



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR310/2022

In the matter between:

**BHEKANI CYPRIAN NKOSI
MNCEDISI SYDWELL NKOSI**

**FIRST APPELLANT
SECOND APPELLANT**

and

THE STATE

RESPONDENT

ORDER

On appeal from Regional Court, Madadeni (Mrs M T Lubuzo sitting as a court of first instance):

1. The appeal of each appellant against conviction is dismissed.
2. The appeal of each appellant against sentence is upheld.
3. The sentence of life imprisonment on each appeal is set aside.
4. Each appellant is sentenced to fifteen (15) years imprisonment.
5. The sentence on each appellant is ante-dated to 24 June 2010.

JUDGMENT

Mngadi J (Seegobin J concurring)

[1] This matter comes before this court, as a result of the two appellants having the benefit of an automatic right of appeal. The appellants appeal against both conviction and sentence.

[2] The appellants, as accused 1 and accused 2 respectively, stood charged before the regional court with one count of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Sexual Offences Act) 32 of 2007. The appellants who were legally represented throughout the trial pleaded not guilty to the charge. The regional magistrate after hearing evidence convicted each appellant as charged. Having found that no substantial and compelling circumstances existed, each appellant was sentenced to the prescribed minimum sentence of life imprisonment.

[3] In convicting the appellants, the regional magistrate relied on the evidence of the complainant which was to the following effect. During the late evening of 27 February 2006, the complainant accompanied her friend who wanted to visit her boyfriend in another section in the township. Her friend found her boyfriend. She remained with her boyfriend. Since it was night, the boyfriend asked the appellants to accompany the complainant back to her home. On the way and before they reached her home, the first appellant grabbed her before they reached a certain shack. He closed her mouth with his hand, hit her with an open hand and pushed her into the shack. Inside the shack, he pushed onto the bed, undressed her, and had sexual intercourse with her without her consent. The second appellant stood nearby. After the first appellant finished, the second appellant came to her. He instructed her to open her legs, and he also had sexual intercourse with her. He finished and she asked him to allow her to go outside to urinate. She went out wearing only a t-shirt. She then ran away crying to the residence of her aunt. She reported to her aunt that she had been raped.

[4] The appellants admitted that the complainant was with them in the shack, and that the second appellant had sexual intercourse with her claiming that it was with her consent. However, they denied that first appellant had sexual intercourse with her. They admitted that the complainant left the shack half naked leaving her clothing and shoes behind at night. The complainant testified that the appellants were hardly known to her, which evidence was not disputed by the appellants. However, when they testified the second appellant claimed that the complainant was his ex-girlfriend and she had previously visited him in the shack. This version was not put to the complainant when she testified.

[5] The regional magistrate found that the appellants were not impressive witnesses. Their versions had material contradictions and improbabilities. The court rejected their evidence. In *R v Dhlumayo and Another*¹ it was held that an appeal court will not disturb the factual findings of a trial court unless the trial court committed a misdirection, and the appeal court was convinced that the trial court reached a wrong conclusion. It was argued before us that the regional magistrate failed to approach the evidence of the complainant with the requisite caution, bearing in mind that she was a single witness. In addition, it was argued that the medical evidence found no physical injuries on the complainant.

[6] It is clear from the record that the regional magistrate correctly made adverse findings against the appellants on credibility. Their versions were replete with inconsistencies and improbabilities. The court correctly rejected their versions. The admissions made by the appellants together with the undisputed evidence that the complainant escaped half naked at night leaving her shoes and some of her clothes in the shack and immediately reporting the rape to her aunt, shows that the version of the complainant could safely be relied on. I find no misdirection on the part of the regional magistrate and the factual findings made are correct. The appeal against conviction of each appellant, therefore, falls to be dismissed.

[7] The State proved no previous convictions against the first appellant. The first appellant was 25 years old, not married and has no children. The first appellant's father

¹ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706.

passed away when he was very young. He had a standard 4/grade 6 level of education. He was employed as a casual worker earning R350 per week and he suffered from asthma.

[8] The second appellant had no previous convictions. He was 29 years old. He was not married and has no children. He had a standard 7/grade 9 level of education, and he stayed with his siblings and his mother, who was a pensioner. He worked as a hawker earning R150 per week. He was not in good health, as he had a skin disease and also coughs.

[9] The regional magistrate stated that the rape for which the appellants stood convicted was of a worst kind. She further said the complainant was severely traumatized, although there was no victim impact assessment report, as the complainant could not be found. The court stated that rape evokes outrage in the community, and the courts are expected to punish rapists severely. The court found no substantial and compelling reasons for a court to impose a sentence less than the prescribed minimum sentence of life imprisonment. It may be stated that the nature and extent of the psychological trauma suffered by the complainant as there was no evidence to support it cannot be assumed.

