THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1546/2024

In the matter between:

BOITUMELO CALEB MOLOTO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Moloto v The State* (1546/2024) [2025] ZASCA 169 (12 November 2025)

Coram: MBATHA, KATHREE-SETILOANE, KEIGHTLEY AND UNTERHALTER JJA and KUBUSHI AJA

Heard: 8 September 2025

Delivered: 12 November 2025

Summary: Sentence – the existence of substantial and compelling circumstances warranting deviation from prescribed minimum sentences – brutality of offences committed not outweighed by insubstantial personal circumstances – appeals of co-accused before separate court – equality of treatment – no inequality of treatment by reason only of different conclusions on sentence – different outcomes on appeal not a ground of appeal – no impact of inequality rights of accused on appeal – desirability of courts on appeal ascertaining existence of related pending appeals by co-accused – to avoid duplication of hearings and different outcomes – disparity on sentence based on same facts – no impact on inequality rights of accused on appeal.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Leeuw JP, Djaje J and Chwaro AJ, sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Kubushi AJA (Mbatha, Kathree-Setiloane, Keightley and Unterhalter JJA concurring):

Introduction

[1] This appeal comes to this Court almost 15 years after the appellant's conviction. The appellant has in essence already served time in respect of one of his convictions, that of robbery, for which he was sentenced to 15 years' imprisonment. The reasons for this inordinate delay are not apparent from the appeal record.

[2] Special leave to appeal was granted to the appellant on petition to this Court on 28 May 2021. The appeal was heard on 8 September 2025, four years after leave to appeal was granted, which in itself is a considerable delay. The appellant applied for condonation for the late filing of the notice to appeal and the reinstatement of the appeal. The condonation application was unopposed and granted. The appeal was reinstated.

[3] This matter originates from the North West Division of the High Court, Mahikeng, sitting at Mogwase (the trial court) where the appellant, Boitumelo Caleb Moloto, together with his co-accused, Kgomotso Naphtally Phutsoane (the co-accused) were arraigned on one count of murder read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA) and one count of robbery. They pleaded guilty to both charges. The trial court convicted and sentenced them to life imprisonment for the murder, and 15 years' imprisonment for the robbery. By

operation of the law,[1] the sentence of 15 years' imprisonment for robbery was to run concurrently with the life sentence.

[4] It is worth noting that although on the second count the appellant and the co-accused were charged and convicted of robbery, they both pleaded guilty to robbery with aggravating circumstances. The trial court found them guilty of robbery. It, however, sentenced them as if convicted of robbery with aggravating circumstances and imposed a sentence of 15 years' imprisonment. No issue was raised by the appellant on this score. However, in light of the conclusion I come to in this appeal, there is no reason to engage further with this issue.

[5] The appellant and the co-accused were granted leave by the trial court to appeal their sentences. The applications for leave to appeal were granted at different times and served before different appeal courts. The appellant's co-accused was granted leave to appeal first. On appeal, the full court of the co-accused (the first full court) found the trial court to have misdirected itself in concluding that there were no substantial and compelling circumstances justifying a deviation from imposing the prescribed minimum sentence of life imprisonment for murder, and 15 years' imprisonment for robbery. It ameliorated the sentences imposed on the co-accused, and reasoned as follows:

'[t]he personal circumstances and mitigating facts of this case viewed cumulatively are indeed substantial and compelling. The appellant [the co-accused] also pleaded guilty which is a sign of remorse or contrition.'

The first full court set aside the sentences imposed by the trial court and replaced them with the following sentences, namely, 22 years' imprisonment in respect of the murder and 10 years' imprisonment for the robbery. The sentences were ordered to run concurrently.

[6] As regards the appellant on appeal before this Court, the second court of appeal in the North West Division of the High Court (the second full court) found that there was no misdirection by the trial court in arriving at the sentences imposed by the trial court. It declined to follow the findings of the first full court, holding that the first full

[1] Section 39(2)*(a)*(i) of the Correctional Services Act 11 of 1998.

court misdirected itself in finding the existence of substantial and compelling factors that warranted deviation from the sentences imposed by the trial court upon the co-accused. The second full court dismissed the appeal.

Background

[7] The appeal before this Court originates from the unfortunate and gruesome murder by the appellant and the co-accused of Shimane Isaac Mafoko (the deceased), when they robbed him of his motor vehicle. The summary of the material facts gleaned from the statement made by the appellant in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, is that, on Sunday 19 July 2009, the appellant, who was in the company of the co-accused came across the deceased who was driving in his motor vehicle. The three spent the night traveling to various taverns. Whilst they were at one of the taverns, the appellant persuaded the co-accused that they should rob the deceased of his motor vehicle.

