



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 681/2024

Reportable

In the matter between:

SABELO DAN CELE

Appellant

and

THE STATE

Respondent

Neutral citation: *Cele v The State* (681/2024) [2025] ZASCA 199 (19 December 2025)

Coram: MAKGOKA, MATOJANE, KGOELE, KATHREE-SETILOANE JJA
and CHILI AJA

Heard: Disposed of without oral hearing in terms of s 19(a) of the Superior
Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 11:00 on 19 December 2025.

Summary: Criminal Procedure – sentence – murder – effective sentence of 41 years imprisonment – whether shockingly inappropriate. Section 274 of the Criminal Procedure Act 51 of 1977 – Trial court insisting on evidence under oath in mitigation of sentence – whether that constitutes misdirection or irregularity to vitiate sentence.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Moshidi, Ismail and Monama JJ, sitting as court of appeal):

- 1 The late filing of the appellant's heads of argument is condoned, and the appeal is reinstated.
- 2 The appeal is upheld.
- 3 The order of the full court against the sentence is set aside and replaced with the following:

'The appeal against the sentence is upheld, and the sentences imposed by the trial court are set aside and replaced with the following:

1. Count 1 (murder): 18 years' imprisonment;
2. Count 2 (attempted robbery with aggravating circumstances): 10 years' imprisonment;
3. Count 3 (unlawful possession of a firearm): 5 years' imprisonment;
4. Count 4 (unlawful possession of ammunition): 6 months' imprisonment.
5. The sentences in counts 3 and 4 shall run concurrently with the sentence in count 1.
6. The total effective sentence is 28 years' imprisonment.
7. In terms of s 282 of the Criminal Procedure Act 51 of 1977, the sentence is antedated to 6 May 2013.'

JUDGMENT

Makgoka et Matojane JJA (Kgoele and Kathree-Setiloane JJA and Chili AJA concurring):

[1] This is an appeal against the sentence only, following the granting of special leave by this Court. The appellant, Mr Sabelo Dan Cele, stood trial in the Gauteng Division of the High Court, Johannesburg (the trial court), together with four co-accused. He was accused number 5 in the trial court. He was convicted on each count

of: murder; attempted robbery with aggravating circumstances; unlawful possession of a firearm; and illegal possession of ammunition.

[2] The murder count was read with s 51 of the Criminal Law Amendment Act 105 of 1997 (the CLAA), and upon conviction, carried a prescribed minimum sentence of life imprisonment in terms of s 51(1) of the Act. In terms of s 51(3), the trial court found substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment. It imposed the following sentences:

- (a) Count 1 (murder): 30 years' imprisonment;
- (b) Count 2 (attempted robbery with aggravating circumstances): 17 years' imprisonment;
- (c) Count 3 (unlawful possession of a firearm): 5 years' imprisonment;
- (d) Count 4 (unlawful possession of ammunition): 6 months' imprisonment.

[3] The trial court ordered that the 5-year sentence on count 2 and the entire sentence on count 4 run concurrently with the sentence on count 1. The sentence on count 3 was ordered to run consecutively to the other sentences. This resulted in the effective term of 41 years and 6 months imprisonment.

[4] On subsequent appeal to it, the full court reduced the sentence for attempted robbery from 17 to 15 years' imprisonment, but the overall effective term of 41 years' and 6 months imprisonment remained. We must state here that the judgment of the full court is disappointingly terse and of little assistance.

In this Court

[5] The appellant contended that the trial court committed an irregularity by preventing his legal representative from making submissions from the bar in mitigation of sentence. In this regard, the appellant submitted that by so doing, the trial court may have relied on incorrect information gleaned from the documents and exhibits admitted into evidence. The appellant further contended that: (a) the sentence was unduly harsh and that the trial court did not sufficiently consider his personal circumstances; and (b) the trial court placed excessive weight on retribution and deterrence while giving insufficient consideration to rehabilitation.

