

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: **A468/2010**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

22 April 2026

In the matter between:

ZWELINZIMA MANGALI

Applicant

and

THE STATE

Respondent

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be **3 February 2026**.*

REASONS FOR THE ORDER

KUBUSHI, J

Introduction

[1] The appeal was heard before us on 3 February 2026, when the following order was issued:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld.
3. The sentence of life imprisonment is set aside and replaced by the following sentence:

“The accused is sentenced to 15 years imprisonment and the sentence is ante dated to 23 February 2010.”

4. The reasons for the order will follow at a later date.

[2] The reasons for the order follow hereunder.

Background

[3] The appellant, Zwelinzima Mangali, together with other co-accused was charged with six counts of contravening the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 (Sexual Offences Act) read with the provisions of section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997 (the CLAA) together with one count of robbery. The appellant pleaded not guilty to all the charges but was convicted on counts 4 and 5 and sentenced to life imprisonment.

[4] Count 4 relates to the rape of K[...] G[...] D[...] (the complainant). The charge being that she was raped by the appellant and one B[...] O[...] (accused 1). Count 5 on the other hand, related to the rape of K[...] J[...] S[...] (K[...]) who it is alleged was raped by M[...] B[...] M[...] (accused 5). From the reading of the judgment of the trial court, it appears as if the appellant was convicted in respect of both count 4 and 5. However, the evidence on record indicates that the appellant conceded to having sexual intercourse with the complainant in count 4 and not with K[...], who is the complainant in count 5. The evidence of the complainant also indicates that the appellant raped her. K[...] who is the complainant in count 5 made no allegations of rape against the appellant.

[5] As such the appellant could not have been convicted on count 5. Therefore, for purposes of this judgment, only count 4 will be considered.

[6] In terms of section 309(1)(a) of the Criminal Procedure Act, Act 51 of 1977 (the CPA), an accused sentenced to life imprisonment in the Regional Court, has on

notice of intention to appeal being given, the automatic right to appeal the convictions and sentences. The appellant is, thus, before this Court appealing both the conviction and sentence.

The Evidence

[7] The complainant's evidence is that on 12 June 2005 (the day in question) she was with her friends at Bisto Tavern playing pool. At about 19h00 she left the tavern in the company of her friend K[...]. As already stated, K[...] is the complainant in count 5. Outside the tavern, K[...] stopped at the gate and the complainant walked some distance from the tavern. Whilst she was so walking, she was accosted by the appellant who asked her to go with him. When she refused, the appellant took out a knife and threatened to stab her and at the same time he hit her with an open hand on the face. The complainant was as a result forcibly taken to a shack in extension 16 by the appellant. On the way to extension 16, they were followed by K[...] who was in the company of accused 1 and accused 5. She did not know under what circumstances K[...] was accompanying the two gentlemen.

[8] When they reached the shack they all went in. The shack had only one room with no partitions. There was no furniture except a double bed. At that time, she saw accused 5 busy fondling K[...]. She could not see K[...]’s reaction, but she could hear her crying.

[9] The appellant ordered her to take off her clothes, but she refused. The appellant pushed her to the ground and took off her jeans and then took off his trousers and underpants and forcibly had sexual intercourse with her. Whilst the appellant was having sexual intercourse with her, accused 1 wanted to have sexual intercourse with her as well and the appellant told him to wait his turn. So, when the appellant finished with her, accused 1 also took a turn and had sexual intercourse with her without her consent. At the same time the appellant was kissing her.

[10] The complainant was crying and hysterical which caused accused 1 to stop having sexual intercourse with her. After a short break accused 1 continued to have sexual intercourse with her and thereafter, the appellant had sexual intercourse with her for the second time and when he finished accused 1 took another turn. All this

time she was lying on the floor crying. She stated that both the appellant and accused 1 did not use condoms.

[11] When all this was happening, K[...] was on the bed with accused 5 and she could hear her crying. After the ordeal they put on their clothes and wanted to leave but they were refused to leave. They had to sit together with their assailants whilst they (their assailants) were chatting to each other. It was at this time that the appellant told her not to lay charges against him as he will say that she was his girlfriend. They were only allowed to leave around 22h00 and they went to their respective homes.

