



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

**Not Reportable
Case no: CA 67/2018**

Regional Magistrates Case No:G57/2008

In the matter between:

HEZEKIEL NKIYA MMUSI

APPELLANT

and

THE STATE

RESPONDENT

Coram: Hendricks JP and Petersen ADJP

Heard: 19 March 2026 (On the papers)

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 10h00 on 24 March 2026.

Summary: Criminal law – Appeal against conviction and sentence – Rape – Conviction confirmed on evidence – Sentence of life imprisonment set aside – Misdirection in application of minimum sentence provisions – Charge sheet incorrectly invoked s 52 of Act 105 of 1997 (repealed) instead

of s 51(2) – Appellant not charged under Part I of Schedule 2 – Appropriate sentence under Part III of Schedule 2 for first offender: 10 years' imprisonment.

ORDER

On appeal from: Regional Court, Garankuwa (M S Pretorius sitting as court of first instance):

1. The appeal against sentence is upheld.
2. The sentence of life imprisonment imposed by the Regional Court, Garankuwa is set aside and replaced with a sentence of ten (10) years of direct imprisonment, antedated to 08 July 2008. If the appellant is still incarcerated, he must be released immediately, unless otherwise lawfully detained.
3. A copy of this judgment must be brought to the attention of the Provincial Head of the Office of the Chief Justice, North West for investigation and appropriate action in respect of the inordinate and unexplained delay in the processing of this appeal in the Office of the Chief Registrar; and, to the extent that the evidence so warrants, for referral to the South African Police Services for criminal investigation.

JUDGMENT

PETERSEN ADJP (HENDRICKS JP CONCURRING):

Introduction

[1] The appellant was charged in the Regional Court, Garankuwa, on a charge of rape. He pleaded not guilty on 12 June 2008. On 21 July 2008, he

was convicted and sentenced to life imprisonment. The appellant initially appealed against both his conviction and sentence. However, he subsequently abandoned the appeal against his conviction and persisted only with the appeal against sentence.

[2] The appeal against sentence came before this court on 04 April 2025. The panel designated by the Judge President to consider the appeal at that time failed to do this timeously and judgment remained outstanding until the matter was recalled in March 2026 by the Judge President. The appeal now serves before the present panel designated by the Judge President.

Background facts

[3] The facts are fully set out in the judgment of the Regional Court and need not be repeated in detail. In summary, the complainant, T[...] C[...] K[...], testified that on 03 December 2007, the appellant visited her and they spent the day together at her home. They consumed alcoholic beverages. The appellant left at about 21h00. The complainant went to sleep with her infant child.

[4] At approximately 01h00 the following morning, she felt a hand on her waist. She woke up, switched on a light, and saw the appellant. She asked him: ‘Nkiya, what are you trying to do?’ The appellant grabbed her throat, throttled her, pushed her onto the bed face down, removed her panties, and raped her from behind. She resisted by kicking and moving. The appellant continued throttling her, preventing her from screaming. Her child woke up and cried. She asked the appellant whether he had no pity for her crying child. He told her to keep quiet and threatened to kill her if she reported the matter.

[5] The complainant managed to escape through a window and ran to her neighbour, R[...] K[...]. She was hysterical and reported that she had been attacked. R[...] observed fresh scratch marks on her throat, consistent with nail marks. He went to the complainant’s house and found her child crying and rolling on the bed. The police were called. The appellant was later arrested after fleeing when he saw the police.

[6] A medical doctor, Dr Kasongo, examined the complainant and noted nail marks on both sides of her neck. He found soft tissue injuries consistent

with the alleged assault. He could not confirm forced penetration because the complainant was sexually active and had given birth three times, which meant that signs of forced penetration might not be evident.

[7] The appellant testified in his defence. He admitted that he had sexual intercourse with the complainant on the day in question but claimed it was consensual. He stated that they drank together, he asked for sex, she agreed, and they had intercourse in the evening. He said he left at about 23h00. He denied throttling the complainant or raping her. He offered an unconvincing explanation for fleeing when the police arrived, namely that he owed someone money and feared his television would be repossessed.

The appeal against sentence

[8] The appeal against sentence is the sole issue for determination. The appellant contends that the sentence of life imprisonment was incompetent because the charge sheet incorrectly invoked the provisions of the Criminal Law Amendment Act 105 of 1997 ('the Act').

[9] The charge sheet stated that the charge of rape was read with 's 52 and Schedule 2 of the Criminal Law Amendment Act'. Section 52 of Act 105 of 1997 was repealed by s 2 of the Criminal Law (Sentencing) Amendment Act 38 of 2007. The reference in the charge sheet should have been to s 51(2) of the Act.