[8] The appellant, subsequently, requested the deceased to take them home. En route to their homes, at the Sun City T-junction, as planned, the co-accused asked the deceased to stop the motor vehicle to attend to a call of nature. When the co-accused alighted, the appellant, who was in the back seat, strangled the deceased with a shoelace. He was soon joined by the co-accused, who assisted in strangling the deceased. They strangled the deceased until he was no longer moving, having lost consciousness. The two lifted the deceased and threw him into the boot of the motor vehicle. The appellant took over the driving, and they proceeded to visit their friend at Rankelenyane village (the village). However, before reaching the village, the appellant became aware that the deceased was alive and conscious. He stopped the motor vehicle, walked to the back and opened the boot. The deceased alighted from the boot of the motor vehicle and asked the appellant and the co-accused what they were doing. The co-accused tripped the deceased, and he fell. The appellant picked up a stone and hit the deceased on the forehead. The appellant asked the co-accused to help him pick up another huge stone which they dropped on the deceased's head. The deceased bled profusely. They loaded him again into the boot of the motor vehicle and drove away. As fate would have it, whilst they were driving, one of the motor vehicle's tyres burst. They continued to drive with the flat tyre, as there was no spare wheel in the motor vehicle. As they proceeded towards Kanana village, the motor vehicle went

through a mud puddle and got stuck. They decided to abandon the motor vehicle there, with the deceased who was still mumbling incoherently in the boot.

[9] Whilst walking, they came across a police van and stopped it. They reported to the police that they had been hijacked by unknown men. The policemen took them to the police station to open a case and, thereafter, drove them to their respective homes. On Monday morning the appellant was approached by the police who informed him that the motor vehicle which was reported stolen, had been recovered with the deceased's body inside the boot. Upon being questioned by the police, the appellant confessed to the murder and robbery and pointed out the scene of the crime to the police. This led to his arrest.

Substantial and Compelling Circumstances

[10] Before this Court, the appellant's ground of appeal was that the second full court erred in confirming the trial court's finding that there were no substantial and compelling circumstances that warranted a deviation from imposing the prescribed minimum sentence. The appellant challenges the sentence of life imprisonment for the murder conviction and imprisonment for 15 years imposed in relation to the conviction of robbery with aggravating circumstances. In terms of the provisions of the CLAA, murder read with the provisions of s 51(1) and robbery with aggravating circumstances read with the provisions of s 51(2), are crimes that carry the prescribed minimum sentences. In terms of the CLAA the trial court is obliged to impose prescribed minimum sentences for specified scheduled offences. The trial court can only deviate from imposing such sentences, and impose a lesser sentence, where there are substantial and compelling circumstances warranting deviation.[2]

[11] The issue for determination before the second full court was whether the trial court erred in finding that there were no substantial and compelling circumstances. It made the following findings:

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[2] Section 51(3) of the Act 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 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: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.'

'The trial court considered all the circumstances in this case which include the appellant's personal circumstances, including his two previous convictions for robbery, the fact that he pleaded guilty, that he made a confession before a Magistrate, his age at the time of the commission of the offence and that he had two children. The trial court went through a detailed analysis of the circumstances surrounding the commission of the offences, the personal circumstances of the appellant and the interest of society and at the end, found that there existed no substantial and compelling circumstances to deviate from imposing the prescribed minimum sentences in respect of the two charges of murder and robbery.

. . .

I have duly perused the judgment of the trial court where it painstakingly and in detail dealt cumulatively with all the factors enunciated in the *Zinn*[3] and *SMM*[4] cases referred to above. The trial court properly and judicially applied its mind to the guidance articulated in the *Malgas*[5] decision regarding the existence of substantial and compelling circumstances and concluded that there were no such circumstances in the present case. In my considered view, the trial court did not misdirect itself or impose a shockingly inappropriate sentence that warrants intervention by this court.'

[12] In this Court, the appellant's counsel referred us to numerous personal circumstances which, he argued, were not considered by the trial court. However, during argument in court, it was conceded on his behalf that the trial court considered those personal circumstances and weighed them against other factors traditionally considered when sentence is imposed. The concession was correctly made. Cameron JA in *S v Abrahams* [6] stated the following in regard to the determination of whether substantial and compelling circumstances exist:

'As indicated earlier, the general manner in which the Judge determined whether substantial and compelling circumstances existed was correct. He took into account all factors traditionally relevant to sentencing. These included the accused's personal circumstances, the nature of the crime and the circumstances attending its commission.'[7]

This is what happened in the trial court in this matter.

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[3] *S v Zinn* 1969 (2) SA 537 (A).
[4] *S v SMM* 2013 (2) SACR 292 (SCA) para 13.
[5] *S v Malgas* 2001 (1) SACR 469 (SCA) para 18.
[6] *S v Abrahams* 2002(1) SACR 116 (SCA).
[7] Ibid para 27.