[12] At home, the complainant found her parents asleep, and she went straight to bed. The following morning, she went to K[...]’s parental home, and they went to the police station to lay charges. She was taken to the doctor for examination. She did not report the matter to anyone else except to the police. She only informed her parents when she came back from the police station.

[13] K[...]’s testimony is that on the day in question she was with the complainant at Bisto tavern playing pool. They left the tavern at around 19h00. At the gate they met the appellant, accused 1 and accused 5. She knew the three gentlemen. At one time she was accused 1’s girlfriend. The relationship had by then ended. Accused 5 told her to go with him as she was his girlfriend. When she refused, accused 5 hit her with a belt on her back. She forcibly walked with accused 5 to a certain shack in extension 16. Whilst on the way to the shack, she asked accused 1 why they were treating them like they were doing, and he answered by saying she must leave him alone.

[14] Inside the shack accused 5 instructed her to take off her pants and she refused. The complainant was also present in the room, and the appellant also asked her to take off her pants and when she refused, he slapped her. Accused 5 removed her pants and had sexual intercourse with her on the bed without her consent on two occasions. At that time, the complainant was on the floor with the appellant. She saw the appellant on top of the complainant having sexual intercourse with her. Thereafter he saw accused 1 get on top of the complainant and had sexual intercourse with her and the appellant took another turn to have sexual intercourse with the complainant. At around 22h00 they were told to leave the shack. When she

arrived home, she was afraid to tell her parents about the ordeal because she was going to be shouted at. In the morning, she went to fetch the complainant, and they went together to make a report at the police station. She sustained no physical injuries.

[15] The appellant's evidence is that he knew the complainant who was his girlfriend as from 12 June 2005, which is six months prior to the commission of the offence. He conceded that he had sexual intercourse with the complainant but that it was with her consent. He did not rape her.

[16] He also conceded that on the date in question they were at Bisto Tavern. The complainant arrived at the tavern whilst he was alone, and they sat together. Accused 1 and 5 arrived and bought beer and they drank together. He left the tavern with the complainant followed by accused 5 who was accompanied by K[...]. They went to his brother's shack. He had asked the complainant to accompany him to the shack. This is a one room shack which has been partitioned into two rooms.

[17] When they reached the shack, he had consensual sexual intercourse with the complainant in one of the rooms whilst accused 5 had sexual intercourse with K[...] in the other room. Accused 5 and K[...] had sexual intercourse on the floor.

[18] After the first round of sexual intercourse, the complainant requested water and he went to fetch it for her. When he returned with the water, he found the complainant on top of accused 5. After that they sat together and chatted. He later on requested the complainant for a second round of sexual intercourse and she agreed. After the second round she accompanied the complainant to her home. The following day he came across the police who told him about the rape charge and he was arrested.

Ad Convictions

[19] The issue before this Court is whether the trial court erred in its finding that the appellant had sexual intercourse with the complainant without her consent. Put differently, the issue is whether the trial court misdirected itself in finding that the complainant did not consent to the sexual intercourse or in its finding that the complaint was not the appellant's girlfriend.

[20] As regards conviction, the appellant's main ground of appeal is that the trial court erred in finding that the state proved its case beyond reasonable doubt. The contention was that in considering the peculiar set of facts involved in this matter, the trial court misdirected itself in finding on the evidence presented that the state had proved the guilt of the appellant beyond reasonable doubt, and that the evidence could be relied upon to convict the appellant. In support of this argument, the reliance was based on what the appellant referred to as material contradictions between the evidence of the complainant and that of K[...].

[21] The trial court in considering the evidence before it, accepted that there were some contradictions in the state's case. However, when considering whether such contradictions were so material as to destroy the state's case, it found the contradictions to be not so material as to have destroyed the state's case.

