



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

Not reportable

Case no: A75/2025

In the matter between

MOKETE BERNEDICT MOTAUNG

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Mokete Bernedict Motaung v The State* (A75/2025) [2025] ZAFSHC 359 (19 November 2025)

Coram: OPPERMAN J *et* BOKWA AJ

Heard: 6 October 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 15h00 on 19 November 2025.

Summary: Criminal appeal – convictions and sentences – rape – minimum sentence legislation – evaluation of evidence – compelling and substantive circumstances found present justifying deviation of the prescribed minimum sentence imposed by the court *a quo*.

ORDER

- 1 The appeal against the conviction is dismissed.
 - 2 The appeal against the sentence is upheld, and the sentence of 15 (fifteen) years imprisonment is hereby set aside.
 - 3 The appellant is sentenced to 10 (ten) years imprisonment.
 - 4 The sentence is antedated to 25 November 2024.
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JUDGMENT

Bokwa AJ (Opperman J concurring)

Introduction

[1] The appellant was convicted and sentenced in the Regional Court for the District of Thabo Mofutsanyana held at Bethlehem (court *a quo*) on 25 November 2024. He was charged with rape read with the provisions of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and s 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The court *a quo* also found that there were no compelling and substantial circumstances meriting a deviation from the prescribed minimum sentence and imposed a sentence of 15 years imprisonment. The appellant now appeals to this Court against both the conviction and sentence imposed by the court *a quo*. The appeal is before this Court with the leave of the court *a quo*.

[2] The charge levelled against the appellant is that on 5 November 2023 and at or near Bohlokong in the district of Bethlehem, and within the Regional Division of the Free State, the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant, by inserting his penis into her vagina without the consent of the said complainant and thus raped her. The appellant was legally represented throughout the trial and pleaded not guilty to the charge of rape.

Factual matrix

[3] At the hearing of the matter in the court *a quo*, the State's case rested on the evidence of three witnesses being: the complainant, her boyfriend Mr Thabiso Sithole (Mr Sithole), and Dr Valdez. At the close of the State's case, the appellant testified in his own defense, also calling a witness to corroborate his version, namely his girlfriend, Ms Mathabo Sibeko (Ms Sibeko). The evidence before the trial court can be summarised briefly as follows:

(a) On 4 November 2023, the appellant met his colleague Mr Sithole at a tavern near Bohlokong township. The appellant was with his girlfriend Ms Sibeko in the company of Mr Sithole and the complainant. The four shared alcoholic drinks until the closing of the tavern in the morning of 5 November 2023 and at about 02h00, they all left for the house of Mr Sithole. Upon arrival, it was decided that a bed be prepared for the appellant and his girlfriend in the kitchen where they would spend the night. Mr Sithole and the complainant, went into a separate bedroom, to retire for the evening. According to the evidence of the complainant, she was awoken at around 04h00, when she felt something hard inside her vagina. She was shocked to realise that it was the appellant who had penetrated her with his penis in her private parts whilst she was fast asleep next to her boyfriend. She confronted the appellant asking him what he was doing. According to her, the appellant seemed shocked and looked away, protesting that he had done nothing wrong to the complainant. She immediately woke Mr Sithole and made a first report to him that the appellant had just raped her.

(b) On hearing about this report, Mr Sithole confronted the appellant, asking him what he was doing in their bedroom and pressing him on why he was naked and also on their bed. According to her testimony, the appellant responded to the question as to why he was in their room by stating that he was not comfortable sleeping on the floor surface as the bed prepared for both him and his girlfriend was in the kitchen and on the floor. To this response, Mr Sithole again asked the appellant why he did not wake him up to raise such a complaint because an alternative arrangement could have been made if that was the truth of why he was in their bedroom.

