

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

CASE NO: AR164/2022

In the matter between:

KHAYELIHLE NKOSI

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Ngwelezane Regional Court (Magistrate A Ramasir sitting as court of first instance):

1. The appeal against the conviction on two counts of rape is upheld.
 2. The judgment of the court *a quo* is set aside and substituted with the following
 - ‘2.1 The accused is found not guilty on counts 1 and 2.
 - 2.2 The accused is convicted on one count of rape in circumstances where the victim was raped more than once by the accused namely on two occasions, as contemplated in item (a)(i) of Part I of Schedule 2.’
 3. The appeal against sentence is upheld.
 4. The sentence of the court *a quo* is set aside and replaced with the following sentence:

‘The accused is sentenced to 25 years imprisonment.’
 5. Such sentence is ante-dated to 25 October 2012.
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JUDGMENT

Henriques J (Mpontshana AJ concurring):

Introduction

[1] This is an appeal exercised by the appellant in terms of his automatic right of appeal against the convictions and sentences imposed by the Ngwelezane Regional Court. The appellant was charged with three counts of rape, read with the provisions of s 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA), in that he is alleged to have had sexual intercourse with a 28-year-old complainant, K[...] S[...] N[...] (the complainant), on three occasions on 20 August 2011, without her consent, and acting at all material times in common purpose with a co-perpetrator.

[2] The appellant, who was legally represented at the time, pleaded not guilty to two counts of rape and admitted to having consensual sexual intercourse with the complainant once on the night in question in respect to one count of rape. On 24 October 2012, the appellant was convicted on two counts of rape as charged and, on 25 October 2012, sentenced to life imprisonment. On the same day, he was advised of his right to an automatic appeal by the presiding magistrate, but for some inexplicable reason, an application for leave to appeal the sentences imposed was heard on 29 July 2013 and refused.

Grounds of appeal

[3] The first ground of appeal was that the court *a quo* erred in convicting the appellant on the two counts of rape as there was insufficient evidence to support such a conviction. The complainant was a single witness and her evidence was not treated with the necessary caution, given the appellant's version that she was a sex worker. In addition, as the appellant admitted to having sexual intercourse with the complainant on the night in question, the issue in the appeal was whether the complainant had consented to such sexual intercourse.

[4] The second ground of appeal was that shortly after the alleged rape, the complainant failed to make a first report to the police officers who approached her

and the appellant whilst they were walking on the road. Ms Citera, who appeared for the appellant, submitted that this negated her allegations of rape as she failed to make such a report at the first opportunity.

[5] The third ground of appeal was that the court *a quo* misdirected itself in rejecting the appellant's version in circumstances where there were mutually destructive versions. The court *a quo* also erred in not pronouncing a finding in respect of the third count of rape. Lastly, when considered holistically, it was alleged that the respondent had not discharged the onus of establishing the commission of the offences beyond reasonable doubt.

[6] As regards the sentence imposed, the appellant submits that the court *a quo* misdirected itself as the prescribed minimum sentence of life imprisonment was not applicable as:

- (a) no finding was made that the appellant acted in common purpose with a co-perpetrator at the time of committing the rapes; and
- (b) the charge sheet did not indicate that the complainant was raped more than once.

[7] Consequently, in the absence of such findings, the court *a quo* committed a misdirection, as the prescribed minimum sentence applicable was that of ten years' imprisonment on each count and not life imprisonment.

The evidence

[8] In the court *a quo*, the respondent led the evidence of two witnesses, that of the complainant and Ms Bongeka Mthembu, the investigating officer. The J88 form was handed in by consent and recorded superficial scratches on the complainant's back and no other injuries were noted. The court *a quo* called three witnesses, namely Sergeant Zwelakhe Mhlongo, Constable Linda Mashaba and Constable Nomuso Ndlovu to testify in relation to the first report. The appellant testified and called no witnesses.

[9] The complainant, a vendor from Richards Bay, testified that on 20 August 2011, between 19h00 and 20h00, after she had finished selling apples and oranges, she, together with her friend, M[...], went to Mazulu tavern, where they consumed alcohol. She could not recollect the exact time that they had left the tavern but estimated it was at approximately 03h00 as she had written her statement between 04h00 and 05h00.