[10] On his first appearance on 26 March 2008, the magistrate explained the provisions of s 51(2) of Act 105 of 1997 to the appellant. The appellant was thus aware that the prescribed minimum sentence regime under s 51(2) applied, notwithstanding the incorrectly phrased charge.

[11] The critical issue in my view is not the incorrectly phrased charge, but whether the trial court was correct to sentence the appellant to life imprisonment under s 51(1) of the Act, read with Part I of Schedule 2, on the basis that the rape involved the infliction of grievous bodily harm, in circumstances where the provisions of s 51(1) were not brought to the attention of the appellant. In my view the trial court could not do so.

[12] In any event, the injuries sustained by the complainant were scratch marks on her neck. While these were painful and visible, they do not

constitute ‘grievous bodily harm’ as required for the application of Part I of Schedule 2. Grievous bodily harm means really serious harm. The scratches, although painful, were not serious enough to fall within that category. There was no medical evidence of significant injury, no hospitalisation, and no lasting harm. The trial court erred in treating the scratches as grievous bodily harm.

[13] The applicable sentencing provision is s 51(2) of the Act, read with Part III of Schedule 2. Part III of Schedule 2 refers to ‘Rape in circumstances other than those referred to in Part I’. The appellant was a first offender. Section 51(2)(b)(i) at the time prescribed a minimum sentence of 10 years’ imprisonment for a first offender convicted of an offence referred to in Part III of Schedule 2.

[14] The trial court did not find any substantial and compelling circumstances to depart from the prescribed minimum sentence. The appellant’s personal circumstances were that he was 45 years old, unemployed but did occasional work, had a previous conviction for rape in 1982 (which was more than 25 years old), and had dependants. The interests of society demand that serious crimes such as rape be met with severe sentences. However, the misdirection in applying the incorrect sentencing regime compels this court to interfere.

Conclusion

[15] The appeal against sentence succeeds. The sentence of life imprisonment is set aside and replaced with a sentence of 10 years’ direct imprisonment, which is the prescribed minimum sentence for a first offender under s 51(2) read with Part III of Schedule 2, at the time. The sentence is antedated to 08 July 2008, being the date on which the appellant was sentenced.

The delay in the appeal

[16] As noted in paragraph [2] above, the previous panel designated to consider this appeal on 04 April 2025 failed to finalise the matter timeously, with the result that the appeal had to be recalled by the Judge President and assigned to the present panel in March 2026. What must also be observed is the period preceding that. The appeal was registered under case number CA 67/2018, yet it only came before any panel for the first time in April 2025, a

delay of some seven years from registration to hearing. The delay in the Office of the Chief Registrar in enrolling and managing this appeal is a matter that demands explanation and accountability.

[17] This court recently addressed an analogous dereliction in *Ramasilo v S; Malebatso v S*¹, where petitions lodged in 2018 received no attention in the Office of the Registrar until 2024. This court held that accountability is the hallmark of any efficient administrative process and that this standard assumes a heightened duty of care when the administrative component is seized with constitutionally enshrined rights — including the right of access to courts and the timeous processing of criminal appeals, reviews and petitions. A nonchalant attitude by the identified role players cannot be condoned. It cannot be business as usual. The conduct of the officials implicated in *Ramasilo* was found to be prima facie serious misconduct, tantamount to defeating the ends of justice, warranting referral to the Provincial Head of the Office of the Chief Justice and to the South African Police Services for criminal investigation.

[18] The delay in the present matter is equally inexplicable and equally inexcusable. Whatever the outcome on the merits, this court must record its strong displeasure at the administrative ineptitude that has caused an appeal registered in 2018 to remain unheard until 2025.

Order

[19] In the result the following order is made:

1. The appeal against sentence is upheld.
2. The sentence of life imprisonment imposed by the Regional Court, Garankuwa is set aside and replaced with a sentence of ten (10) years of direct imprisonment, antedated to 08 July 2008. If the appellant is still incarcerated, he must be released immediately, unless otherwise lawfully detained.
3. A copy of this judgment must be brought to the attention of the Provincial Head of the Office of the Chief Justice, North West

¹*Ramasilo v S; Malebatso v S* (CAP 26/2024; CA 27/2024) [2024] ZANWHC 317 (19 December 2024) at paras [22], [35]–[36].

for investigation and appropriate action in respect of the inordinate and unexplained delay in the processing of this appeal in the Office of the Chief Registrar; and, to the extent that the evidence so warrants, for referral to the South African Police Services for criminal investigation.

A H PETERSEN
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION
MAHIKENG

I agree.

R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION
MAHIKENG

Appearances

For the appellant: Adv O Ntsamai
Instructed by: Legal Aid South Africa
Mafikeng

For the respondent: Adv N B Goloda
Instructed by: Director of Public Prosecutions North West
Mafikeng