[13] It was, however, argued on behalf of the appellant that the second full court failed to recognise the following errors by the trial court: (a) the possibility that he was a candidate for rehabilitation because of his age; (b) the fact that he showed remorse in that he took the court into his confidence by pleading guilty; and, (c) his conduct prior to the trial in that he voluntarily made a pointing out during police investigations, and made a confession before the Magistrate.

[14] This Court cannot fault the finding of the second full court in coming to the decision on sentence. It is evident from the record that the trial court evaluated the personal circumstances of the appellant. It considered all the factors that are relevant to sentencing. It found, correctly so in my view, that '[t]he trial court properly and judicially applied its mind to the guidance articulated in the *Malgas* decision regarding the existence of substantial and compelling circumstances and came to a conclusion that there were no such circumstances in the present case'.

[15] There is nothing in the appellant's personal circumstances that, in my view, should have persuaded the second full court to have found that the trial court misdirected itself in finding that the appellant's personal circumstances were not substantial and compelling when weighed against the cruelty of the crime. In *Director of Public Prosecutions, Gauteng v Pistorius*,[8] this Court referring to *S v Vilakazi (Vilakazi),*[9] stated that '[i]n cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background'. This is one of those cases.

[16] The brutality of the offences committed by the appellant in this matter cannot be outweighed by his insubstantial personal circumstances. He committed a heinous crime, which led to one of the most painful deaths that a person could suffer. I have already set out above the cruel way in which this crime was committed. The photos on record, depict the serious and gruesome injuries suffered by the deceased. The deceased died a painful, prolonged and merciless death. It is under such

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[8] *Director of Public Prosecutions, Gauteng v Pistorius* [2017] ZASCA 158; 2018 (1) SACR 115 (SCA); [2018] 1 All SA 336 (SCA) para 22.
[9] *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA) ; 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) para 58.

circumstances that personal circumstances, in particular the age of the accused, must recede into the background. The callousness of the killing cannot be attributed to the actions of an immature youthful offender. They depict the ruthlessness of the offender.

[17] The following passage in S v *Matyityi (Matyityi)*[10] resonates with the facts of this case. In *Matyityi* this Court expressed itself as follows:

'. . . It is trite that . . . the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rule out immaturity. Although the exact extent of the mitigation will depend on all the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that the younger the offender the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question in the final analysis is whether the offender's maturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness.'[11] (footnotes omitted).

The present matter is not such a case.

[18] At the age of 24, the appellant cannot be regarded as a callow youth. His age alone does not reduce his moral blameworthiness. Particularly viewed in the light of the callousness of the offences committed. At best for him, his age is a neutral factor. Moreover, since he chose not to testify personally in mitigation, there is no evidence about his level of maturity.

The Equality Challenge

[19] It was, furthermore, argued on behalf of the appellant that a miscarriage of justice had occurred. This was argued to be so because the second full court failed to follow the decision of the first full court which found that there were substantial and compelling circumstances that warranted a deviation from the prescribed minimum sentence in the case of the co-accused. It was argued that the second full court ought to have taken the same approach to sentencing as the appellant and the co-accused

[10] *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) ; [2010] 2 All SA 424 (SCA).
[11] Ibid para 14.

were co-perpetrators in the commission of the offences, and should have been treated equally.

[20] The second full court dealt with this aspect, fully. It rejected the reasoning of the first full court and stated as follows:

'. . .As I have indicated elsewhere in this judgment, the trial court dealt with each and every relevant factor which a sentencing court ought to consider in determining whether there is need to deviate from the imposition of prescribed minimum sentences. The dicta from the *Lichtenstein* decision quoted above fits well into the process undertaken by the trial court in the present matter.

In my view, the Full Court, . . . misdirected itself by over-emphasising the personal circumstances of the appellant [the co-accused], which were in any event different from the personal circumstances of the appellant in the present matter, and not having due regard to other factors like the gravity of the offence and the interest of society as called upon to do by the decisions in *Zinn* and *SMM* referred to above. In the premises and for the reasons outlined in this judgment, this court is unable to follow and apply the decision of the Full Court . . .'

I am constrained to find any fault with the findings of the second full court.

[21] The conduct of the appellant and the co-accused during the commission of the murder, leaves much to be desired. There were three attempts to end the deceased's life. They had sufficient opportunity to reflect on their conduct to let the deceased go free, yet they persisted with the intention to murder him. For instance, the opportunity presented when the appellant was unable to subdue the deceased whilst strangling him with a shoelace; the second was when the deceased regained consciousness whilst in the boot; and the third was after the appellant hit the deceased with a stone on the forehead. It was clear from their afore stated conduct that their intention was to murder the deceased as they eventually resorted to use a big stone to crush his head. The motive was no longer robbery, but a concerted effort to kill the deceased. This was correctly pointed out by counsel for the respondent that the original intention to take the motor vehicle, had long been abandoned as they were already in possession thereof. The two of them could have easily overpowered the deceased without resorting to the violence that left him dead by the roadside.