[10] After they had left the tavern, they were approached by the appellant, who was in the company of two men. The appellant grabbed her and pushed her off the road into a secluded place that was 'like a forest'. She noticed one of the appellant's companions handing him something, which she later realised was a knife. The appellant's companions were forcibly trying to take M[...]'s bag away from her and she observed M[...] run away. Although it was dark at the time she encountered the appellant and his companions, there was light emanating from the stores around the area as they were walking toward the garage. The appellant instructed her to lie down and pointed at her with the knife when she refused.

[11] He tore her trousers, removed them, and informed her that he wanted to have sexual intercourse with her. Thereafter, the appellant did not say anything further and 'inserted [his penis] into her vagina' and had sexual intercourse with her. She knew that he had ejaculated as she felt 'something on her buttocks going down towards through her buttocks'. It was semen. After the appellant had ejaculated for the first time, he removed his penis. He thereafter inserted his penis into her vagina for a second time and had sexual intercourse with her again.

[12] He did this until his friend approached to say that the appellant should finish as he also wanted to have sexual intercourse with her. At the time, his friend threw M[...]'s nightdress at them. When his friend made the approach, the appellant refused and said he 'won't let it because I had a nice vagina'. The appellant remained with his penis in her vagina and continued to have sexual intercourse with her.

[13] When he was done, the appellant took M[...]'s nightdress and cleaned himself as well as her. After doing this, the appellant had sexual intercourse with her again

by inserting his penis into her vagina. After the appellant had finished, he wiped her and himself again and told her to get dressed. She confirmed that the appellant had ejaculated again as she could feel his semen. After they had dressed, the appellant told her to accompany him to his homestead and took her jersey from her and wore it.

[14] As they were walking on the road, the police approached from behind. At the time, the appellant had his arm around her waist. When the police vehicle stopped, M[...] alighted and approached with the police and the complainant explained to them what had happened. She assumed that her friend had told the police what had transpired, as M[...] had seen her being taken by the appellant into the dark place but she had run away. When the police questioned her as to what had transpired, she told them 'this one slept with me by inserting his penis into my vagina'.

[15] On hearing this, the police removed her jersey from the appellant, handcuffed him, and placed him inside the police vehicle. She accompanied the police, M [...], and the appellant to the police station and the appellant was taken to the holding cells. As they were under the influence of alcohol, the police informed her that they had to wait until morning to prepare their statements. She testified in answer to a question relating to her level of intoxication that 'I did not drink that much but they said it was because they could smell it'. She testified that she could stand properly and speak normally.

[16] Her statement was taken the following morning after she had been taken to MP Memorial Hospital. She was examined at the hospital and provided with anti-retroviral medication. She testified that when the appellant initially grabbed her, he did not assault her but placed his hand over her mouth. When the appellant had undressed her, he had removed her underwear together with her trousers. Whilst lying on the ground during the rape, she was not injured on her back but the appellant injured her on her thighs, as when she refused to open her thighs, he used his knee to forcibly open her thighs.

[17] She did not know the appellant and she had seen him for the first time on that day. The complainant disputed the appellant's version that she had consented to

have sexual intercourse with him on one occasion for payment as she was a sex worker. She reiterated that she was a vendor. She confirmed in answer to a question from the prosecutor that when she observed the appellant at the police station, he looked like he was drunk and the police questioned him regarding his state of sobriety.

[18] During cross-examination, the complainant acknowledged that on her arrival at the tavern, she had purchased three beers but during the course of the night and early hours of the morning, apart from the beers, she had also consumed brandy which her friend had purchased. She acknowledged during cross-examination that she was 'drunk, but not that drunk that it can make me fall' and was in full control of her mental faculties and could distinguish between right and wrong.

[19] She denied being a sex worker and denied having engaged in consensual sex with the appellant for the amount of R40 and denied that her usual amount was R50. At the time she left the tavern, she had R10 for transport. She subsequently acknowledged that she had R50 but was no longer purchasing any alcohol, as her friends were doing so. She acknowledged that she did not think of stopping the police vehicle as she was drunk, scared, and the vehicle had approached them from behind.

[20] The appellant was not known to her and he was accompanied by two males when they approached her. When he grabbed her and she screamed, the appellant blocked her mouth and she observed his friend handing a knife to him, at which stage he then took her to the secluded area where he raped her. She could see the blade but could not see what kind of knife it was. She disputed the appellant's version that on the night in question he was at Lion's Den Bar in Richards Bay and exited the bar at approximately 21h30 and whilst walking to hitchhike towards Alton, he came across her and M[...].