[6] We deem it necessary to clarify two matters. The first concerns the correct approach to statements by counsel from the bar in mitigation of sentence. The second is the proper basis on which this Court is entitled to interfere with a sentence imposed by a trial court. We deal with each in turn.

Statements by counsel from the bar in mitigation of sentence

[7] The appellant submitted that the trial court misdirected itself by declining to allow his counsel the opportunity to place information in mitigation of sentence from the Bar. According to the appellant, this was a misdirection which vitiated the sentence. It is necessary to set out what transpired in this regard. In its judgment on sentence, the trial court stated the following about this aspect:

'For the purposes of sentencing, in terms of section 274 of the [Criminal Procedure] Act, I must receive all evidence, as I think fit, to assist me in reaching the appropriate sentence. Now section 274 requires me to receive "evidence". I cannot receive speculation. I cannot receive chitchat. I cannot receive gossip. I cannot receive hearsay.

In this particular trial, after consultation with your counsel and after [having] informed your counsel before the weekend that I would only accept evidence [at] the sentencing stage, each of you for some reason have decided not to give evidence. You have the right to do so. You retain the right to remain silent at your trial.

The difficulty is that the so-called legal implications if your advocates just testify or rather address the court from the bar, the legal implications of providing information from the bar, is that it is not evidence and there is therefore [no] evidence under oath in terms of section 274. The practice that some courts have adopted which [has] allowed some advocates just to talk from the bar [has] been described as being "characterised by uncertainty and unease" because this is not evidence. It seems to be that only the cases where there has not been full compliance with the law of evidence is that where there would be a time-consuming process, a very time-consuming affair, without much advantage to show for it.

I am concerned that none of the accused have chosen to give evidence. That is their choice. I do not want to hear evidence from each counsel. Whatever they say can [do] no more than that. Advocates are not witnesses. They are not sworn in to give evidence. They cannot be cross-examined. What they say cannot be tested. After all they are no more than a messenger of hearsay evidence.

In this case I have not been told that there is any information which, if leading the evidence, would take a long, long time to lead. I have not been told that the process of leading evidence would be very time-consuming. I have not been told that there are other witnesses you might have called or would have been wanted to be called but who have not been called. It seem[s]

that counsel only thought of the accused themselves as the potential witnesses who would not give evidence.

. . .

In the interest of fairness to the accused, I have checked the record of the trial insofar as my notes reflect the record and I have also checked the documents which are exhibits in the trial and which constitute part of the record to extract what I can as both mitigating and perhaps aggravating factors therefrom. I am also prepared in order to be absolutely fair to each accused to draw inferences from the evidence which [is] actually before me’

[8] True to its word, the trial court considered none of the information conveyed to it from the bar by the appellant’s counsel. Instead, it sought mitigatory factors from the oral evidence adduced at trial and from the admitted documentary evidence. As regards the appellant’s age, the trial court relied on a copy of his identity document, which had been accepted as an exhibit during the trial. Regarding his schooling, it considered the appellant’s evidence given during cross-examination that he had completed standard 9. For the period the appellant spent in custody awaiting trial, the court relied on his confession statement to deduce that he had been in custody for 17 months as an awaiting-trial prisoner.

Section 274 of the CPA

[9] The question is whether the trial court committed an irregularity or misdirection in declining to accept the appellant’s mitigatory factors from the bar, as the appellant submitted. The issue is governed by s 274 of the Criminal Procedure Act 51 of 1977, which provides:

‘Evidence on sentence

(1) A court may, before passing sentence, receive such *evidence* as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) The accused may address the court on any *evidence* received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.’ (Emphasis added.)

We consider in turn, the two legs of s 274.

Section 274(1)

[10] On its face, s 274(1) requires that information relayed to the court for sentencing be presented as evidence given under oath. This is the default position, and the preferable method. If given under oath, such evidence can be tested through cross-

examination and will enable the court to make an informed decision based on the facts.¹ However, over the years, a practice has developed in terms of which facts in mitigation of sentence are presented to the court by an accused's legal representative.

