IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: CA09/2023

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates: NO

Circulate to Regional Magistrates: NO

In the matter between:

DANIEL KEDIMETSE SEHEMO	Appellant
AND	
THE STATE	Respondent

DATE OF HEARING	**:**	**06 JUNE 2025**
DATE OF JUDGMENT	**:**	**21 AUGUST 2025**
FOR THE APPELLANT	**:**	**ADV. NTSAMAI**
FOR THE RESPONDENT	**:**	**ADV. NTSALA**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives *via* email. The date and time for hand-down is deemed to be 10h00 on 21 August 2025.

ORDER

Resultantly, the following order is made:

(i) The appeal against sentence is dismissed.

(ii) The sentence of life imprisonment is confirmed.

JUDGMENT

Summary

Sentence of life imprisonment imposed in the Regional Court – automatic right of appeal in terms of Section 309 (1) (a) of the Criminal Procedure Act 51 of 1977 (CPA) - Whether it is an appropriate, fair and just sentence with regard to the facts of this case.

HENDRICKS JP

Introduction

[1] The Appellant, Mr. Daniel Kediemetse Sehemo, was arraigned before the Regional Court, Taung and charge with the offence of rape. The annexure to the charge sheet reads thus:

> *"THAT the accused is/are guilty of the crime of the contravening the provisions of Section 3 read with Section 1, 2, 56(1), 56A as amended, 50 (2) (a) and 50 (2) (b), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and related matters) Amendment Act, Act 32 of 2007. Further read with the provisions of Sections 83, 84, 94 256 and 261, 270 and 299A* of the Criminal Procedure of the Criminal Procedure Act, 51/ 1977, Further read with the provisions of Sections 51(1) Part 1 of schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended and the older Person's Act 13/2006 as inserted by Section 25 (a) of act 8/2017 (51(1) (b) (iA).*
>
> *(The accused must be informed of the fact that he may be included in the National Register of Sex offenders)*
>
> ***RAPE***
>
> *IN THAT on or about **03 FEBRUARY 2022** and at or near **SEKHING VILLAGE** in the District of **TAUNG** and within the Regional division of **NORTH WEST**, the said accused did unlawfully and intentionally commit and act of sexual penetration with a female person to wit, **M[...] N[...] M[...], (73 YEARS) BY INSERTING HIS PENIS INTO HER VAGINA AND HAD SEXUAL INTERCOURSE WITH HER** without the consent of the said complainant and thus raped him/her *more than once as per Section 94 Act 51/1977."*

[2] He pleaded guilty to the charge and a statement in terms of section 112 (2)[1] of the Criminal Procedure Act (CPA) was read into the record, the contents of which he

[1] Section 112 (2) of the CPA provides: 112 Plea of guilty

confirmed. Being satisfied that all the elements of the offence has been admitted, the Regional Magistrate convicted the appellant. The complainant testified in aggravating of sentence. The salient background facts of this case as outlined in the section 112 (2) statement of the appellant, and as supplemented by the evidence of the compliant, which makes it common cause, are as follow. The appellant went to a tavern on 02 February 2022, where he consumed alcoholic beverages and while away time. He doesn't know the exact duration of time he was at the tavern. However, in the early morning hours of 03 February 2022, he walked towards his house. En route, he had to walk past the house of the complainant, who is his neighbor. He was literally raised (grew up) in front of her. She was by then 73 years of age and she had suffered a stroke. She was therefore not enjoying good health, which he was aware of.

[3] He proceeded to the front of the house of the complainant and he knocked. As she was asleep by then, she did not answer. He then went to the back and contemplated knocking until she would open the door for him. However, he saw the window at the back of the house slightly ajar. He opened it wider and climbed inside the house. He then called her and she emerged from her bedroom. He wanted to kiss her but she refused. She said that she wanted to sleep. She turned around and walked back to her bedroom. He followed her into her bedroom. He undressed himself and got into her bed with her. She tried to resist but he strangled her. He twice had sexual intercourse with her without her consent. Not only did she sustain injuries on her neck and throat as a result of the strangulation, but her hearing was also affected. She reported the matter to the police and underwent a medical examination as well. A medical report was compiled.

"(1) …
(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.
(3) ..."

[4] The appellant was sentenced to undergo an effective imprisonment term for life. The appellant, *ex lege* in terms of the provisions of Section 309 (1) (b) of the CPA, enjoys an automatic right of appeal. There lies no appeal against the conviction. The sentence of life imprisonment is assailed on the grounds that it is excessive and that the Regional Magistrate erred not to find that 'there were substantial and compelling circumstances to deviate from the minimum sentence. That the seriousness of the offence was over-emphasized and the personal circumstances of the appellant was under-emphasized. The appellant is a good candidate for rehabilitation'.