[21] She disputed that the appellant asked her what she was doing in the area and disputed that she responded by saying that she was a sex worker. She indicated that she sells apples and oranges. She further disputed that she voluntarily accompanied him to a secluded area where they engaged in consensual sexual intercourse and

left her friend behind on the road. The complainant confirmed that the appellant did not have sexual intercourse with her once but did so three times without her consent.

[22] The investigating officer, Bongeka Maureen Angela Mthembu (Ms Mthembu) testified that she was unable to trace M[...]. When asked to explain why the statement of the arresting officer was not filed, she indicated that she managed to eventually contact Sergeant Mhlongo from Richards Bay, who informed her that he had not arrested any suspect concerning a rape incident but rather for being drunk in a public place.

[23] Her enquiries with Sergeant Mhlongo eventually led to her finding out that the initial investigating officer was Constable Mashaba. During cross-examination, she confirmed that she did not have any first report concerning the rape matter and could not account for the fact that Sergeant Mhlongo did not make a statement to this effect. She confirmed having requested a statement from Sergeant Mhlongo. That then was the evidence presented by the respondent in the court *a quo*.

[24] The appellant testified that on 20 August 2011, he had consensual sexual intercourse with the complainant - once. On the evening in question, he was leaving Lion's Den about to hitchhike home. He testified he was not drunk but was tipsy. At about 21h30, he observed two ladies whilst walking. He was in the company of four men when he left the tavern but left them behind and carried on walking. He was alone when he observed the complainant and Simangele (the complainant referred to her as Doris Ngubane), whom he knew. He questioned them as to what they were doing there so late at night and the response was that they were sex workers.

[25] He questioned the complainant as to how much she charged and she indicated R50 per round. She agreed to have consensual sex with him for R40. At the time, they were standing near the workshops and they then crossed the road to a grocery area where they had consensual sexual intercourse. After they had finished and he had paid the complainant, they then returned to the road and a police van then emerged with Simangele inside the vehicle.

[26] On seeing them, Simangele responded to a question from the police that he, the appellant, was a friend of the people who had taken her bag. This resulted in his arrest. He, together with Simangele and the complainant, travelled in the police vehicle to the police station. Simangele informed him that if he did not mention who his friends were who had taken her bag, they would open a false rape case against him.

[27] He disputed the complainant's version that he forcibly penetrated her and threatened her with a knife and that the sexual intercourse was not consensual. In addition, he disputed that the incident occurred at around 03h00 and was adamant that it was at 21h00, as he was going to board a bus at 22h00.

[28] The appellant indicated that the complainant and her friend were fabricating a case against him as his friends took Simangele's clothing. He disputed the complainant's version that at the time of the police's arrival, she made a report that she had been raped. He indicated that he was arrested for drinking in public and it is a common occurrence in the Richards Bay area that if a person is found intoxicated on the road, then the person is taken to the holding cells to sober up. That is the reason why he was taken to the police station and he was not charged. He was only charged for rape after the investigating officer had arrived.

[29] The appellant, during cross-examination, indicated that he knew the complainant's companion, Doris Ngubane, as 'Simangele' and that she was a sex worker, as he had seen her ply her trade near the garage in Hillside, Richards Bay. He confirmed that he provided the complainant with money for engaging in the sexual intercourse with him and were heading back to Simangele. It was on their return to the road that he noticed the police van with Simangele in the company of a number of policemen.

[30] The police placed him together with Simangele and the complainant into the police van and when he questioned her as to why she was with the police, Simangele reported to him that his friend, who had been in his company, had taken her bag. He was surprised to see her alight from the police vehicle and also

surprised that she mentioned his friend who had been at the tavern with him as he had not seen her at the tavern earlier on.

[31] He confirmed that at the time he was not informed what he had been arrested for but that all along he was on good terms with Simangele. He was only charged for rape the following morning when he was informed that the complainant had opened a rape case against him. He testified that he informed the investigating officer that it was a business deal and that he had not raped the complainant.

[32] The appellant could, however, not explain why the complainant was being used to fabricate the case against him when it was Simangele who had a complaint about her bag being stolen by his friend. He could also not explain why it was never suggested during the course of the complainant's cross-examination that the allegation of rape was a fabrication between her and Simangele. That then was the case for the appellant.

[33] At the request of the appellant, the complainant was recalled to be cross-examined on certain aspects of her evidence which had not been canvassed with her earlier. This related to the first report that she testified she had made to the police when they first arrived. It was also put to her that the allegation of rape was a fabrication between her and Simangele. She disputed that the appellant was arrested for drinking in public and not for rape and disputed that she and Simangele were fabricating a case against the appellant. She testified that when the police arrived, it was mentioned that the appellant must hand back the bag that was taken by his friends from Simangele. The appellant indicated that he did not know who these people were. The police then also questioned the appellant as to why he had slept with her, as it may be related to the taking of the bag.

[34] She disputed that whilst at the police station she and Simangele had approached the appellant and indicated they would withdraw the rape charges if he handed back Simangele's bag. The complainant confirmed that whilst at the police station, she mentioned to the appellant that 'if you infected me with a disease you will cure me until I am cured'. In the morning, the police questioned her as to whether

she could identify her assailant, and she pointed to the appellant and provided a description of his clothing.

[35] The court called several witnesses to deal with the issue of the first report. None of these witnesses were of assistance. Sergeant Mhlongo testified that he did not deal with a rape matter but was aware that the appellant was arrested because he was drunk. He completed a form in the register to record this. He could no longer locate his pocket book and could not be of assistance to the court and recollect precisely what had been reported to him. He confirmed that he was with Constable Ndlovu at the time. When he spoke to the complainant who was with the appellant at the time, she informed him that the appellant had mentioned to her that they should go to his house and he observed that they had their arms around each other. He confirmed that he had arrested the appellant at approximately 05h30.

[36] He indicated that on the night in question, the only person whom he had arrested and had taken to the cells was the appellant. He disputed the complainant's version that because she was drunk, she was made to wait and that was the reason why a statement was not taken from her until the following morning. He indicated that he knew nothing about the complainant's version that when she and the appellant first approached them, the complainant made a report to him that she had been raped or that after such a report, he handcuffed the appellant and placed him in the police van and took her jersey from the appellant and handed it back to her. He indicated that he knew nothing of this report and neither did he know the complainant. He could not proffer any explanation as to why if they did not know each other, the complainant would specifically mention that he was the police officer whom she made the report to.

[37] Sergeant Mhlongo confirmed that when he took the appellant into custody in the early morning, he did not explain his rights to him, as they normally wait for persons like the appellant to sober up. He knocked off work at 06h00 and was not certain what transpired once he had left. He confirmed that on the night when he took the appellant into custody, he was with a female officer. As far as his recollection of events is concerned, the complainant was not drunk and he did not arrest her nor did he take her to the police station.

[38] He also indicated that at no stage on the night in question did Simangele approach him to advise him that her bag had been stolen nor did she accompany him to the police station. He confirmed that after he had arrested the appellant and placed him in the cells, he had no further role in the matter and it was possible for another officer to charge the appellant if any further crime had come to their attention.

[39] Constable Nomuso Ndlovu testified that she is currently employed at the CSC but on the night in question, was on duty together with Sergeant Mhlongo. She was of no assistance to the court and could not take the matter any further, as she had no independent recollection of the night's events and was not assisted by her pocket book as it had gone missing. She had no independent recollection of the complainant making any report of being raped to her.

[40] Constable Linda Voyelwa Mashaba testified that she was on duty in the CSC. In the morning, at 06h00, when she reported on duty, she observed two women seated on the bench in the charge office. The complainant made a report to her that she wanted to open a case of rape. She had confirmed with Warrant Officer Dlamini, who was going off shift, that the reason why the complainant's statement had not been taken down earlier was as the complainant was under the influence of alcohol.

[41] She took the statement from the complainant, registered the docket, and took her to the hospital. At the time the complainant had made the report to her, the person who had allegedly raped her was being held in the cells and her enquiries with the police officer on shift revealed he had been arrested for being drunk.

[42] She did not take a statement from M[...], as a colleague of hers was scheduled to take her statement.

[43] That then was the evidence presented in the court *a quo*.

Judgment of the court *a quo*

[44] In its judgment on conviction, the court *a quo* weighed up the evidence of both the complainant and the appellant as well as the three witnesses who were called to testify by it. The court *a quo* expressed its dissatisfaction with the manner in which the police investigation was conducted, specifically the fact that both Sergeant Mhlongo and Constable Ndlovu did not appear to do anything regarding the first report which the complainant had made to them. They could not even recollect what the circumstances were under which the complainant was taken to the police station.

[45] The complainant was, however, adamant that she had made a report to Constable Mashaba when she reported for duty. Constable Mashaba noted that the complainant reported to her that her statement in relation to the alleged rape could not be taken down any earlier, as the police had informed her that she was in a drunken state and that after she had sobered up, a statement would be taken from her in relation to the alleged rape.

[46] The court *a quo* found that the complainant was a satisfactory witness who gave her evidence in a clear and concise manner and was not shaken under cross-examination. It found that Sergeant Mhlongo, who the complainant indicated she had made the first report to regarding the rape, was an unsatisfactory witness and was not honest and forthright.

[47] When confronted with the extract from the register completed by him, Sergeant Mhlongo confirmed he was the author of the entry, but indicated that the word rape had not been recorded and rather his drunkenness. He was evasive concerning what had transpired and the report which the complainant made to him. The court *a quo* found on the probabilities that the complainant did make the first report to him but he was neglectful in submitting an arresting officer's statement and tried to hide behind the drunkenness of the complainant.

[48] The court *a quo* found that the appellant did not create a good impression and did not answer questions when put to him. On the probabilities, it rejected the appellant's version that he had left the tavern at 21h30, given the entry in the OB register at 04h30, relating to his arrest for being under the influence of alcohol. It also rejected the appellant's version in relation to what transpired between him and the

complainant, specifically the fact that she was a sex worker and he had paid her for her services. The court found that the issue of consent had been negated by the physical condition of the complainant and that the appellant could have been under no illusion that she was drunk at the time.

[49] It found that given the state of inebriation of the complainant, the appellant's version that they had consensual sex on one occasion fell to be rejected. In addition, there was no basis to accept the version of the appellant that the rape charge was a fabrication between the complainant and her friend as the appellant's friend had stolen the bag. There was no reason for the complainant to falsely implicate the appellant in the rape. As a consequence, the court *a quo* concluded that the version of the complainant that she was raped on two occasions on the night in question ought to be accepted and he found the appellant guilty on two counts of rape only, as charged.

[50] Although the charge sheet in respect of the three counts referred to the fact that 'the appellant acted in common purpose with a co-perpetrator' the court *a quo* made no finding in this regard nor did it refer to this at all in its judgment on conviction. It also failed to deal with the third count of rape and render a verdict in respect thereof.

Sentence

[51] At the commencement of the trial, prior to pleading, the appellant was warned by the presiding magistrate that he faced sentences in terms of the prescribed minimum sentencing legislation, should he be convicted. However, at the time of convicting the appellant, the presiding officer made no finding as to whether the appellant was convicted in circumstances where he acted in common purpose with anyone.

[52] In mitigation of sentence, the appellant testified, and apart from placing the appellant's personal circumstances on record, Mr Masondo, his legal representative, indicated that the only substantial and compelling circumstance which he could advance, was the fact that the appellant was a first offender.

[53] When sentencing the appellant, the court *a quo* had regard to the appellant's personal circumstances, namely that he was 28 years old, that he had four siblings, and two children, one resided with their maternal aunt, and one who resided with their mother and who were receiving a child care grant. The court took into account that he was a first offender with no previous convictions nor any pending charges and had been in custody since 20 August 2011.

[54] It considered the triad of *Zinn*,¹ the purposes of punishment, the seriousness of the offence, that it involved rape, and that the appellant had threatened the complainant with a knife at the time of the commission of the offences. Whilst it acknowledged that he was a first offender, it was of the view that the circumstances of the case outweighed any mitigating circumstances presented by the appellant's personal circumstances.

[55] It similarly ruled that there were no substantial and compelling circumstances entitling it to deviate from the prescribed minimum sentence, save for the fact that he was a first offender. What weighed heavily with the court when sentencing the appellant, was the fact that he did not show any remorse and continued to deny having committed the offences. It was for these reasons, in addition to the fact that the appellant had been convicted of rape on two occasions, that the court sentenced him to life imprisonment and declared him unfit to possess a firearm.

Submissions at the appeal

[56] At the hearing of the appeal, Ms Citera, who appeared for the appellant, submitted that the appeal should succeed as the appellant was upfront with the court and did not deny having had sexual intercourse with the complainant on one occasion. He had no reason to lie and the only issue in dispute was consent. The first report was not made on the first available opportunity and the State's investigation in this regard was 'shoddy', to say the least. She submitted that the court *a quo* only dealt with two of the counts for which the appellant had been charged and did not deal with the third count.

¹ *S v Zinn* 1969 (2) SA 537 (A) ('Zinn').

