IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

Appeal No: A125/2024

DPP Ref No: 10/2/5/1-(2024/69)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO

28/05/2026
DATE

[redacted]
SIGNATURE

In the matter between:

MALATJIE, THAPELO CLIFF **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Karam AJ:

INTRODUCTION

1. The appellant was convicted in the Protea Regional Court on the following charges:

   1.1 count 1 – robbery with aggravating circumstances;

   1.2 count 2 – robbery with aggravating circumstances;

   1.3 count 3 – rape;

   1.4 count 4 – rape;

   1.5 count 5 – kidnapping; and

   1.6 count 6 – kidnapping.

2. The robbery counts were read with the provisions of Section 51 (2) of the Criminal Law Amendment Act 105 of 1997 ("the minimum sentence provisions").

The rape counts were read with the provisions of Section 51 (1) of the minimum sentence provisions.

3. The appellant was sentenced as follows:

3.1 count 1 – 15 years imprisonment in terms of the minimum sentence provisions;

3.2 count 2 – 15 years imprisonment in terms of the minimum sentence provisions;

3.3 count 3 – life imprisonment in terms of the minimum sentence provisions;

3.4 count 4 – life imprisonment in terms of the minimum sentence provisions;

3.5 count 5 – 5 years imprisonment;

3.6 count 6 – 5 years imprisonment.

The sentences imposed on counts 1, 5 and 6 were ordered to run concurrently with that on count 4.

The sentence imposed on count 2 was ordered to run concurrently with that on count 3.

Accordingly, the effective sentence was life imprisonment.

4. Leave to appeal was sought in respect of both conviction and sentence. Same was refused by the court a quo.

5. The appeal comes before this court by virtue of the automatic right to appeal the life sentences on counts 3 and 4, conferred by Section 309 (1) (a) of the Criminal Procedure Act 51 of 1997 ("the CPA").

ISSUES ON APPEAL

6. The issues to be determined are whether the trial court erred in failing to find substantial and compelling circumstances, warranting a departure from the imposition of the prescribed minimum sentences of life imprisonment on counts 3 and 4; whether the sentences imposed are startlingly inappropriate in the circumstances; and whether the sentences imposed are disproportionate in the circumstances.

LAW AND ANALYSIS

7. It is trite that punishment is pre-eminently a matter for the discretion of the trial court. A court of appeal can only interfere with the sentence imposed where that discretion has not been judicially, properly or reasonably exercised, resulting in irregularity or misdirection, or where the sentence imposed is shockingly inappropriate in that it is substantially different from that sentence which the appeal court would have imposed.

S v Pieters 1987 (3) SA 717 (A) at 727 (F) – 728 (C)

S v Malgas 2001 (1) SACR 469 (SCA) at 478 (d) – 479 (d)

DPP v Mngoma 2010 (1) SACR 427 (SCA) at 431 (c) – (g)

S v Grobler 2015 (2) SACR 210 (SCA) at 212 (g) – (i)

AD SENTENCE

8. The appellant was made aware, prior to pleading, of the implications of the minimum sentence legislation.

9. It is common cause that the appellant raped the respective complainants more than once, placing him squarely within the ambit of the minimum sentence legislation.

10. A further factor placing him within the ambit of the minimum sentence legislation, is the fact that he was convicted by the trial court of two offences of rape.

11. The main thrust of the argument by the appellant's counsel relates to the submissions that the learned Magistrate failed to consider the period of incarceration awaiting finalisation of the matter, being a period of 4 years, and the issue of remorse. These submissions are to be considered within the context of the matter.

    11.1 Regarding the issue of remorse:

        11.1.1 It appears from the trial record that the appellant initially pleaded not guilty to all counts and made no plea explanation.

        It was only subsequent to the complainant on count 4 having testified

in chief, that the court was advised that the appellant intended changing his plea and the matter had to be further postponed for this purpose.

11.1.2 The appellant did not testify as to his alleged remorse. Same was expressed by his legal representative and the probation officer.

11.1.3 It is noteworthy that the expressions of alleged remorse in 2024, pertains to these incidents that occurred in 2011 and 2018 respectively and after the commencement of the trial.

I am of the view, having regard to the aforesaid, that it cannot be said that there is true or genuine remorse, as enunciated in the decision of **S v Matyityi 2011 (1) SACR 40 (SCA) at 47 (a) – (d).**

11.2 Regarding the period of incarceration:

11.2.1 It is trite that such detention does not, on its own, constitute a substantial and compelling factor, but is one of the factors to be considered.