[22] I agree with the trial court's finding that the contradictions in the state's evidence are not material. It is my view that the two state witnesses did not contradict each other about the commission of the offence itself. Both witnesses stated that the appellant raped the complainant on two occasions. The contradictions as I see them are mainly about whether K[...] was talking to accused 1 at the gate at the time the witnesses were leaving the tavern; whether the complainant asked for help from the lady who was around the tavern; whether the appellant was forcing the complainant to leave the tavern with him, and contradictions as to when it comes to the report to the police. These in my view are not material contradictions warranting the destruction of the state's case.

[23] It should also be kept in mind that the trial court made factual and credibility findings in favour of the state's evidence. It found the evidence of the state witnesses to be credible and satisfactory in all respects and the story they told was found to be true. It further made factual findings that the appellant had sexual intercourse with the complainant without her consent.

[24] It is trite that appellate courts are reluctant to interfere with the factual and credibility findings made by trial courts unless there are shown to be clearly wrong or based on material misdirection.¹ Bearing in mind the advantage that a trial court has

¹ *S v Monyane* 2008(1) SACR 543 (SCA) para 15.

of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial court's evaluation of oral testimony.²

[25] I cannot find the findings of the trial court to be clearly wrong or based on material misdirection. The complainant's evidence was corroborated by that of K[...] in all material respects when it came to the commission of the offence. Both of them were in the room where the offence was committed. Both testified that the appellant twice raped the complainant. This was further corroborated by the evidence of the appellant who conceded that he had sexual intercourse with the complainant twice. What confirms that the complainant did not consent to the sexual intercourse is that the two state witnesses both testified that the complainant was crying during the whole time of the commission of the offence. If the complainant was the appellant's girlfriend and had consented to the sexual intercourse, she had no reason to be crying during such sexual intercourse. If indeed the complainant was the appellant's girlfriend, I find it odd that he did not find it offensive when he found the complainant on top of accused 5 when he came back from fetching water for her.

[26] I have to hold that the trial court correctly found that the sexual intercourse was without the consent of the complainant, and that the state proved its case beyond reasonable doubt. The appeal on conviction was as a result dismissed.

Ad Sentence

[27] In the case of **S v Rabie**³ it was stated by Holmes JA that:

"In every appeal against a sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

- (a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and*
- (b) should be careful not to erode such discretion; hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised."*

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

³ 1975(4) SA 855 (A).

[28] The question, therefore, is whether this Court has the authority to alter the sentence of life imprisonment imposed by the trial court. Put differently, the question is whether the discretion of the trial court has not been judicially and properly exercised.

[29] This Court will only interfere with the sentence imposed by the trial court 'where there has been an irregularity that results in a 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.'⁴

[30] As already stated, the appellant was found guilty as charged in terms of section 3 of the Sexual Offences Act, read with the provisions of section 51(2) of the CLAA. Section 51(2) addresses offences in Parts II, III and IV of Schedule 2, and provides in relevance that:

*"[n]otwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in (a) Part II of Schedule 2, in the case of (i) a first offender, to imprisonment for a period not less than 10 years."*⁵

[31] Thus, a sentence in terms of section 51(2) of the CLAA is triggered when a person is convicted of an offence set out in Part II of Schedule 2. Specifically for the purpose of this matter, in accordance with Part II of Schedule 2, the offence is rape as contemplated in section 3 of the Sexual Offences Act in circumstances other than those referred to in Part I.

[32] In this instance, the appellant was charged with and found guilty of rape read with the provisions of section 51(2) of the CLAA and was sentenced to life imprisonment. In sentencing the appellant to life imprisonment as it did, the trial court was persuaded by its finding that the complainant was raped more than once and by the appellant and accused 1 (what the trial court referred to as gang rape).

[33] Life imprisonment would have been appropriate in the circumstances if the appellant's rape charge was read with the provisions of section 51(1) of the CLAA or

⁴ *S v Bogaards 2013 (1) SACR 1 (CC)* at para 41.

⁵ 10 years was the minimum sentence of imprisonment for a first offender then. Now the period is 15 years.

if, once such evidence has been proven, an amendment of the charge sheet was applied for.⁶ The Supreme Court of Appeal in *S v Legoa*,⁷ held that under the common law it was desirable, but not essential, that the charge sheet should set out the facts the state intended to prove in order to bring the accused within a minimum sentencing jurisdiction.