[57] There was also not much effort made to locate M[...], who was in the company of the complainant on the night in question, as her evidence could have corroborated the complainant's version of events. As regards the level of intoxication of the complainant, she submitted that the complainant changed her answers to suit the different stages of her version but had full control of her mental faculties when the police arrived. She submitted that because the complainant did not make a first report to them, it did not support her version. She submitted that there were two mutually destructive versions before the court *a quo* and the appellant ought to receive the benefit of the doubt.

[58] Turning now to sentence, Ms Citera submitted that there were substantial and compelling circumstances which the court *a quo* did not take into account when sentencing the appellant. She submitted that he was a first offender with two children and had no pending cases. Alcohol played a role in the commission of the offence and this ought to have been a consideration which the court *a quo* took into account.

[59] She acknowledged that the appellant indicated that he was tipsy and not drunk and the complainant indicated that she had drunk a number of beers together with hard liquor. She acknowledged that what is evident from the evidence is the fact that intoxication played a key role on the night in question. She submitted that if the complainant is found to have been intoxicated, then so too was the appellant, given the facts, and he ought to be given the benefit of the doubt and acquitted. She acknowledged, however, when it was suggested by the court that if intoxication is found to play a key role, then the provisions of s 1(2) read together with s 3 of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 (SORMA) would come into play and the appellant could not escape liability as a consequence.

[60] Mr Magwaza, for the respondent, submitted that the court *a quo* correctly convicted the appellant and that a first report is not a requirement for a conviction. A first report is only of relevance where the appellant, as in the current instance, raises the question of consent. The complainant's evidence that she made a first report to Sergeant Mhlongo must be accepted. He, in addition, submitted that the court *a quo* correctly approached the evidence of the complainant with caution, given that she was a single witness.

[61] He submitted that the court *a quo* correctly rejected the appellant's version as it was not reasonably possibly true when viewed against the conspectus of evidence. He indicated that there was sufficient corroboration for the complainant's evidence that the incident occurred at the time she testified, given that Sergeant Mhlongo testified the arrest occurred at 05h30.

[62] At the hearing of the matter, I raised with both Ms Citera and Mr Magwaza additional aspects in relation to the conviction and the sentence, which they had not dealt with in their heads of argument nor during the course of their submissions. Mr Magwaza submitted that the charge sheet was incorrectly framed and the court *a quo* did not make any finding in relation to the aspect of common purpose. The charge sheet ought to have been amended in the court *a quo* to read 'rape committed on divers occasions'. He submitted that this court was still entitled to amend the charge sheet at this stage given the nature of the evidence led.

[63] Ms Citera submitted that if the appeal court were to do so, this would render the proceedings unfair and constitute a breach of the appellant's fair trial rights. However, both parties elected to file supplementary heads of argument and written submissions relating to this issue, as neither one of them canvassed this point in preparation for the hearing of the appeal and neither of them were the authors of the respective heads of argument.

Analysis

[64] An appeal court must always be mindful not to interfere with the credibility findings of a trial court and its evaluation of the evidence, in the absence of a material misdirection. In a criminal trial, a court's approach to assessing the evidence 'is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'²

² *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

[65] In my view, the court *a quo* correctly applied the aforementioned test when evaluating the evidence holistically, despite the fact that it was faced with the evidence of a single witness. It is trite that s 208 of the Criminal Procedure Act 51 of 1977 (the CPA) makes provision for an accused person to be convicted on the evidence of a single competent witness, such as the complainant in this instance.³

[66] I now turn to the first and third grounds of appeal. Firstly, in my view, there is sufficient corroboration for the evidence of the complainant that she was raped by the appellant on the night in question. That the appellant had sexual intercourse with the complainant is not in dispute. What is in dispute is whether it was consensual or not. There is no basis for the appellant's version that the complainant is a sex worker and the court *a quo*, in my view, was correct in rejecting this version.

[67] There is corroboration for the complainant's version in relation to the fact that on the night in question, the appellant was accompanied by friends and that she and M[...] had seen them earlier at the tavern. The appellant did not dispute this and although he indicated he did not see them, he said that it was possible for them to have seen him. Her version that he was in the company of friends is further corroborated by the appellant as the appellant did not dispute that one of his friends had taken M[...]’s bag. In fact, he proffered this as a motive for them falsely implicating him in the offences.