[22] In describing the gravity of the offence committed by the appellant and the co-accused, the trial court stated that:

'This killing of the deceased is nothing else but very very ugly acts of criminality. There was brutality to this particular crime. In my view, taking into account the facts of this case, this is one of the serious cases of murder and robbery.'

In that regard I find that the sentences imposed by the trial court against both of them, were appropriate under the circumstances. The trial court applied the proportionality test as envisaged in *Vilakazi*, where this Court stated that –

'It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the "offence" in that context . . .

"consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender."' [12]

[23] The personal circumstances of the appellant differ from those of the co-accused. The appellant was previously convicted of robbery, which is an indicator, as the trial court also found, that he has a propensity to violence. The sentence of one year of imprisonment that was meted out to him at the time did not assist in his rehabilitation as he reoffended after a lapse of only five years. The co-accused on the other hand, although he also has a previous conviction for robbery, at least, led a crime-free life for about seven years.

[24] Significantly, the appellant and the co-accused played different roles in the commission of the offences. The appellant was the master mind. Each of the actions leading to the death of the deceased were orchestrated by him. He instigated the idea of robbing the deceased of his motor vehicle. He came up with the *modus operandi* of carrying out the planned robbery. He is the one who initially strangled the deceased and hit him on the head with a stone and even asked the co-accused to assist him to carry the big/heavy stone that was used to crush the deceased's head.

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[12] Op cit fn 9 para 15.

[25] It is my view that the disparity in the sentences did not amount to inequality of treatment. The Constitutional Court (the CC) in *Van der Walt v Metcash Trading Limited (Metcash)*[13] dealt with a purported alleged inequality of treatment where this Court made contrary orders in two cases which were materially identical, albeit in a civil law setting. The issue that arose was whether the provisions of s 9(1) of the Constitution guarantees equality of outcome in litigation based upon materially identical facts and circumstances. The CC found that it did not, and reasoned as follows:

'. . . In the present case, the difference in treatment arises from the consequences of the exercise of a discretion by different panels of judges. Nowhere in the record is there a suggestion that any of the SCA judges acted arbitrarily and no submission to that effect was made by counsel. If one of the SCA panels reached a legally incorrect conclusion, that would not justify the conclusion that it was an irrational decision or was reached in an arbitrary manner.'[14] (footnotes omitted)

It was further held that –

'. . . [t]he proper interpretation of the provision in section 9(1) that everyone has "the right to equal protection and benefit of the law", cannot mean that where a final court of appeal properly exercises a discretion, such exercise may be subject to attack under section 9(1). It is clear that the provision means that all persons in a similar position must be afforded the same right to access the courts and to the same fair and just procedures with regard to such access. In this case both the applicant and Mr Kgatle had the right to petition the SCA and to have their applications heard in the ordinary course.'[15]

[26] In light of the decision in *Metcash*, the appellant and the co-accused had the right to appeal their sentences and to have their appeals heard in the ordinary course. They both exercised those rights. The appellant can, therefore, not be heard to complain about unequal treatment. While at a glance, it may appear that there is inequality of treatment, this is not the case. On the contrary, the second full court dealt fully, and correctly, with all the relevant facts and principles applicable. It considered the judgment of the first full court and gave reasons for why, in its view, that court had

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[13] *Van der Walt v Metcash Trading Limited* [2002] ZACC 4; 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC).
[14] Ibid para 18.
[15] Ibid para 24.

erred in reducing the co-accused's sentence. This demonstrates that there was no substantive inequality of treatment suffered by the appellant.

[27] This case highlights that where the co-accused appeal their sentence, it is desirable that their appeals be heard by the same court to avoid the perceptions of unequal treatment where different appeal courts come to different conclusions. As it was found in *Metcash,* the judicial system should avoid, to the extent possible, the kind of result which occurred in this case.[16]

Conclusion

[28] For all the above reasons, it is my view that neither the trial court nor the second full court misdirected itself. There is, therefore, no reason for this court to interfere with the sentences imposed.

[29] In the result, I make the following order:

The appeal is dismissed.

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E M KUBUSHI

ACTING JUDGE OF APPEAL

[16] Ibid para 20.

Appearances

For the Appellant:	T G Gonyane
Instructed by	Legal Aid South Africa, Mmabatho
	Legal Aid South Africa, Bloemfontein
For the Respondent:	D G Jacobs
	Director of Public Prosecutions, Mmabatho
	Director of Public Prosecutions, Bloemfontein.