(c) The complainant went into the kitchen to check on the appellant's girlfriend, whom she found asleep, and half clothed. She then returned to her bedroom and sat on the bed crying. At this stage Mr Sithole asked the appellant to get out of their room. The appellant, who was naked, took his clothes from the floor and covered his private parts and walked out of the room to the kitchen. The complainant asked Mr Sithole to check

her private parts because she felt wetness in her vagina, which he proceeded to do and discovered that it was indeed so. The appellant then left the house with his girlfriend. He later returned alone without his girlfriend and reentered the bedroom of Mr Sithole. This time he was asking the complainant if she was sure about her allegations. The complainant reiterated her stance and version.

(d) When the complainant reiterated her stance, he apologised for his conduct. The complainant requested her boyfriend to call the police. The appellant left the house alone. The complainant later went to the hospital for a medical check-up and then to the police station to open a case of rape. It was her evidence that although she had consumed alcohol; she was nevertheless still aware of her surroundings and her senses.

[4] The cross examination focused on when they all left the tavern, how much alcohol was consumed, if alcohol was consumed at the house after they left the tavern, and the details of how the complainant and her boyfriend slept with their positioning whilst both naked. The complainant was adamant that she did not engage in any sexual activity with her boyfriend that evening. Though she did not see what penetrated her vaginally, she was adamant that she felt something in her private parts.

[5] The summary of Mr Sithole's evidence was briefly as follows: that they all four met at a tavern and consumed alcohol and later in the morning hours, when the tavern closed, proceeded to his home. Upon arrival, a bed was prepared in the kitchen with blankets provided for the appellant and his girlfriend. He was awoken around 04h00 by the complainant and he also noticed that the appellant was in bed with them. The complainant made the first report to him that she was raped by the appellant. He realised that the appellant seemed sleeping with his back turned against the complainant. He noticed that the appellant was naked and proceeded to enquire what he was doing in their bedroom and further requested the reason why he was also naked. According to his testimony, they had earlier come from the tavern and went to bed and switched off the lights. When he woke up, the lights were on. The lights were, however, switched off before they went to the bedroom earlier. To his surprise, when he was awoken by the complainant, the lights in the bedroom were on.

[6] The appellant responded that he couldn't sleep on the floor as it was uncomfortable. He confronted him about why he did not wake him up so that he could

make an alternative plan, to which the appellant did not respond. By the time the complainant went out to check on the appellant's girlfriend in the kitchen, he followed her. He asked the appellant to leave his room whereupon the appellant got off the bed naked, took his clothes from the floor, covered his front private parts and left the room. The appellant left the house with his girlfriend and later returned alone. He went into their bedroom and offered him a cider which he refused to drink. He went on to request for forgiveness from the complainant. Subsequent hereto, he left the house. Mr Sithole and the complainant left for the hospital where the complainant received medical attention and later proceeded to the police station to report the case of rape.

[7] According to Mr Sithole, there was no bad blood between him and the appellant and as a matter of fact, they had a close relationship before this incident. He had never expected a close friend to conduct himself in a manner that the appellant conducted himself that morning of the alleged rape incident. On the night in question, it was his evidence that he did not engage in sexual activity with his girlfriend on account of being under the influence and being tired.

[8] Dr Valdez was the third state witness who testified that he conducted medical examinations on the complainant. He found that there was a discharge in the private parts of the complainant and further that he couldn't rule out sexual penetration. On cross-examination he was clear that semen could still be detected in a rape victim, up to seven days after intercourse. The J88 form was received as an exhibit confirming the doctor's evidence. The state closed its case.

[9] The appellant testified in his own defense corroborating the testimony of the state witnesses that on the day in question, 4 November 2023, he had met the complainant and Mr Sithole at a tavern in Bohlokong also in the company of Ms Sibeko. They had enjoyed alcoholic drinks and when the tavern closed, around 02h00 they proceeded to the house of Mr Sithole where they were to be accommodated for the balance of the night as guests. On arrival, they were provided with blankets to prepare a bed in the kitchen on the floor. He and his girlfriend engaged in sexual intercourse shortly thereafter on the morning of the 5 of November 2023. He would feel the discomfort of sleeping on the floor and after 30 to 35 minutes, left the kitchen where he was sleeping on the floor and joined the complainant and Mr Sithole on their bed. According to his evidence, he slept next to the complainant, only to be awakened by the complainant during the course of the

morning, questioning his presence in their bedroom and claiming that he had raped her. His evidence is that he was shocked and denied doing any such act.