[68] The complainant testified that during the course of the non-consensual intercourse, a friend of the appellant approached and asked to have a turn to have sexual intercourse with her. The appellant refused and simultaneously with the request, the friend threw M[...]’s nightdress at him. This lends credence to her version that at the time, he was accompanied by a number of people and the only reason why, in my view, she was not raped by his friend was because the appellant refused. This is also consistent with her version that he wiped her and himself down after ejaculating.

³ *R v Mokoena* [1956] 3 All SA 208 (A) at 212-213; *S v Sauls and others* 1981 (3) SA 172 (A) at 180E-F.

[69] Secondly, there is corroboration for her version as to when the incident occurred. She testified it occurred in the early hours of the morning, at approximately 03h00, as she had made a statement between 04h00 and 05h00. The appellant's version was that it did not occur at that time but occurred earlier on in the evening. This is not supported by the evidence of Sergeant Mhlongo that they had approached in the vehicle and had taken the appellant, as well as M[...] and the complainant, with them to the police station. His version is further improbable, given the evidence presented in relation to the OB entry that the appellant was arrested at 05h30.

[70] Although the J88 and medical report are inconclusive, it does record that there were scratches on her back. I agree with the court *a quo*'s finding that the appellant was a poor witness and that his version ought to be rejected as false, as it was not reasonably possibly true. The court *a quo* correctly rejected his version in light of the conspectus of the evidence.

[71] The other difficulty which the appellant faces, in my view, is the aspect of consent. One of the aspects considered crucial to the definition of rape is whether or not there was consent. In terms of s 1(2) of SORMA, for purposes of s 3, consent means 'voluntary or uncoerced agreement'. According to s 1(3)(d)(iii), a person is incapable in law of appreciating the nature of the sexual act if that person is 'in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that [the person's] consciousness or judgement is adversely affected'.

[72] The appellant's version is that he engaged in consensual sexual intercourse with the complainant. Both confirm that they had indulged in alcohol during the night in question. The appellant described himself as being tipsy and the complainant herself as being drunk but not so drunk that she did not know what was going on around her. There are two conflicting versions in this regard, that of the appellant that he engaged in consensual sex with the complainant as she was a sex worker. Juxtaposed is the complainant's version that she was not a sex worker, and was forced at knife point to have sexual intercourse with the appellant without her consent. There is thus also an element of coercion to the alleged rape vitiating

consent envisaged in s 1(3)(a) of SORMA.

[73] Secondly, intoxication can vitiate consent and courts must have regard to the surrounding circumstances and draw inferences from the facts. In the circumstances and on the facts of this particular matter, I am of the view that it cannot be said that the complainant was capable of consenting to sexual intercourse and this falls within the definition contemplated by s 1(3)(d)(iii) of SORMA, as she was in an altered state of consciousness being under the influence of alcohol. That they were both inebriated is confirmed by Sergeant Mhlongo as well as Constable Mashaba.

[74] Even though she testified she could speak and stand properly the objective evidence of Constable Mashaba that Warrant Officer Dlamini had reported to her that the complainant's evidence could not be taken earlier as she was drunk, in my view clearly established she was intoxicated to the extent that she was incapable of consenting to sexual intercourse. I consequently agree with the finding of the court *a quo* that there was no consent.

[75] Turning now to the second ground of appeal, one of the criticisms levelled by Ms Citera in relation to the complainant's version was her failure at the first available opportunity to make a report concerning the rape. She submits that the court *a quo* committed a misdirection in finding that Constable Mashaba was the first report when it was not the first available opportunity for the complainant to report the rape. This is in the face of the evidence of Sergeant Mhlongo and Constable Ndlovu that the complainant had not made a report to them, although she said she did.

[76] Section 59 of SORMA is relevant in this regard, and provides that '[i]n criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof'.

[77] The Supreme Court of Appeal in *Monageng v S*⁴ held the following:

⁴ *Monageng v S* [2008] ZASCA 129; [2009] 1 All SA 237 (SCA) paras 23-24.

[23] Much was made by the appellant's counsel of the complainant's apparent ability to act normally after the rape and her delay in reporting it. It has been firmly established in a number of studies on the impact of violence, including rape, against women that victims display individualised emotional responses to the assault. Some of the immediate effects are frozen fright or cognitive dissociation, shock, numbness and disbelief. It is therefore not unusual for a victim to present a façade of normality.