[11] Such statements are routinely admitted, subject to this qualification. The weight given to such statements depends on whether the State and/or the court admits them. If they are admitted, they carry the same weight as facts presented before the court by way of evidence under oath, and the court is bound to consider them as though they had been proved in evidence.² But where the State or the court does not accept the facts stated, the accused must be pre-warned in either case. This would enable him or her to decide whether to lead evidence, instead. This is all about fairness in the proceedings.³ The position was explained thus in *R v Hartley (Hartley)*.⁴

'[I]f the court feels that it cannot accept any particular facts which are placed before it, the accused or his legal representative should be informed of this and in these circumstances, the accused must decide whether he wishes to lead evidence to establish this fact or not . . . '.

[12] Of course, the accused cannot be forced to adduce evidence in mitigation of sentence. This is because the accused's right under s 35(3)(h) of the Constitution to remain silent, and not to testify during proceedings, also applies to the sentencing stage of the trial, as the Constitutional Court explained in *S v Dzukuda; S v Tshilo*.⁵ Having said that, it is perfectly proper for a presiding judicial officer to indicate that, for purposes of determining an appropriate sentence, evidence under oath would carry more weight than a legal representative's submissions from the bar.⁶ As pointed out in *S v Klassen*,⁷ an accused's silence during the sentencing process may have adverse consequences in that a court may not, in the absence of evidence, resort to impermissible speculation for purposes of determining the presence of mitigating factors.

¹ *R v Shuba* 1958 (3) SA (C) 844 at 845A.

² *S v H* 1977 (2) SA 954 (A) at 960H.

³ *S v Jabavu* 1969 (2) SA 466 (A) at 472E; *S v Olivier* [2010] ZASCA 48; 2010 (2) SACR 178 (SCA); [2010] 4 All SA 503 (SCA) para 16.

⁴ *R v Hartley* 1966 (4) SA 219 (RA) at 221H.

⁵ *S v Dzukuda and Others; S v Tshilo* [2000] ZACC 16; 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC); 2000 (2) SACR 443 (CC) para 40.

⁶ Du Toit et al *Criminal Procedure Act Commentary* RS 69, 2022 ch28-p6J.

⁷ *S v Klassen v S* [2017] ZASCA 58; 2017 (2) SACR 119 (SCA) para 8.

[13] The position has been well summarised by the full court of the KwaZulu-Natal Division in *S v Khumalo*⁸ as follows:

'With regard to submissions from the bar in relation to sentence, it is undoubtedly the practice in our Courts for statements of fact to be made by the representative of an accused in mitigation of sentence. Mostly such statements relate to uncontentious issues such as the age, family background and employment details of the accused. Most often the State offers no challenge to these statements, and they are accepted by the Court.

However, neither the State nor the Court [is] obliged to accept such statements, and, even more so statements relating to the facts of the commission of the crime. The State may contest them and lead evidence to do so. The Court may require them to be given under oath, as occurred in this matter

Whatever course the State or the Court adopts, our procedure requires that it be fair to the accused. The accused and/or the legal representative must be informed, prior to any judgment being given, that the Court requires the statements to be made under oath.'⁹

[14] The trial court may have been somewhat brusque in its approach to the issue. However, considering the authorities cited above, it acted well within its rights to refuse statements from the bar in mitigation of sentence, and informed the appellant's counsel accordingly, in advance. After explaining the implications of s 274, the trial judge allowed the appellant's counsel to consult with the appellant about whether or not to give evidence in mitigation of sentence. The appellant chose not to testify in mitigation of sentence.

[15] Having earlier made her position clear, the trial Judge stuck to it, which, as explained in *Hartley*, she was entitled to. Conscious of the court's duty to act proactively during the sentencing stage, the trial court sought to establish mitigating factors from the evidence on record in fairness to the appellant. Tellingly, the appellant does not suggest that had his counsel been allowed to place mitigating factors from the bar, he would have conveyed anything different from what the trial court gleaned from the exhibits in mitigation of sentence. Viewed in the light of the above, there is no merit in the submission that the trial court committed an irregularity.

Section 274(2)

⁸ *S v Khumalo* 2013 (1) SACR 96 (KZP).

⁹ *Ibid* paras 13-15.

[16] Under s 274(2), the parties can address the court in mitigation of sentence. The appellant's complaint that the trial court prevented his counsel from addressing the court in mitigation of sentence is not borne out by the record. In his heads of argument, the appellant concedes that his counsel was afforded such an opportunity. What the trial Judge declined to accept were mitigating facts from the bar. The trial court committed no irregularity on the second leg of s 274.

The appellate court's power to interfere with the trial court's sentence

[17] It is settled that sentencing is a matter which falls pre-eminently within the discretion of a trial court. This is because the essential inquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the court in imposing it exercised its discretion properly and judicially.¹⁰ Thus, a court of appeal can interfere with a sentence imposed by a trial court only on two bases.

[18] The first, which we refer to as 'the misdirection' basis, is where a material misdirection by the trial court vitiates the exercise of its discretion. That was explained by this Court in *S v Pillay*, as follows:

'[A] mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.'¹¹

[19] The second, which we refer to as 'the disparity' basis, is where the sentence imposed by the trial court and that which the court of appeal would have imposed is marked. This Court in *S v Sadler*¹² said that the disparity must be 'so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. The Court went on to explain:

'The traditional formulation of the approach to appeals against sentence on the ground of excessive severity or excessive lenience where there has been no misdirection on the part of the court which imposed the sentence is easy enough to state. It is less easy to apply. Account must be taken of the admonition that the imposition of sentence is the prerogative of the trial

¹⁰ *S v Pillay* 1977 (4) SA 531 (A).

¹¹ *Ibid* at 535E-F.

¹² *S v Sadler* [2000] 2 All SA 121 (A); 2000 (1) SACR 331 (SCA).

court and that the exercise of its discretion in that regard is not to be interfered with merely because an appellate court would have imposed a heavier or lighter sentence. . . .¹³

[20] The misdirection and disparity bases are conceptually different, and each can serve as a ground for an appellate court to interfere with a sentence. However, notionally, in a given case, they can both serve as grounds for interference. It is therefore crucial for this Court, when interfering with a sentence imposed by a trial court, to identify and record the basis on which it does so. This would prevent interference with a trial court's exercise of discretion where such is not warranted.

The judgment of the trial court on sentence

[21] The trial court considered: (a) the gravity of the offence; (b) the aims of punishment, being deterrence, prevention, reformation and retribution;¹⁴ (c) the personal circumstances of the appellant; and the interests of society. As this Court emphasised in *S v Sterrenberg*,¹⁵ the weight to be accorded to any relevant factor or circumstance is pre-eminently something that falls wholly within the purview of the trial court's discretion. That it attached too little or too much weight to any one factor is not a cognisable misdirection unless that digression is so serious or unreasonable that it shows failure to exercise proper discretion.

[22] In *S v Mhlakaza*¹⁶ this Court pointed out that, given the high levels of violence and serious crime in our country, when sentencing such crimes, the emphasis should be on retribution and deterrence. The Court went on to explain, with reference to *S v Nkwanyana*,¹⁷ that in other instances retribution may even be decisive.¹⁸ Thus, the fact that a sentencing court might seem to have emphasised retribution over other sentencing aims cannot, by itself, be regarded as a misdirection.

[23] The trial court's careful balancing act was also evident when it found that substantial and compelling circumstances existed, which allowed it to deviate from the

¹³ Ibid para 8.