[10] Further to this, he corroborated the complainant's evidence that she woke up Mr Sithole and reported to him that she had been raped. Similarly, Mr Sithole, enquired from the appellant why he was in their room. At this stage, he strenuously denied that he had raped the complainant. He got out of bed, got dressed, and left with his girlfriend. A short while later, he returned alone, came into the bedroom with a cider. According to his version, he came to apologise for entering their bedroom and their blankets without their permission. He was still adamant that he was innocent of the allegations of rape. He even suggested that the complainant report the matter to the police, as he protested his innocence, whereafter he left the house of Mr Sithole.

[11] On cross examination, he stated that when their bed was being prepared, he had made it very clear to everyone present that he would be uncomfortable to sleep on the floor. In reaction to this comment, all the parties laughed and took the comment as a joke. However, there was no solution or plan presented as an alternative by the host. He claims, upon entering the room where the complainant and her boyfriend were sleeping, he got in next to the complainant and turned his back on them as he slept. The question emanated from the bench regarding why he didn't sleep next to Mr Sithole, to which he responded that there was no space, save next to the complainant. It was his evidence that he was clothed in his boxers and was not naked and in any event, he also denied any sexual intercourse between him and the complainant.

[12] Ms Sibeko testified under oath that she was in the company of the appellant, the complainant and Mr Sithole, on 4 November 2023, at a tavern in Bohlakong. When the activities of the entertainment ended around 02h00 that morning, they were offered a place to sleep at Mr Sithole's house nearby. On arrival, at the residency of Mr Sithole, they were offered blankets to prepare a bed in the kitchen. She slept naked with the appellant, made love and after a while, in the morning, she heard noises coming from the main bedroom of the complainant and her boyfriend. She then saw the appellant and Mr Sithole emerge from the bedroom. She also heard a report that the appellant had allegedly raped the complainant, and according to her evidence, she was surprised by those allegations. The sum total of her evidence is that all four had consumed alcohol that night. She was awakened by the commotion emanating from the main bedroom of

the complainant and her boyfriend.

Grounds of appeal

[13] The judgement of the court *a quo* is assailed in respect of both the conviction and the sentence on a number of grounds, which can be summed up as follows: first, the court *a quo* erred in finding that the State proved its case beyond a reasonable doubt. Second, the court *a quo* erred in finding that there were no improbabilities in the State's case. Third, the court *a quo* erred in finding that the State witnesses gave evidence in a satisfactory manner. Fourth, the court *a quo* erred in finding that the discrepancies in the version of the appellant were sufficient to reject his version as false. Fifth, the court *a quo* erred in finding that the appellant's version is or was not reasonably and possibly true. Sixth, the court *a quo* did not take into account that all parties were under the influence of alcohol.

[14] Regarding the sentence, the appeal is based mainly on the following grounds of appeal, which can be summed up as follows: firstly, the court *a quo* erred in finding that there were no substantial and compelling reasons tendered on behalf of the appellant for the court to deviate from the imposition of the minimum sentence of 15 years imprisonment. Secondly, the court *a quo* placed too much emphasis on the seriousness and the prevalence of the offence, the interests of the community and placed the personal circumstances of the appellant at the receiving end. Thirdly, the court *a quo* over-emphasised the deterrence factor during sentencing. Fourthly, the court *a quo* over-emphasised the issue of gender-based violence, without balancing all factors for sentence purposes.

Analysis

[15] The issue which the court *a quo* had to determine was whether the appellant did have unlawful and non-consensual sexual intercourse with the complainant, thus raping her on the morning of 5 November 2023. This aspect remains to be determined by this Court, sitting on an appeal mode. It is trite law that a court of appeal should be slow to interfere with the findings of fact of the trial court in the absence of material misdirection.¹ An appeal court's powers to interfere on appeal with the findings of fact of a trial court are limited.² In the absence of a demonstratable and material misdirection by the trial court,

¹ *S v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706.

² *S v Francis* 1991 (1) SACR 198 (A) at 204E.

its findings of facts are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. When an appeal is lodged against the trial court's findings of fact, the appeal court should take into account the fact that the trial court was in a more favourable position than itself to form a judgment because it was *inter alia*, able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial.³

[16] The principles in criminal proceedings are salient. The state bears the onus to prove the accused's guilt beyond reasonable doubt.⁴ No onus rests on the accused to prove his or her innocence.⁵ The accused's version cannot be rejected only on the basis that it is improbable, but only once the trial court has found, on credible evidence, that the explanation is false beyond a reasonable doubt.⁶ The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. Equally trite is that the appellant's conviction can only be sustained if, after consideration of all the evidence, his version of events is found to be false.⁷

[17] The court *a quo* properly analysed the evidence of the complainant as a single witness and in my view applied the cautionary rule properly. There was no bad blood between the complainant, who was the girlfriend of Mr Sithole and the appellant, meaning that there would have been no motive for her to incriminate him falsely about the alleged rape incident of 5 November 2023. The evidence seems to suggest, Mr Sithole and the appellant were actually work colleagues who had a good relationship even before the incident. The court *a quo* properly analysed the evidence and, in my view, came to a proper finding that the state had proved its case beyond reasonable doubt when considering the totality of the evidence presented by the state witnesses.

[18] The court made a finding that the complainant, though a single witness, was credible. Section 208 of the Criminal Procedure Act 51 of 1997 permits the conviction of an accused on the evidence of a single witness. Such evidence still has to be reliable and

³ *S v Monyane and Others* [2006] ZASCA 113; [2006] SCA 141 (RSA) ; 2008 (1) SACR 543 (SCA) para 15.

⁴ *S v Mbuli* [2002] ZASCA 78; 2003 (1) SACR 97 (SCA) para 57; *S v Jackson* 1998 (1) SACR 470 (SCA) at 476E and *S v Shackell* [2001] ZASCA 72; [2001] 4 All SA 279 (A); 2001 (4) SA 1 (SCA); 2001 (2) SACR 185 (SCA) para 30.

⁵ *S v Combrinck* [2011] ZASCA 116; 2012 (1) SACR 93 (SCA) para 15.

⁶ *S v V* 2000 (1) SACR 453 (SCA) at 455B.

⁷ *S v Sithole and Others* 1999 (1) SACR 585 at 590. See also *Tshiki v S* [2020] ZASCA 92 para 13.

credible enough to discharge the onus of proof and guilt beyond reasonable doubt. The evidence must be clear and satisfactory in every material respect. The court *a quo* found that the complainant's testimony was clear and forthright and especially materially corroborated by the evidence of Mr Sithole, especially in the events pertaining to the bedroom when the complainant was awakened. The court *a quo* further made a finding that there were no inconsistencies or material contradictions to affect the credibility of the evidence of the complainant. The court *a quo* came to a conclusion that the sum total of her testimony passed evidentiary gate keeping and accepted her testimony as such. Equally, in analysing the evidence of Mr Sithole, the court *a quo* made a finding that the sum total of his evidence was impressive and corroborated the complainant's first report about what transpired in the bedroom. Further to this, the court *a quo* made a finding that there was nothing to suggest that his evidence was contrived or false.

[19] In analysing the evidence tendered by the appellant, the court *a quo* made a finding that his version was a simple denial, despite the fact that he was present in bed with both the complainant and Mr Sithole. The court *a quo* clearly identified the issue in dispute of whether there was an intentional and unlawful vaginal penetration of the complainant by the appellant. The court *a quo* rejected the evidence of the appellant as it was a bare denial and the fact that his evidence was not satisfactory as a witness. The evidence of Ms Sibeko did not offer much corroboration as it showed glaring contradictions especially the events relating to the first and the second instances of being awakened when she heard the commotion. The court concluded that she did not say anything regarding having sexual intercourse with the appellant and came to the conclusion that her evidence was not credible.

[20] In my view, the evidence of the complainant was solid and uncontroverted as compared to the evidence of the appellant, which in my view was farfetched and could not be said to be reasonably possibly true. The sum total of the appellant's evidence is a bare denial. He was supposed to be a good guest, and he went out of his way to contradict every rule or etiquette in the book expected out of a good guest.

[21] What is clear from the record are the following facts which are common cause: that the complainant went to her boyfriend at the tavern and that they consumed alcohol and decided to walk home when the tavern closed; that she was moderately drunk when they

left the tavern; that she was in the company of her boyfriend, the appellant and his girlfriend; that upon their arrival at home, she prepared a bed for the appellant and his girlfriend on the floor in the kitchen, for them to spend the night; that she proceeded to the bedroom with her boyfriend; whilst sleeping she felt something inside her private part and that awoke her; that she was sleeping on top of her boyfriend, that is, her head on his chest and leg across the boyfriend's thighs; when she turned around, she found that it was the appellant and that the appellant was completely naked. Further that, the appellant took his clothes and covered his private parts with it; that he later accompanied his girlfriend as they left the house of Mr Sithole and then he came back to the house alone and asked for forgiveness.

[22] In *S v Chabalala (Chabalala)*,⁸ the Supreme Court of Appeal established the correct approach for a court sitting on appeal to assess evidence. The appeal court must weigh all the evidence, including its inherent strengths and weaknesses, to determine if the court *a quo*'s findings of guilt was correct, ensuring that the guilt of the accused is proved beyond a reasonable doubt. The significant principles from that judgment are the holistic evaluation of the evidence, meaning an appeal court must examine the entire body of evidence to see if it was assessed holistically by the court *a quo*, weighing the possibilities. The court must weigh the evidence pointing to the accused's guilt against that pointing to their innocence, considering the probabilities and improbabilities of both sides. For a guilty verdict to be upheld, the evidence in favour of the State must be so strong that it leaves no reasonable doubt about the accused's guilt.

[23] What this means for an appeal court is that it is not to tamper with a trial court's factual findings unless it is clearly wrong. If the appeal court finds there were inconsistencies, contradictions, or improbabilities that were not properly considered by the trial court, it may find that the State did not prove its case beyond a reasonable doubt. If the balance of evidence weighs heavily in favour of the accused, the appeal court should not uphold the conviction. In essence, *Chabalala*,⁹ emphasises that the guilt of an accused is a conclusion derived from a careful and balanced assessment of all evidence, rather than the accumulation of individual facts.

⁸ *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

⁹ *Ibid.*

Sentence

[24] It is trite that the sentence of an accused must be balanced between the interests of the society, the offence and the personal circumstances of the accused.¹⁰ It is also trite law that a court of appeal will only interfere with the sentence if it is not suitable or if any irregularity occurred during sentencing.¹¹ The personal circumstances of the appellant, at the time, were as follows: he was 28 years old at the time of the sentence; his highest standard of education was grade 10; he was not married; he had no children; he was regarded as a first offender, even though he had a previous conviction of substance abuse in 2016 where he paid an admission of guilt fine; he was gainfully employed at Lion's Rock; he was earning R11 500 per month; his parents were not employed; and his parents were elderly people.

[25] The following was stated by the court *a quo* on page 321 of the record at line 15: 'In casu, I objectively find no substantial and compelling circumstances justifying a departure from the prescribed sentence. Yes, there is prejudice to his elderly parents, but they are not the ones being tried. The situation is [but a] factor in the scheme of things, which must be approached cumulatively so as to avoid disproportionality. Having considered and looked at the guiding case law judiciously; balancing the competing interests; there is no objective justification to depart.'

[26] I deal next with whether there are any grounds for interfering with the sentence that the court *a quo* imposed on the appellant. The narrow issue in this regard, gleaned from the grounds of appeal relied on, is whether the court *a quo* erred in finding that no substantial and compelling circumstances existed which warranted deviation from the minimum sentence prescribed for the offence of which the appellant was convicted. The difficulty in formulating the straitjacketed definition of the phrase 'substantial and compelling circumstances' is generally recognised by the courts.¹² It bears emphasising that the advent of minimum sentence legislation has not done away with the traditional factors that are relevant to sentencing. Those are the personal circumstances of the offender, the crime committed and the interest of society.