[5] It is trite that sentence is pre-emptly within the discretion of the trial court and that a court of appeal will not lightly interfere with the discretion exercised by the trial court, unless there is a serious misdirection; or where the discretion was not properly exercised; or where the sentence imposed is 'shocking', 'severe' and 'excessive'; and that the sentence induce a sense of shock[2]. In **Sedumoeng v S**[3] this Court stated:

> *[11] … The complainant, an elderly lady as defined in the Older Persons Act 13 of 2006, aged sixty-six (66) years, was asleep in the safety and sanctity of her domba, when she was accosted and attacked by the appellant in the wee-wee hours of the morning. As a woman and an elderly lady, she is a vulnerable member of society. Her domba was broken into and she was assaulted, threatened to be killed with a knife and throttled. She sustained injuries as a result of these assaults. She was raped and robbed of her properties. The appellant had no regard to the property and dignity of the complainant."*

[6] I am of the view that the facts and circumstances of this case is akeen to the facts in the **Sedumoeng** case, *supra.* The complainant in this matter was also asleep in

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[2] See: S v Boogards 2013 (1) SACR 1 (CC).
[3] See: Sedumoeng v S (CA25/2023) [2024] ZANWHC 19 (8 February 2024).

the safety and sanctity of her own house when the appellant gained entry through a window at the back of the house. She was alone at home, which the appellant knew, as they were neighbors. She had suffered a stroke and was not in good health. This, the appellant also knew as she suffered the stroke in his presence, quite recently before this incident. He strangled her and he raped her twice. The sentence ordained by the legislature is life imprisonment.

[7] In **S v Bailey** 2013 (2) SACR 533 (SCA), the following is stated:

> *"[20] What then is the correct approach by an appellate court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court after exercising its discretion properly simply because it is not the sentence which it would have imposed or that it finds it shocking? The approach to an appeal on sentence imposed in terms of the Act, should in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This in my view is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not."*

[8] In **S v Malgas** 2001 (1) SACR 469 (SCA), the following is stated:

> *"[15] I consider the dicta in the cases which advocate such an approach to the application of s 51 to be conducive to error. In my view, they constrict unjustifiably the power given to a trial court by s 51 (3) to conclude that a lesser sentence is justified. Any limitations upon that power must be derived from a proper interpretation of the provisions of the Act and not from the assumption a priori that only a process akin to that which a court follows when in appellate mode is intended.*

[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary –

A Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E *The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.*

F *All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.*

G *The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.*

H *In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.*

I *If the sentencing court on consideration of the circumstances of the 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.*

J *In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should*

be assessed paying due regard to the bench mark which the legislature has provided.

[30] *Liebenberg J gave anxious consideration to the question of sentence and concluded that the circumstances of the case could not be regarded as substantial and compelling in their mitigatory effect and therefore such as to justify the imposition of a lesser sentence than imprisonment for life. He reached that conclusion with regret and said that if it had not been for the fact that a sentence of life imprisonment was prescribed by the relevant statute, he would not have considered sentencing appellant to imprisonment for life. He referred to the lack of unanimity in the provincial divisions of the High Court as to the correct interpretation of the legislation and regarded himself as bound by the approach indicated by Stegmann J in S v Mofokeng which approach had been approved by Jones J in an unreported decision in the Eastern Cape Division. He indicated that he was, in any event, in agreement with that approach. One of the findings made by Stegmann J in Mofokeng's case was that "for substantial and compelling reasons to be found, the facts of the particular case must present some circumstance that is so exceptional in its nature and that so obviously exposes the injustice of the statutory prescribed sentence in the particular case, that it can rightly be described as 'compelling' the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified".*

[31] *As I have indicated earlier in this judgment the requirement that the circumstances be "exceptional" does not appear from the legislation and, in so far as Liebenberg J approached the question of sentence from that perspective, he erred. In all other respects Liebenberg J approached the question of sentence in a manner consistent with the approach set forth in this judgment. He made reference to the very serious nature of the crime. He pointed to the element of premeditation present and the*

defenselessness of the deceased. He considered that the motive for the killing was greed. There were apparently some life insurance policies from which Carol would benefit and the appellant stood to gain from the "lekker lewe" of which Carol had spoken. He adverted to the prevalence of crimes of violence in the country and the community's interest in having the courts deal severely with offenders."

[9] In **S v Matyityi** 2011 (1) SACR 40 (SCA), the following is stated:

"[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is 'no longer business as usual'. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial

officer, is foundational to the rule of law which lies at the heart of our constitutional order."

[10] It is quite apparent that there are no substantial and compelling circumstances present in this case, that warrants a deviation from the impositioning of the prescribed minimum sentence of life imprisonment ordained by the legislature for this type of offence. The learned Regional Magistrate's finding in this regard cannot be faulted. This was aptly enunciated in **S v Malgas** and **S v Matyityi,** *supra*.

[11] I am of the considered view that the sentence of life imprisonment imposed by the Regional Magistrate is indeed the only appropriate sentence that can be imposed under the circumstances of this case. The appellant took advantage of the fact that the complainant is an elderly woman of society. That she was alone and had recently suffered a stroke, which made her even more vulnerable. He strangled her and he raped her twice. He even had the audacity to tell her that he is not going to stay overnight, he will just do what he is going to do and then leave.

[12] Rape is one of the most humiliating and degrading crimes that can be committed. I echo the sentiments expressed by Ponnan JA in **S v Matyityi,** *supra,* in paragraph [22] where the following is stated:

"[22] Despite our particularly strong commitment to the promotion of the rights of victims of sexual crimes, particularly rape, we still do not have a clear strategy for dealing inclusively with it either at a primary preventative or secondary protective level. The result is that as alarmed as we may be by the reported incidence of rape the true extent of the scourge appears far more widespread.

[13] I am of the view that no misdirection was committed by the Regional Magistrate, and the appeal against sentence should consequently fail.

Order

[14] Resultantly, the following order is made:

(i) The appeal against sentence is dismissed.

(ii) The sentence of life imprisonment is confirmed.

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R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

I agree

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J.H.F PISTOR
ACTING JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG