



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)

CASE NO.: A34/21

BEFORE THE HONOURABLE JUSTICE LANGA(J) e/t MALANGENI (AJ)

Date: 18TH February 2026

In the matter between:

ZWELI INNOCENT MKHIZE

And

THE STATE

Private Bag X1822, Middelburg 1050

APPELLANT

2026 -02- 18

RESPONDENT

MLD-MID-002

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA LOCAL DIVISION,
MIDDELBURG
COURT ORDER

The Judge heard the matter on the 17th October 2025 and electronically circulated the judgment on the 18th February 2026, gave an order in paragraph "22" as follows:

I therefore propose the following order:

1. The appeal against sentence is dismissed.
2. The sentence of life imprisonment is hereby confirmed.

BY THE COURT

REGISTRAR *NP* MAGAGULA



IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MIDDELBURG

CASE NO: A34/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES:NO
(3)	REVISED: NO
	<u>18/02/2026</u>
SIGNATURE	DATE

In the matter between:

ZWELI INNOCENT MKHIZE

APPELLANT

and

THE STATE

RESPONDENT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 18 FEBRUARY 2026 at 10h00.

JUDGMENT

Malangeni AJ et Langa J

Introduction

[1] The appellant notes an appeal against the sentence of life imprisonment imposed by the Regional Court sitting at Amersfoort, ("the court *a quo*"), on 12 December 2019. He is relying on his automatic right of appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977, ("the CPA").

[2] The appellant appeared before the court *a quo* on one count of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as amended, read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA") and another count of kidnapping.

[3] It was alleged that he had unlawful sexual intercourse with the complainant more than once, and further that he took her to his place against her will. The appellant pleaded not guilty to the charges. His basis of defence was that the sexual intercourse was by consent, and further that he went with the complainant to his place by agreement.

[4] The State led evidence of two witnesses, and the appellant was the only witness to his defence. The appellant was convicted on both counts and was subsequently sentenced to life imprisonment. For purposes of the sentence, both counts were treated as one.

Grounds of appeal

[5] The grounds of appeal can be summarised as follows:

5.1 That the sentence of life imprisonment is harsh and disturbingly shocking and induces a sense of shock.

5.2 That the principles of punishment were not considered when life imprisonment was imposed on the appellant as a first offender.

5.3 That the honourable court erred by not taking into account the appellant's personal mitigating factors cumulatively to find that compelling and substantial circumstances were present.

5.4 That the court *a quo* failed to blend the sentence with mercy under the circumstances and in terms of the principles of sentencing.

Personal circumstances

[6] The appellant's personal circumstances, as placed on record, are that he is 34 years of age, unmarried, with no dependants. Before his arrest, he was working in Middelburg at one of the mines, earning R2 000.00 every second week.

The applicable legal principles

[7] It is trite law that a court of appeal has no wide boundaries when it comes to the interference with the trial court's sentencing powers. This Court must ascertain whether or not the trial court exercised its discretion judicially and properly. The correct approach on an appeal against a sentence was set out in *S v Pillay*,¹ as follows:

"As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, 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 discretion on sentence."

[8] The question as to how the appeal court interferes with the sentence imposed by the trial court was stated clearly in *S v Bogaards*:²

"... where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

¹ *S v Pillay* [1977] 4 All SA 713 (A); 1977 (4) SA 531 (A) at 535E-G.

² *S v Bogaards* 2013 (1) SACR 1 (CC) para 41.

[9] From the reading of the above-mentioned authorities, it is clear that the appeal court's powers are limited. The limitation is premised on the fact that sentencing is discretionary. In *S v Kgosimore*,³ it was held that:

"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true enquiry. (Compare *S v Pieters* 1987 (3) SA 717 (A) at 727G-I). Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so."

Applicability of the provisions of the CLAA

[10] It is common cause that the appellant has been convicted of rape that falls within the ambit of section 51(1) of the CLAA, as it was rape more than once. This is cited in the charge sheet as applicable in this matter. The law dictates that a prescribed sentence be imposed unless there are substantial and compelling circumstances existing in proceedings. In such circumstances, the court may deviate from the application of the prescribed sentence. Courts are encouraged not to deviate for flimsy reasons.

[11] In *Price and Another v S*,⁴ the court held that the correct interpretation of section 51 meant that the section limited but did not eliminate the court's discretion in imposing a sentence in respect of certain offences. The courts should therefore be mindful when sentencing specific crimes that legislation has established a new benchmark against which the sentence to be imposed must be assessed. The courts are required to apply a severe, standardised and consistent response to relevant

³ *S v Kgosimore* 1999 (2) SACR 238 (SCA) para 10.

⁴ *Price and Another v S* [2003] 4 All SA 26 (SCA).

crimes in question unless convincing reasons justify otherwise. The court held that prescribed sentences are not to be departed from for flimsy reasons. The only instance in which departure would be justified is if the circumstances relevant to sentencing were substantial and compelling.