[27] It has been held that the prescribed minimum sentences are not to be departed

¹⁰ *S v Banda and Others* 1991 (2) SA 352 (V) at 355A-C.

¹¹ *S v Malgas* 2001 (1) SACR 469 (SCA) (*Malgas*) para 12, *S v Anderson* 1964 (3) SA 494 (A) at 495F-H and *S v De Jager and Another* 1965 (2) SA 616 at 629A-B.

¹² *S v Dodo* 2001 (3) SA 382 (CC) (*Dodo*) para 10 and *Malgas* para 20.

from, for flimsy reasons that would not withstand scrutiny;¹³ and that in cases of serious crimes the personal circumstances of the offender, by themselves, will necessarily recede into the background. In *S v Vilakazi*,¹⁴ it was held that once it becomes clear that the crime is deserving of a substantial period of imprisonment, the questions whether the accused is married or single, whether he has two children or three, and whether or not he is in employment, are in themselves largely immaterial in the light of what that period should be, and that those seem to be the kind of 'flimsy' grounds that, according to *Malgas*, should be avoided.¹⁵

[28] I now turn to an aspect of the use of alcohol during the commission of this crime by all parties involved. Regarding the effect of intoxication, I acknowledge what the court said in *S v Ndlhovu (2)*.¹⁶ In that case it was held that intoxication is one of humanity's age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do.

[29] However, the learned author Terblanche,¹⁷ states that the intake of alcohol or drugs is not necessarily a mitigation factor; the circumstances of the case will determine whether it is. Generally, however, once the court is satisfied that the offender was intoxicated, his intoxication will be a mitigation factor. The reason for this is that '[liquor] can arouse senses and inhibit sensibilities which may diminish the responsibility of the offender'. However, it has to be shown that the intoxication actually impaired the mental faculties of the offender; only then can his blameworthiness be regarded as diminished.

[30] These views also found expression in *Director of Public Prosecutions, Grahamstown v Mzukisi Peli*,¹⁸ a case where the accused (and respondent on appeal by DPP) was 24 years old and the victim six years old), in which the court held:

'It is trite, that for intoxication to be considered as a substantial and compelling circumstance in mitigation, it must be shown that the consumption of alcohol had impaired or affected the

¹³ *Malgas* para 25.

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

¹⁵ *Vilakazi* para 58.

¹⁶ *S v Ndlhovu (2)* 1965 (4) SA 692 (A) at 695C-D.

¹⁷ SS Terblanche *Guide to Sentencing in South Africa* 2 ed (2007) at 7.3.9.

¹⁸ *Director of Public Prosecutions, Grahamstown v Peli* [2018] ZASCA 40; 2018 (2) SACR 1 (SCA).

respondent's mental faculties or judgment and thereby diminished the respondent's moral blameworthiness: see *S v Cele* 1990 (1) SACR 251 (A) at 254*h-l* & 255*b-c*; *S v Makie* 1991 (2) SACR 139 (A) at 143*c-d* and *S v Eadie* 2002 (1) SACR 663 at 673*j-674f* together with the cases mentioned therein. . . That the respondent appreciated the wrongfulness of his conduct and was accordingly able to distinguish right from wrong, but nevertheless proceeded to rape the complainant, cannot on the facts of this case serve to diminish his moral blameworthiness to the extent that it may be regarded as a substantial and compelling circumstance.¹⁹

[31] It is as well to mention that despite the minimum sentence legislation, the centrality of proportionality in sentencing has not changed. The absence of substantial and compelling circumstances from the personal circumstances of the appellant is not in and of itself the end of the inquiry. A prescribed sentence cannot automatically be assumed to be proportionate in a particular case. Disproportionate sentences are not to be imposed as the courts are not vehicles for injustice. In *S v Dodo*,²⁰ the court held that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. This, the court does by considering all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have bearing on the seriousness of the offence and the culpability of the offender.