[10] The regional magistrate, it appears, did not attach enough weight to the personal circumstance of the appellants, in particular, that they were first offenders. The aggravating factors are the offences brutalised the complainant and invaded her dignity and personality, leaving her with long lasting psychological damage. The complainant was only 17 years old at the time. The appellants were entrusted with the safety of the complainant who was from the same area as the appellants. The appellants raped the complainant in turns. On the other hand, the appellants were young men who found themselves in the middle of the night with a young woman and they opportunistically sexually assaulted her. It is debatable whether, as stated by the regional magistrate, the rape committed by the appellants was of a worst kind or not. It would, in my view, constitute a misdirection to sentence the appellants on the basis that they committed a rape of the worst kind. The regional magistrate, in addition, emphasised that there was

no indication that the appellants were remorseful, as there was no expression of remorse by them or made on their behalf by their legal representatives. Importantly, the regional magistrate failed to consider whether the sentence of life imprisonment was proportionate.

[11] The regional magistrate concluding the judgment on conviction stated that:

'Both Accused are found guilty of rape as charged and it seems they took turns in raping the complainant. The court finds that the provisions of section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended are applicable.'

[12] The record of the proceedings contains annexures to the charge sheet, one is written count 1, and the second one is written count 2, in all other respects they are the same and they read as follows:

'The accused is guilty of the crime of Rape read with Section 51(1)(2) and Section 52 of the Criminal Law Amendment Act 105 of 1997.

In that on or about 27-2-2006 and at or near Osizweni in the District/Regional Division of KwaZulu-Natal, the accused did unlawfully and intentionally assault [E...N...], a female, to wit, 17 years and have unlawful sexual intercourse without her consent.'

[13] The transcript of the proceedings shows that before the appellants were called upon to plead, the regional magistrate enquired from each of the appellants' legal representative, and each appellant, whether each appellant was aware about the provisions relating to the prescribed minimum sentence as well as the competent verdicts, and they said they were informed.

[14] The record does not show which provisions relating to the minimum sentences the appellants were informed of, and it does not indicate what was said or explained to them. The charge refers to 'Section 51(1)(2)' but there is no such provision in the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act). If it meant that both subsections were invoked, this would be irregular, because the subsections regulate differing circumstances that would not be applicable at the same time. In addition, in ss 1 there are no sub-paragraphs. In the body of the charge, no grounds are stated for

invoking the provisions in question, nor were any grounds stated at the commencement of the proceedings.

[15] In *S v Mseleku*² the court held:

'Where no mention is made, notwithstanding its factual framework, the provisions should be brought to the attention of the accused by the court whether the accused is represented or not. Where mention of the Act is made in the indictment, and the accused is unrepresented, the court must pertinently draw the accused's attention to its provisions.'

[16] In *S v Ndlovu*³ the court held:

'The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly.'

[17] In *S v MT* [2018] ZACC 27, 2018 (2) SACR 592 (CC)⁴ the court held:

'This precedent has not created a hard-and-fast rule that each case where an accused has not been explicitly informed of the applicability of the Minimum Sentences Act will automatically render a trial unfair. However, a practice has developed to include the relevant section of the Minimum Sentences Act in the charge-sheet because of this precedent.'

MT held that where 'there is no mention of the applicability the Minimum Sentence Act in the charge-sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken, in order to determine whether the omission amounts to unfairness in the trial' or not.⁵

² *S v Mseleku* 2006 (2) SACR 574 (D) at 581d-e.

³ *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12.

⁴ *S v MT* [2018] ZACC 27; 2018 (2) SACR 592 (CC) (*MT*) para 39.

⁵ *MT* para 40.

[18] Each appellant raped the complainant once. However, when each appellant was sentenced, he was sentenced for his rape and the rape committed by his co-accused. Since the appellants had not been charged with it, it was required that in the charge-sheet or at the commencement of the trial that each appellant be advised that he was being held liable for the rape committed by his co-accused, together with the grounds thereof. It is trite that accused charged on the basis of common purpose must be informed before the trial or at the commencement of the trial.⁶ The prosecution must explicitly state its intention to rely on common purpose and provide enough information about specific actions and intent that prove that a common purpose existed.⁷

[19] The effect of the authorities are that the accused, in order not to infringe his constitutional right to a fair trial, before he could be sentenced in terms of the provisions of the Minimum Sentences Act, must be advised either in the charge-sheet or in some other manner at the commencement of the trial of the provisions of the Minimum Sentences Act that is being invoked and the grounds for invoking the particular provision.⁸ As a result, the sentencing of the appellants in terms of s 51(1) read with Part 1 of Schedule 2 of the Minimum Sentences Act constituted an infringement of their constitutional right to a fair trial regarding sentencing.