[34] This, however, is not what happened in this case. The appellant was charged on a single incident of sexual intercourse without consent, and even though the evidence proved that the appellant was sexually penetrated more than once and by the appellant and his co-accused, proving that the rape ought to have been read with the provisions of section 51(1) of the CLAA, he was found guilty as charged. That is, he was found guilty of a single incident of sexual penetration. In terms of section 51(2) of the CLAA, with which the appellant was charged, if found guilty, the minimum sentence the trial court could impose was 10 years imprisonment because the appellant was a first offender.

[35] However, in *S v Kolea*,⁸ the Supreme Court of Appeal stated that the term of imprisonment referred to in section 51(2) of the CLAA is the minimum sentence that a trial court must impose. The section does not preclude a trial court from imposing a sentence of imprisonment higher than the said term. In terms of the section, the trial court is entitled, as it has the jurisdiction to do so, to impose any sentence of imprisonment, even life imprisonment, as long as the sentence was in excess of the term stated.

[36] It means that in the present case, if not for the provisions of section 92(1) of the Magistrates Court Act, Act 32 of 1944 (the Magistrates Court Act), the trial court could have been entitled to impose the sentence of life imprisonment, as it did. A Regional Court derives its sentencing jurisdiction in terms of section 92(1) of the Magistrates Court Act, which jurisdiction provides for punishment of up to 15 years imprisonment. As the trial court when imposing the sentence of life imprisonment was a Regional Court, it could not impose a sentence in excess of 15 years. Therefore, in imposing the sentence of life imprisonment, the trial court exceeded its sentencing jurisdiction, and in that sense, it erred.

⁶ *S v Kolea* 2013(1) SACR 13 (SCA) para 16.

⁷ 2003 (1) SACR 13 (SCA) para 14.

⁸ 2013 (1) SACR 409 (SCA) at para 17.

[37] Additionally, it was argued on behalf of the appellant that if the trial court was inclined to impose a sentence which is in excess of the prescribed minimum sentence, it ought first to have informed the appellant of its intention to do so, and to give the appellant an opportunity to address it on the intended sentence. The trial court having not done so, the contention, which is correctly made, is that it was not entitled to impose that sentence, and having done so, it materially misdirected itself.

[38] It is trite that a material misdirection by the trial court vitiates its exercise of its discretion. In *S v Malgas*, the Supreme Court of Appeal held that

‘Where material misdirection by the trial court vitiates its exercise of that discretion, an appeal court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is large.’⁹

[39] This Court is, thus, at large to look at sentence afresh.

[40] The concession on behalf of the appellant that the matter ought not to be remitted to the trial court for reconsideration of an increased sentence because it will serve no purpose due to the length of time spent by the appellant in custody, was correctly made. The appellant has already served fifteen to sixteen years in custody and sending the matter back will not be in the interest of justice and of the appellant’s right to fair trial. This will only result in delaying his release. The proposition is that this Court should consider sentence on the basis of the record as it stands. I agree.

[41] The trite traditional factors applicable to sentencing are the personal circumstances of the offender (this would include mitigating and aggravating factors); the nature and gravity of the offence; and the interests of society.¹⁰ In determining the sentence to be imposed, the purpose of sentencing, being prevention, retribution, reformation and deterrence, must also be taken into account.¹¹

[42] Section 51(3) of the CLAA provides as follows:

“If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser

⁹ *S v Malgas* 2001 (2) SA 1222 (SCA) para 12.

¹⁰ *Ibid* at para 25F.

¹¹ *S v RO and Another* 2010 (2) SACR 248 (SCA) para 30.

sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.”