[32] The aggravating circumstances were as follows: the appellant was convicted of a very serious offence; the appellant took advantage of the complainant as she was under the influence of alcohol; this is a gender-based offence; the appellant was a friend to the complainant's boyfriend; and the psychological effect the incident had on the complainant. I acknowledge the need for deference to the court *a quo*'s factual findings, but this Court is not bound by the court *a quo*'s evaluation of evidence, regarding sentencing, especially where the evidence shows that alcohol played a key role during the commission of the rape incident. In my view, this Court must consider whether it should deviate from the sentence imposed by the trial court for the reasons outlined above.

[33] Accordingly, having due regard to the aforementioned and the dictates of justice, it is clear in my mind that the court *a quo* ought to have taken this aspect of alcohol use

¹⁹ Ibid para 9.

²⁰ *Dodo* paras 37 and 40.

into account in determining a proper sentence and therefore should have deviated from imposing the prescribed minimum sentence. I pause to mention that I have carefully considered all the aggravating and mitigating factors for the purposes of sentence. Accordingly, in my view, we may interfere with the sentence imposed by the court *a quo*. It follows therefore that the appeal against the sentence must succeed.

Conclusion

[34] Further to this, the evidence presented before the court *a quo* is clear. I am satisfied that on the conspectus of the evidence, the factual findings made by the court *a quo* were correct and cannot be faulted. The court *a quo* was correct in finding that the state succeeded in proving the guilt of the appellant beyond reasonable doubt. The evidence of the appellant is untenable and ought to be rejected outright.

[35] The Honourable Magistrate, of the court *a quo* sent a minute to us, which I quote herein below:

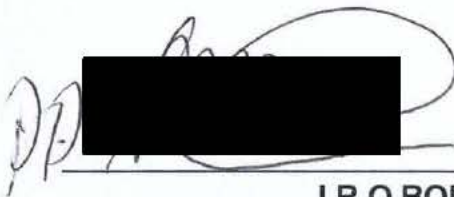
'After perusing the trial transcripts, I bring it to the Honourable Justices' attention that I have misapplied and misdirected myself making a declaration in terms of S120(4) of the Children's Act 38 / 05 declaring the accused unsuitable to work with children and an order in terms of section 50 of act 32 / 07 (Sorma) by including the accused name in the national register. The charge did not relate to a minor as envisaged in the sections.'

[36] The minute provided to us by the court *a quo* is noted. The misdirection made by the court *a quo* is withdrawn from the judgment and should be ignored. Nevertheless, in my view, it does not change the effect of the conviction by the court *a quo*. Counsel for the appellant submitted that this Court should set aside the imposed sentence of 15 years imprisonment and replace it with 8 years imprisonment and that the latter sentence be antedated to 25 November 2024. I am inclined to agree with counsel for the appellant that this Court should intervene with the sentence of the court *a quo*, for the reasons I have expressed herein above. I differ with him regarding the number of years of imprisonment this Court should imposed having weighed all the factors relating to sentencing.

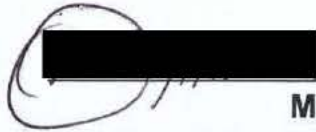
[37] In the circumstances, the following order is made:

- 1 The appeal against the conviction is dismissed.
- 2 The appeal against the sentence is upheld, and the sentence of 15 (fifteen) years imprisonment is hereby set aside.

- 3 The appellant is sentenced to 10 (ten) years imprisonment.
- 4 The sentence is antedated to 25 November 2024.


[REDACTED]
I R O BOKWA
ACTING JUDGE OF THE HIGH COURT

I concur.


[REDACTED]
M OPPERMAN
JUDGE OF THE HIGH COURT

Appearances

On behalf of appellant:

P Mokoena

Instructed by:

Legal Aid South Africa

Bloemfontein Local Office

Bloemfontein

On behalf of respondent:

MMM Moroka

Director of Public Prosecutions, Free State Division

Bloemfontein.