



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

CASE NO: A41/2025

HEARD ON: 10 February 2026

JUDGMENT: 23 April 2026

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE : 23 April 2026

SIGNATURE:

In the matter between:

MASIBONGE MPOKELA

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

STRIJDOM J

1. The appellant and his co-accused were charged in the regional court at Pretoria with kidnapping (count 1) and rape (count 2) in contravention of section 3 of the

Criminal Law (Sexual Offences and Related Act).¹ Despite his plea of not guilty, he was convicted as charged.

2. The appellant was accused two during the trial and he was legally represented.
3. During the trial, accused one was referred to Weskoppies Psychiatric Hospital for observation. The trial proceeded only against the appellant.
4. On 12 August 2024 the appellant was sentenced to five (5) years imprisonment for kidnapping (count 1) and life imprisonment for rape (count 2).
5. The appellant has an automatic right of appeal in terms of section 309 of the Criminal Procedure Act 51 of 1977, read with section 10 and 43(2) of the Judicial Matters Amendment Act 42 of 2013.
6. In the notice of appeal, the appellant appeals against the convictions and sentence.

THE SALIENT FACTS

7. Z[...] N[...] (complainant) testified that on the evening of 13 November 2014 she and her friends went to Europa Club in Pretoria to celebrate her birthday. Her boyfriend was at the club and worked as a DJ. She consumed alcohol but described her state of sobriety as “tipsy” and not drunk. During the evening, she and her friend. T[...], went out of the club for fresh air. They were approached by two men who asked if the complainant is feeling well. Accused 1 put the complainant on his shoulder and carried her to his motor vehicle. T[...] followed them and entered the vehicle with the complainant. They drove to the nearest garage and T[...] descended from the vehicle to buy water for the complainant. While she was at the shop, the driver of the vehicle drove away because he saw police officers and did not want to be arrested for drunk driving. The complainant was fighting with the two accused and tried to open the door to exit the vehicle. She also hit the windows and was threatened by the two accused. The vehicle stopped somewhere at Groenkloof where she tried to drive away but did not manage

¹ Act 32 of 2007

to start the vehicle. Accused one took her to the veld and raped her. When he was finished, he called the appellant and told him to “taste” the complainant. The appellant then raped her.

Soon after the complainant was raped, a police vehicle stopped near them. The complainant ran to the police officers and reported to them that she was raped. The police officer put her in the vehicle and ordered the two accused to follow them to the garage to look for T[...]. They did not find her and went to Europa Club. T[...] was there and complainant reported to her that she was raped. The complainant was taken to the police station for a statement and referred to a medical doctor for examination. Complainant testified that she injured her finger where a nail was ripped off when she tried to stop the vehicle.

8. **T[...] N[...] D[...]** testified that on 13 November 2014 she was with the complainant at Europa Club. While sitting outside on the sidewalk, they were approached by two men. One of the two men put the complainant on his shoulder and carried her to his vehicle. Ms D[...] followed and also got into the vehicle. They said that they will take them to the nearest garage to buy water for the complainant. At the garage Ms D[...] was given money and she descended from the vehicle to buy water. While she was in the shop the vehicle drove away. She then returned to the Europa Club. Later the complainant arrived with the police and she made a report to Ms D[...] that she was raped.
9. **Gladstone Aphans Khumalo** testified that he is a police constable and was on duty on 13 November 2014. He was with Captain Tshipi in the Groenkloof area when they saw a vehicle with doors open but no occupants. They stopped at this vehicle and the complainant approached them. She informed them that she was raped. The two accused followed the complainant. Constable Khumalo took the driver's license of accused one and ordered the two accuseds to follow the police vehicle. They could not find Ms D[...] at the garage and went to Europa Club where they found her. The complainant reported to Ms D[...] that she was raped. Constable Khumalo arrested accused one, but the appellant was no longer at the vehicle.
10. **Eugene Gordan Seller** testified that he is a medical doctor and on 14 November 2014 he examined the complainant. He noted an injury on her right middle finger where a nail was ripped off. He testified that it was not strange that no injuries were

found on the private parts of the complainant. According to him at least 70% of rape victims do not sustain injuries.

11. The appellant testified that on 13 November 2014 he was with accused one at Europa Club. He noticed that accused one and the complainant had a conversation. At some stage the complainant and one of her friends went outside. Accused one and the appellant went outside. The complainant said she needs water and they all got into the vehicle of accused one to buy water at the nearest garage. The friend of the complainant was given money and she went to the shop to buy water. While she was in the shop accused one drove away to avoid the police. They drove to their flat to get more money. The complainant did not want to go with them to the flat, she wanted to go back to her friend at the garage. Accused one drove the vehicle to Klapperkop where he stopped the vehicle because the complainant wanted to urinate. Appellant saw accused one and the complainant walked into the veld where they spent some time. He walked towards complainant and accused one and saw them having sexual intercourse. The appellant then asked if he could have sexual intercourse with the complainant. The complainant did not say no and did not resist when he had sexual intercourse with her. The police arrived and the complainant then got into the police vehicle. The appellant and accused one followed the police to Europa Club. Appellant remained in the vehicle while accused one went with the police and the complainant to her friends while the appellant was waiting in the vehicle he needed to urinate and exit the vehicle. When he returned to the vehicle it was gone.