¹⁴ *S v Rabie* 1975 (4) SA 855 (A) at 862A-B.

¹⁵ *S v Sterrenberg* 1980 (1) PH H 71 (A).

¹⁶ *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) (*Mhlakaza*) at 519c-e.

¹⁷ *S v Nkwanyana & Others* 1990 (4) SA 735 (A) at 749C-D.

¹⁸ See also *S v Nkambule* 1993 (1) SACR 136 (A) at 147c-e; *S v Swart* 2004 (2) SACR 370 (SCA) paras 11 and 12; *S v Govender and Others* 2004 (2) SACR 381 (SCA) para 32.

prescribed minimum sentence of life imprisonment in respect of the murder count. A court of appeal should not easily conclude that a trial court misdirected itself when it considered a sentence. As this Court observed in *S v Rabie*,¹⁹ a court of appeal should be careful not to erode the discretion enjoyed by a trial court. As we see it, the trial court balanced each relevant factor against the others when it imposed the sentence and did not commit any misdirection. There was, for that matter, no misdirection, let alone the one envisaged in *Pillay*, being 'of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably'.

[24] For these reasons, the appellant's submission that the trial court misdirected itself, by over-emphasising the gravity of the offence and under-emphasising his personal circumstances, is unsustainable. We accordingly conclude that this Court is not competent to interfere with the sentence on the misdirection basis.

Basis for interference

[25] The only aspect in relation to which the trial court erred, is in failing to consider the cumulative effect of the sentences it imposed in respect of the various offences. In our judgment, this is the only basis on which we are entitled to interfere with the sentence of the trial court.

[26] It is a salutary practice for a sentencing court to consider the cumulative effect of the respective sentences where an accused person is convicted of more than one offence, as this Court observed in *S v Whitehead*.²⁰ To achieve that objective, an order that the sentences should run concurrently may be used to prevent an accused person from undergoing a severe and unjustifiably long effective term of imprisonment. In *S v Mokele*²¹ this Court held that an order that sentences should run concurrently is called for where the evidence shows that the relevant offences are 'inextricably linked in

¹⁹ Ibid at 857D-F.

²⁰ *S v Whitehead* 1970 (4) SA 424 (A).

²¹ *S v Mokele* [2011] ZASCA 166; 2012 (1) SACR 431 (SCA) para 11.

terms of the locality, time, protagonists and, importantly, the fact that they were committed with one common intent'.²² This is the case here.

[27] This Court has repeatedly cautioned against the imposition of excessive determinate sentences instead of life imprisonment, often to circumvent the possibility of early release on parole by the Executive.²³ In *S v Nkosi* the Court explained:

'Thus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed (ie a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. . . .'²⁴

[28] The effective sentence imposed on the appellant falls within the range of the sentences referred to above. If the trial court was of the view that the gravity of the offence warranted a harsher punishment, it should have imposed life imprisonment. A cumulative sentence of 41 years and 6 months' imprisonment is particularly inappropriate in the present case. The appellant was 28 years old at the time of sentencing, and a first-time offender who had left school at standard 9. This suggests that he could be rehabilitated.

[29] The murder was an unplanned outcome of a failed robbery. The trial court accepted that the murder was committed with *dolus eventualis* (reckless intent) rather than direct premeditation. He had been in custody for 17 months awaiting trial. Furthermore, he voluntarily surrendered himself to the police after the murder, through the intervention of his father and a senior police official, Brigadier Ndlovu. This conduct, while not a demonstration of remorse in itself, is a significant mitigating factor demonstrating a willingness to submit to the authority of the law.

[30] A sentence of such magnitude serves to destroy the individual rather than to punish him or her. It ignores the legitimate element of rehabilitation. As stated in *S v*

²² Ibid para 11. See also *S v Mate* 2000 (1) SACR 552 (T), where the full court held that where there is a close link between offences, and where the elements of one are closely bound up with the elements of another, the concurrence of sentences should be considered.