[20] In the manner in which they were charged and convicted, they ought to have been sentenced for the rape for which each appellant committed. The State when invoking the provisions of s 51(2) of the Minimum Sentences Act need not specify the grounds for doing so because all rapes not falling under s 51(1) fall under s 51(2). The regional magistrate ought to have sentenced the appellants in terms of s 51(2) of the Minimum Sentences Act, which at the time provided that if there are no substantial and compelling circumstances for a court to impose a lesser sentence, the prescribed minimum sentence is 10 years imprisonment in the case of a first offender and a maximum of 15 years

⁶ See s 35(3)(a) of the Constitution, and s 85(1)(a)-(d) of the Criminal Procedure Act 51 of 1977.

⁷ *Ntuli v S* [2025] ZASCA 114 paras 13-16; *S v Msimango* [2017] ZASCA 181; 2018 (1) SACR 276 (SCA) paras 14-16; *Masipa v S (Appeal)* [2025] ZAGPPHC 602 paras 16-28.

⁸ *S v Shiburi* [2018] ZASCA 107; 2018 (2) SACR 485 (SCA) para 49 (minority judgment).

imprisonment.⁹ There are no substantial and compelling circumstances for a court to sentence each appellant to a sentence less than the prescribed minimum sentence of 10 years imprisonment. The aggravating factors, in my view, indicate that a sentence of 10 years imprisonment is too lenient. A fair, just and appropriate proportionate sentence is a sentence of 15 years imprisonment.

[21] The personal circumstances of the appellants, the circumstances of the crime as well as the mitigating and aggravating factors are set out above. The regional magistrate due to the manner in which the appellants were charged misdirected herself in convicting the appellants of rape in terms of s 51(1) Part 1 of Schedule 2 of the Minimum Sentences Act and to sentence each appellant to life imprisonment.

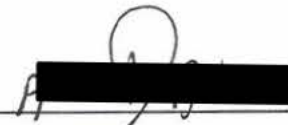
[22] Before concluding this judgment, there is one other aspect that needs to be addressed. This relates to the apparent delay involved in the prosecution of this appeal. The appellants committed the rape on 27 February 2006. They first appeared in court on 3 August 2006. On 14 June 2010 the regional magistrate sentenced each appellant to life imprisonment. On 2 February 2011 the Registrar of this court sent the appeal record back to the regional magistrate stating that an application for leave to appeal is needed and it must provide whether the appeal is against conviction and or sentence, and a power of attorney was required. This was apparently in response to a letter dated 30 June 2010 from Legal Aid - Newcastle to the Clerk of Court - Madadeni. Therefore, a notice of appeal was only filed with the Clerk of Court - Madadeni on 28 September 2022 by Legal Aid, that is after 12 years after the appellants were sentenced. The delay to the prejudice of the appellants is as a result of the failure by each of the parties mentioned to monitor progress in the matters they are dealing with. The rights of automatic appeal granted by the legislature to convicted persons in this case was frustrated by those who were supposed to assist them. The head: magistrate's court in Madadeni, the Head: Legal Aid, Newcastle and the Registrar of this court are ordered within 30 days from the date of this judgment to file a report with the Registrar of the presiding judge in this matter explaining what measures are in place or shall be put in place to ensure that matters processed for

⁹ See the proviso to s 51(2) of the Minimum Sentences Act.

appeal are properly monitored to prevent the reoccurrence of delay as it happened in this matter.

[23] It is ordered as follows:

1. The appeal of each appellant against conviction is dismissed.
2. The appeal of each appellant against sentence is upheld.
3. The sentence of life imprisonment in each appeal is set aside.
4. Each appellant is sentenced to fifteen (15) years imprisonment.
5. The sentence of each appellant is ante-dated to 24 June 2010



Mngadi J

I agree,



Seegobin J

APPEARANCES

For the Appellants :

Mr Mbatha

Instructed by:

Justice Centre - PIETERMARITZBURG

For the Respondent:

Mr Mdluli

Instructed by:

DPP - PIETERMARITZBURG

Heard on:

08 May 2026

Judgment delivered on:

19 June 2026