[12] The issue of substantial and compelling circumstances was further dealt with in *S v Malgas*,⁵ where the court stated that:

"If the sentencing court on consideration of the circumstances of that particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

Analysis

[13] In the proceedings under discussion, a member of a vulnerable group (a woman) was raped and kidnapped by a male person. This constitutes gender-based violence. This court takes judicial notice that offences of this nature are prevalent countrywide. The complainant has rights enshrined in the Constitution which include but are not limited to the following:

13.1 Section 10, which provides that: "Everyone has inherent dignity and the right to have their dignity respected and protected"; and

13.2 Section 12(1), which states that: "Everyone has the right to freedom and security of the person, which includes the right –

(a) Not to be deprived of freedom arbitrarily or without just cause;

...

(b) To be free from all forms of violence from either public or private sources."

[14] The appellant negatively interfered with the enjoyment of such rights by the complainant. It is on record that the complainant is a lesbian in terms of her sexuality. As the trial court stated in its judgment for sentence that: "You in the first place assaulted this complainant and thereafter you raped her more than once and as the prosecutor pointed out, this complainant's sexual preference is not to have sexual

⁵ *S v Malgas* 2001 (1) SACR 469 (SCA) at 471C.

intercourse with men, her lifestyle is one of or is a lesbian lifestyle. So definitely this incident was a humiliating experience for her". This clearly means that the appellant deprived the complainant of her right in terms of section 10. He further caused the complainant to suffer physical injuries as depicted on the J88 that was exhibited, B, by the trial court.

[15] It is common cause that the complainant was at an entertainment place when she was kidnapped and later raped by the appellant. The question is: when will the women of this country be free to enjoy entertainment without fearing their male counterparts? In *S v Chapman*,⁶ it was held that:

"[Women] have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives ... The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."

[16] These are fundamental rights that need to be protected by a court of law. The infringement of such rights is a serious violation.

[17] In paragraphs 9, 10 and 22 of the heads of arguments, the legal representative for the appellant submitted that:

"The trial court misdirected itself by sentencing the appellant to an effective term of life imprisonment and it is disproportionate to the offence committed which induces a sense of shock. The trial court misdirected itself in finding that the personal circumstances of the appellant, cumulatively, does not constitute mitigating factors which constitute substantial and compelling circumstances and did not consider the below circumstances. The appellant prays that the appeal court finds that the sentence of life imprisonment was not in accordance with justice and stands to be corrected. He further submitted that the court a quo should have found that, cumulatively, the substantial and compelling circumstances are present in this case. He further

⁶ *S v Chapman* 1997 (3) SA 341 (SCA) at 345A-D.

submitted that a sentence of 20-25 years' imprisonment would have been justified under the circumstances."

[18] The State made the following submissions:

"The appellant failed to show that there are compelling and substantial circumstances to justify deviation from the prescribed minimum sentence. The only submissions he made in this regard were that the complainant did not suffer serious injuries, and further that the appellant spent some time in custody. It is submitted that this falls short of being compelling and substantial circumstances. It is humbly submitted that the court imposed the right sentence prescribed by the law."

[19s] My view is that the trial court considered the nature of the crime, the interests of the society, the accused's personal circumstances and the interests of the victim. The trial court struck a balance between these factors. In respect of the first three factors, their consideration is in line with *S v Zinn*,⁷ and the last factor is supported by *S v Blaauw*.⁸ Society views rape as an inhuman crime. In *S v C*,⁹ it was held that:

"Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim - he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life - a fate often worse than loss of life."

[20] The trial court could not find any substantial and compelling circumstances. I agree with this finding. The appellant's personal circumstances even taken together with the traditional mitigating factors, constitute ordinary circumstances which in my view fall short of the substantial and compelling circumstances as envisaged in section 51(3). On the other hand, the complainant's personal circumstances, coupled with the fact that she sustained physical injuries and the prevalence of rape offences countrywide, outweigh the mitigating factors, more especially the appellant's personal circumstances. In *S v Vilakazi*,¹⁰ it was held that:

⁷ *S v Zinn* 1969 (2) SA 537 (A).

⁸ *S v Blaauw* 2001 (2) SACR 255 (C) at 257D-E.

⁹ *S v C* 1996 (2) SACR 181 (C).

¹⁰ *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 58.

"In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. 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, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that *Malgas* said should be avoided."

[21] I find that the sentence imposed by the trial court is not influenced by any misdirection, neither is it appropriate and disproportionate. The trial court exercised its discretion properly and judicially. Therefore, the appeal must fail.

Order

[22] I therefore propose the following order:

- 1 The appeal against sentence is dismissed.
- 2 The sentence of life imprisonment is hereby confirmed.



M MALANGENI

ACTING JUDGE OF THE HIGH COURT
MPUMALANGA, MIDDELBURG

I agree, and it is so ordered



MBG LANGA

ACTING JUDGE OF THE HIGH COURT
MPUMALANGA, MIDDELBURG

Appearances

For the Appellant: Advocate MC Mavasa,
Instructed by: Legal Aid South Africa
Emalahleni Local Office

For the Respondent: Advocate TB Molefe
Instructed by: DPP's Office,
Middelburg

Date of Hearing: 17 October 2025
Date of delivery: 18 February 2026