²³ See, for example *S v S* 1987 (2) SA 307 (A) at 313H-J; *Mhlakaza* at 521G-I; *S v Bull and Another*; *S v Chavulla and Others* 2001 (2) SACR 681 (SCA) at 694B.

²⁴ *S v Nkosi and Others* 2003 (1) SACR 91 (SCA) para 9.

Moswathupa,²⁵ when dealing with multiple offences, the court must not lose sight of the fact that the aggregate penalty must not be unduly severe. Sentences should be realistic and capable of being served within a lifetime that offers some hope of return to society. In practice, the sentence imposed is more onerous than a life sentence, which permits consideration for parole after 25 years. Such a sentence effectively denies the appellant any realistic prospect of post-incarceration life, extinguishing hope and arguably offending the constitutional injunction that everyone has the right to dignity and not to be treated in a cruel, inhuman, or degrading way.

[31] The interests of society are not served by a sentence that is so crushing that it negates all possibility of rehabilitation and hope. In *S v Khumalo*,²⁶ this Court observed that extended imprisonment does not encourage rehabilitation; instead, it causes the prisoner to deteriorate mentally and physically. By failing to consider the cumulative effect of the sentence it imposed, it erred. By confirming the effective sentence of 41 years' imprisonment, the full court similarly erred. The disparity between that sentence and one which this Court would have imposed is so marked that the trial court's sentence can be described as 'shocking' and disturbingly inappropriate.

[32] There is, therefore, a basis for this Court to interfere with the sentence imposed by the trial court and confirmed by the full court, and replace it with one it deems appropriate. We draw from the objective facts in the record, specifically the exhibits referred to by the trial court. Having regard to the totality of the circumstances, for the murder and attempted robbery counts, we consider 18 and 10 years' imprisonment, respectively, to reflect a fair balance between the appellant's personal circumstances and society's expectation of a sentence that appropriately reflects the gravity of the offences.

[33] The sentences must accordingly reflect both society's indignation at crimes committed and its concern that the appellant, as a first offender, should not be crushed under the weight of an unduly lengthy period of incarceration.²⁷ For unlawful possession of a firearm, a sentence of five years' imprisonment would suffice. For unlawful possession of ammunition, six months' imprisonment should be imposed. To

²⁵ *S v Moswathupa* [2011] ZASCA 172; 2012 (1) SACR 259 (SCA) para 8.

²⁶ *S v Khumalo and Others* [1984] ZASCA 30; [1984] 2 All SA 232 (A); 1984 (3) SA 327 (A) para 16.

²⁷ *S v Motlhakane*; *S v Sehlake*; *S v Van Heerden van Oudshoorn* 2011 (1) SACR 510 (GNP) para 13.

ameliorate their harshness, the latter two sentences must be ordered to run concurrently with the sentence for murder.

Order

[34] The following order is made:

- 1 The late filing of the appellant's heads of argument is condoned, and the appeal is reinstated.
- 2 The appeal is upheld.
- 3 The order of the full court against the sentence is set aside and replaced with the following:

‘The appeal against the sentence is upheld, and the sentences imposed by the trial court are set aside and replaced with the following:

1. Count 1 (murder): 18 years’ imprisonment;
2. Count 2 (attempted robbery with aggravating circumstances): 10 years’ imprisonment;
3. Count 3 (unlawful possession of a firearm): 5 years’ imprisonment;
4. Count 4 (unlawful possession of ammunition): 6 months' imprisonment.
5. The sentences in counts 3 and 4 shall run concurrently with the sentence in count 1.
6. The total effective sentence is 28 years’ imprisonment.
7. In terms of s 282 of the Criminal Procedure Act 51 of 1977, the sentence is antedated to 6 May 2013.’

T MAKGOKA
JUDGE OF APPEAL

K E MATOJANE
JUDGE OF APPEAL

Appearances

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Instructed by:

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