[43] The elements required to prove substantial and compelling circumstances are those that are generally and traditionally considered when sentence is assessed. They include the gravity and nature of the crime, the interest of society and the personal circumstances of the offender.¹²

[44] The personal circumstances of the appellant tendered in mitigation of sentence are that: the incident was committed under the influence of alcohol; the appellant has since after his arrest been incarcerated since 13 June 2005 until 12 March 2007 and further from 18 November 2008 until the date of sentence on 23 February 2010, which is approximately 38 months; the appellant was born on 6 May 1987 and was 23 years old at the time of sentence but 18 years of age at the time of the commission of the offence; he was not married, had no children and was unemployed; he had progressed in school to Grade 7; and he was a first offender.

[45] It was argued on behalf of the respondent that the gravity of the offence is that the offence of rape by its very nature is serious. The seriousness thereof is aggravated further in this instance by the fact that the complainant was humiliated by being raped in the presence of her friend and other people. The offence is prevalent in that such offences appear on the court rolls on a daily basis. Violence against women and children is rife within the jurisdiction of the trial court and in the country generally, and campaigns against gender violence do not yield the required response.

[46] It was further argued that the actions of the appellant in this instance were cold, vulgar and inhumane. The complainant was slapped and threatened with a knife. She was raped by the appellant and his co-accused interchangeably. She was forced to remove her clothing and made to lie on the cold bare ground with no protection from her back. Her cries and pleas fell on deaf ears. She was forced to spend time with her assailants whilst they were still considering whether or not to release her.

¹² *S v Abrahams* 2002(1) SACR 116 (SCA).

[47] In the interests of society, it was submitted on behalf of the respondent that the family members of the complainant in this case were surely also influenced in a devastating manner, due to the rape of the complainant.

[48] It is my view that there are no substantial and compelling circumstances that warrants a deviation from imposing the prescribed minimum sentence. Although the personal circumstances of the appellant in regard to his age at the time of the commission of the offence and the fact that he was kept in detention for 38 months awaiting trial, can be regarded as mitigatory factors, however, such factors cannot be overemphasised over the gravity of the offence and the interests of society.

[49] The circumstances under which this offence was committed are in and of themselves, aggravating. It is clear that the offence was planned, it was not impulsive. The offence was humiliating and degrading in that the complainant was raped in the presence of her friend and other people, the appellant's co-accused. She was made to sit in the company of her assailants whilst they were deciding whether to release her and K[...]. She was raped more than once, in fact four times, and interchangeably by two persons – the appellant and accused 1, both did not use condoms. She was threatened with a knife and slapped with open hands. The complainant was still incredibly young at the time of the commission of the offence. She has to carry the scars of this ordeal for the rest of her life. Although the J88 could not identify any injuries that she physically sustained, it is a known fact that the consequences of rape are not the physical scars but the resultant trauma that a survivor carries which might be for life.

[50] When considering the offence, the offender and the interests of society, in particular the seriousness of the offence, I am of the view that the custodial sentence of 10 years imprisonment, which as stated, is the minimum sentence to be imposed in this matter, should be increased.

[51] The suggestion was made on behalf of the appellant that the minimum sentence of 10 years imprisonment be imposed and that if it is to be increased, in light of the gravity of the offence, it should be to 15 years because of the trial court's sentencing jurisdiction. The suggestion was further that the term of 15 years be decreased to 12 years by the 38 months the appellant spent in detention awaiting

trial. I am of the view that a just and proportionate sentence in the circumstances of this case is a sentence of 15 years imprisonment.

[52] Consequently, the appeal on sentence was upheld and the imposed sentence set aside and replaced with a sentence of 15 years imprisonment. The sentence was also ante-dated to the 23 February 2010 as provided for in section 282 of the CPA.

Condonation

[53] The respondent had filed its heads of argument late and condonation thereof was granted unopposed.

Conclusion

[54] It is under these circumstances that the order issued on 3 February 2026 was granted.

E.M KUBUSHI
JUDGE OF THE HIGH COURT

I concur,

ND KEKANA
ACTING JUDGE OF THE HIGH
COURT

APPEARANCES:

For the Applicant:

Instructed by:

Adv M Botha

Legal-Aid

For the Defendant:

Instructed by:

Adv C Pruis

State Attorneys

Date of the hearing:

03 February 2026

Date of judgment:

03 February 2026