ANALYSIS AND APPLICABLE LEGAL PRINCIPLES

12. The trial court bears the task of analysing and evaluating evidence. A court of appeal is limited in its ability to interfere with the trial court's conclusions and may not do so simply because it would have come to a different finding or conclusion.
13. The above principle was laid down in *R v Dlumayo and Another*² where the court dealing with the appeal court's powers stated that:

² 1948 (2) SA 677 (A) at 705

“Ordinarily the appellant in a criminal appeal has to satisfy the appellate court that the verdict was wrong, at least to the extent that the trial court should have had a reasonable doubt as to his guilt ... Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.”

14. In *Pistorius v S*³ Boshielo JA at paragraph 30 held that:

*“It is a time-honored principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. **R v Dhlumayo and Another** 1948 (2) SA 677 (A) at 706; **Kebana v S** 2010 (1) ALL SA 310 (SCA) para 12. It can hardly be disputed that the Magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testifying in his presence in court. As the saying goes he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his finding.”*

15. It was conceded by counsel for the appellant that the trial court has not misdirected itself in its factual findings.

16. We have given careful consideration to both the written and oral submissions in support of the attack on the Magistrate’s reasons. On a conspectus of the evidence we have not been persuaded that the trial court misdirected itself in any relevant or material respect in its assessment of the evidence and its findings of fact pursuant thereto.

17. In our view, the guilt on all two counts was established beyond reasonable doubt by the witnesses who testified on behalf of the prosecution, assessed against the facts which were common cause, and the objective circumstances.

18. The full and careful judgment of the Magistrate justified her conclusion that the evidence given by the appellant could not reasonably possibly be true.

³ 2014 (2) SACR 314 (SCA)

THE SENTENCE

19. It is trite that the court of appeal will only interfere with the conviction and/or sentence of the lower courts if there is a substantial misdirection as to the law or fact or if the sentences induce a sense of shock or is manifestly inappropriate.⁴

20. In *S v Vilakazi*,⁵ Nugent AJ, interpreted the determinative test as set out in *S v Malgas*⁶ as justifying the view that any sentence considered to be disproportionate to the offence committed would be justification for the imposition of a lesser sentence. This is irrespective whether exceptional circumstances exist or not.

21. In *S v Malgas* 2001 (2) SA 499 (SCA) guidelines for what constitutes substantial and compelling factors has been set out. In *S v Ntsheno*, *S v Dlanini*, *S v R*⁷, the court was of the view that substantial and compelling factors are all the factors taken in account in sentencing, or all “everyday factors”.

22. It was submitted on behalf of the appellant that the sentence of life imprisonment on count two (2) is unjust and would not be consistent with the principle of proportionality.

23. It was further submitted that the following factors considered cumulatively may be construed as substantial and compelling: factors which warrant a deviation from the prescribed life sentence:

- 23.1 At time of sentence appellant was 39 years old;
- 23.2 He was 29 years old at the time of the offence;
- 23.3 He is not married and had three minor children;

⁴ *S v Obisi* 2005 (2) SACR 350 (WLD)

⁵ 2009 (1) SACR 552 (SCA)

⁶ 2001 (2) SA 469 (SCA)

⁷ 2010 (1) SACR 295 (GSJ)

- 23.4 He was employed at Old Mutual as a sales representative and earned approximately R12 500,00 per month.
- 23.5 Appellant had one previous conviction of driving under the influence of liquor which is not relevant to the charge of rape and kidnapping.

24. The following factors can be regarded as aggravating factors:

- 24.1 Rape is a serious offence and is prevalent in the whole country;
- 24.2 The complainant was raped by two men, which is regarded as gang rape;
- 24.3 The rape was planned because the appellant and accused one sent T[...] to the shop so that they could drive away with the complainant.
- 24.4 The appellant took advantage of the complainant because she was under influence of liquor and vulnerable.
- 24.5 The complainant will live with the trauma and torment of being raped by two men for the rest of her life.
- 24.6 The appellant showed no remorse for his actions.

25. In *DPP, North Gauteng, v Thabethe*,⁸ it was held that: “Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst to all right thinking and self-respecting members of society. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young innocent, defenseless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by the law-abiding members of society as failure to do so would regrettably have the effect of evading the public confidence in the criminal justice system.”

26. I conclude that the Magistrate was correct in finding that there are no substantial and compelling circumstances justifying departure from the prescribed sentence.

⁸ 2011 (2) SACR 567 (SCA) 577 G-I

27. I am also of the view that taking in consideration the mitigating and aggravating circumstances, the sentences imposed is not disproportionate to the crimes, the offender, the victim and the interest of society.

28. In the result, the following order is made:

1. The appeal against the conviction and sentences is dismissed.

Strijdom J

JUDGE OF THE HIGH COURT

I agree

MOOKI J

JUDGE OF THE HIGH COURT

Appearances:

For the appellant: Adv L Augustyn

Instructed by: Legal Aid South Africa

For the respondent: Adv LA More

Instructed by: Director of Public Prosecutions