S v Radebe & Ano 2013 (2) SACR 165 (SCA) at 170 (b)

DPP (NG,P) v Gcwala & Others 2014 (2) SACR 337 (SCA) at 342 (d) – 343 (h)

Ncgobo v S 2018 (1) SACR 479 (SCA) at 483 (b) – (e)

Loyiso Ludidi & Others v S 2024 ZASCA 162 (SCA) at 228 (c) – 229 (e)

11.2.2 The court a quo ought to have investigated the reasons for the delays in the commencement of the trial. However, and notwithstanding its failure

to do so, I am of the view that having regard to the fact that the court is dealing here with indeterminate sentences, together with the other facts and circumstances of this matter, that that factor alone does not constitute a substantial and compelling circumstance justifying a departure from the prescribed minimum sentences of life imprisonment.

12. The aggravating factors far outweigh the mitigating factors, including the following factors:

12.1 the prevalence of the offence;

12.2 the fact that in respect of the incident relating to count 3, the appellant was in possession of a firearm and having chased her boyfriend away, raped the complainant more than once without using a condom.

12.3 the fact that in respect of the incident relating to count 4, the appellant was in the company of his two friends, the appellant took control of the complainant's vehicle, drove to an isolated area where the complainant and other occupants were ordered out of the vehicle, and pointing a firearm at the complainant, the appellant instructed her to move to a remote area where he raped her more than once without using a condom.

12.4 the fact that both these incidents happened at night and the complainants were subsequently left alone in dark and isolated places, making them vulnerable to further harm.

12.5 Whilst it was submitted on the appellant's behalf and accepted by the State that the appellant, ex facie the SAP 69, has two unrelated previous convictions for escaping or attempting to escape from lawful custody in1999, this is clearly not the case.

12.5.1 Ex facie the SAP 69 there is an endorsement to the effect that the appellant was released on 27 April 2012 on special remission of sentence until 20 October 2015.

12.5.2 This endorsement clearly does not relate to the aforesaid previous convictions for which the appellant was respectively sentenced in 1999 to 18 months and 6 months imprisonment.

12.5.3 This, too, ought to have been investigated by the court a quo. Accordingly, this court is in the dark as to the nature of the appellant's other conviction/s and sentence/s. Counsel were unable to assist the court in this regard. Whilst there is a reference in the probation officer's report of the appellant stating that he was convicted of 2 counts of robbery, he goes on to state that these cases were subsequently withdrawn. Whilst this serves to compound the confusion and does not explain the endorsement, what is significant is that it is clear that the appellant has been in further conflict with the law.

13. I am of the view that the learned Magistrate correctly found that there is nothing substantial and compelling in the appellant's personal circumstances.

14. In **S v Malgas** supra at 481 (i) – (j) it was stated that the minimum sentence Legislation aimed at ensuring a severe standardized and consistent response from the courts and is to be applied unless there are and can be seen to be truly convincing reasons for a different response.

Further, and at 481 (j) – 482 (a) that the specified sentences are not to be departed from lightly or for flimsy reasons which cannot withstand scrutiny. This has been reiterated by the superior courts on numerous occasions.

15. I am of the view that the learned Magistrate properly considered all the mitigating factors, and correctly found that same, neither individually nor cumulatively considered, constitute substantial and compelling factors.

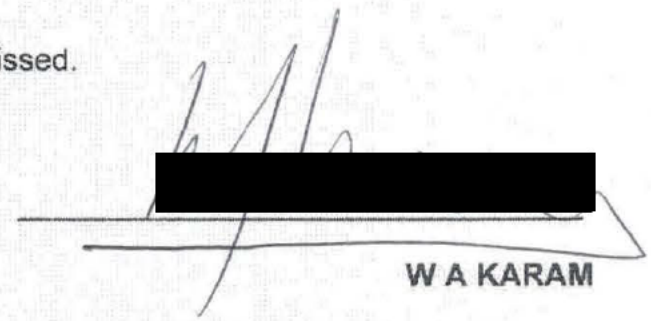
16. I am further of the view that the imposition of the minimum sentences is not disproportionate, considering the facts and circumstances as a whole, and does not result in an injustice.

17. I am further of the view that the learned Magistrate imposed a proper sentence in the circumstances.

18. Accordingly, I am of the view that there is no merit in the appeal.

19. In the circumstances, I propose the following Order:

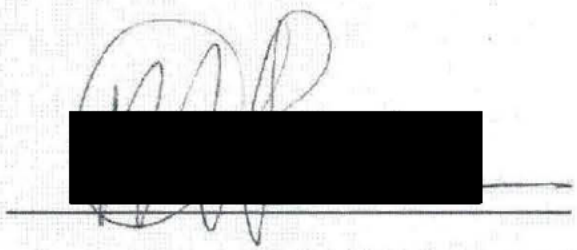
    19.1 The appeal against sentence is dismissed.



W A KARAM

ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED



R MKHABELA

JUDGE OF THE HIGH COURT

Appearances:

Appellant: Adv S Mamoepa with Adv E Guarneri

Legal Aid SA

Johannesburg Office

Respondent: Adv P T Mpekana

Director of Public Prosecutions

Gauteng Local Division