and the deterrent effect sentences should have in respect thereof⁶. Rape within a family context has its own "reprehensive features"⁷.

[23] Despite the above, it is clear that the intention of the magistrate was to impose a lesser sentence than the minimum life sentence, despite how she has formulated it. She appears to have been motivated by the appellant's expressed remorse and the fact that he was a first offender. The incorporation of the element of mercy mentioned in the sentencing judgment, appears to result in her attempt at tempering the life sentence imposed, with the limitation of 25 years incarceration.

[24] Had the trial court correctly formulated its intention, then imposing (or retaining in this instance) a life sentence in respect of count 1, would effectively amount to interference by this court with the discretion of the trial court and result in an impermissible increase in the intended sentence.

[25] In respect of count 2, we are of the view that a sentence of 10 years in respect of that charge would not be inappropriate or induce a sense of shock. The offence was the strangulation of a minor by a person who she had trusted. We find no reason to deviate from the prescribed minimum

⁵ 105 of 1997.

⁶ See, for example *Mudau v State* (746/12) [2012] ZASCA 56 (9 May 2013) at par (17), *sv Chapman* 1997 (2) SACR 3 (SCA) at par 5 and *S v Kekana* 2019 (1) SACR 1 (SCA).

⁷ *S v Abrahams* 2002 (1) SACR 116 (SCA) at par [23].

sentence in these circumstances.

[26] As to whether the two sentences, that is that of 25 years in respect of count 1 and 10 years in respect of count 2 should run concurrently, we find the following finding of this court instructive:

*" ... an order that the sentences should run concurrently was called for where the evidence showed that the offences were inextricably linked in terms of locality, time, protagonists and a common intent, as was the case in the present instance. The failure of the trial court to take these factors into consideration resulted in the cumulative effect of the sentences being disturbingly inappropriate. These factors justified an order of concurrence in the sentences"*⁸.

[27] To sum up, we find that two separate sentences should be imposed in respect of the two counts and that those two sentences should be 25 years and 10 years imprisonment respectively. The two sentences are related to events which occurred either simultaneously or at least, within the same space of time and place, and should therefore run concurrently. The appeal should accordingly succeed, but only to this effect.

Order

[28] In the premises, an order is made in the following terms:

The appeal is upheld insofar as the sentences are altered to read as follows:

1. In respect of the charge of rape the accused is sentenced to 25 years imprisonment.
2. In respect of the charge of assault with the intent to do grievous bodily harm, the accused is sentenced to 10 years imprisonment.

⁸ *S v Mthethwa* 2015 (1) SACR 302 (G). See also *5 v Kruger* 2012 (1) SACR 369 (SCA).

The sentences are to run concurrently and are antedated to **11** October 2023.

N DAVIS

Judge of the High Court
Gauteng Division, Pretoria

I agree

BMT MORE

Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing:	19 August 2025
Reasons delivered:	29 September 2025

APPEARANCES:

For the Appellant:	Adv LA Van Wyk
Attorney for the Appellant:	Legal Aid South Africa, Pretoria
For the Respondent:	Adv AP Wilsenach
Attorney for the Respondent:	The Director of Public Prosecution, Pretoria