[24] It is further widely accepted that there are many factors which may inhibit a rape victim from disclosing the assault immediately. Children who have been sexually abused, especially by a family member, often do not disclose their abuse and those who ultimately do may wait for long periods and even until adulthood for fear of retribution, feelings of complicity, embarrassment, guilt, shame and other social and familial consequences of disclosure. Significantly, the newly passed Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides, in section 59, that–

“in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.”

Raising a hue and cry and collapsing in a trembling and sobbing heap is not the benchmark for determining whether or not a woman has been raped. There was thus nothing unusual about the complainant's behaviour and her explanation for not immediately reporting the appellant is plausible.' (Footnote omitted.)

[78] The court in *Maila v S*⁵ endorsed the view expressed in *S v Vilakazi*⁶ that it is not mandatory that there be a first report in relation to the actual rape.

[79] Ms Citera emphasised that the first report would have gone a long way to 'rebut' the appellant's version of consensual intercourse. Given the defence, a first report made at the first opportunity the complainant had, she submitted, would have negated the appellant's defence. That the complainant did not do so when the police,

⁵ *Maila v S* [2023] ZASCA 3 paras 27-29.

⁶ *S v Vilakazi* [2016] ZASCA 103; 2016 (2) SACR 365 (SCA) para 15.

Sergeant Mhlongo and Constable Ndlovu, arrived at the scene, only goes to corroborate the appellant's version.

[80] Firstly, the respondent's evidence regarding the first report is based on the evidence of the complainant and Constable Mashaba. The evidence of the police witnesses called by the court *a quo* is sketchy, to say the least. I agree with the court *a quo*'s indication that on the probabilities, a report must have been made to Sergeant Mhlongo and that he and Constable Ndlovu did nothing about it at the time, given the complainant's state of sobriety.

[81] It is the only explanation for the complainant and M[...] being told to wait until later. On the probabilities, the complainant must have made a report to Sergeant Mhlongo and Constable Ndlovu and they did nothing about it. She repeated the report to Constable Mashaba when she came on duty, hence Constable Mashaba's subsequent conduct.

[82] agree with the submissions of the respondent that the first report was necessary to prove the rape, given the defence of consent. Having regard to the evidence, when viewed holistically, I accept the complainant's version that she reported it to Sergeant Mhlongo and Constable Ndlovu and that she was immediately taken to the police station. Given the conclusion that the intercourse was non-consensual, this ground of appeal is without merit.

[83] In her supplementary heads of argument, Ms Citera submitted that fundamental to the rights entrenched in s 35(3) of the Constitution, is the right 'to be informed of the charge with sufficient detail to answer it'.⁷ She submits that from the outset, in order for the appellant to have thoroughly prepared and answered the charges he faced, he ought to have been furnished with a proper charge sheet. She submitted that, as a consequence, the appellant cannot be found guilty on that which he had not been charged, competent verdicts being excluded.

⁷ Section 35(3)(a) of the Constitution.

[84] As the respondent had specifically included common purpose in the charge and because the court *a quo* only found the appellant guilty of rape, especially on two occasions and there was no pronouncement on the aspect of common purpose, it was inconsistent with the fair trial principles to allow an amendment to the charge sheet, alternatively to allow him to be convicted for rape, even if the evidence shows otherwise.

[85] She submitted that the two separate acts of penetration, which the complainant testified to, occurred during the course of a single event, a few minutes apart. She relied on *S v Blaauw*,⁸ where Borchers J remarked as follows:

‘Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (ie the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred.’

She submitted that an alternative would be to find separate and distinct acts of rape but for the purposes of sentencing, to consider it as one act.⁹

[86] Mr Magwaza, in his supplementary heads of argument, submitted that the appellant was charged with three individual counts of contravening the provisions of s 3 of SORMA. He knew at the outset that the State intended to, and did, invoke the provisions of the CLAA. This was as the State alleged the appellant acted in the furtherance of a common purpose with a co-perpetrator. The court *a quo* convicted the appellant on two counts of rape but the court was silent about the third count in respect of which the appellant was charged, with no verdict given. From the available evidence, he conceded that the evidence established that it was only the appellant who raped the complainant and his friend did not participate in the rape, as the appellant refused to allow him an opportunity to do so.

[87] He submitted that the charge sheet in the court *a quo* was incorrectly framed and that the appellant ought to have been charged with one count of rape, read with

⁸ *S v Blaauw* 1999 (2) SACR 295 (W) at 300c-d (*‘Blaauw’*).

⁹ *S v Willemse* 2011 (2) SACR 531 (ECG); *S v Maxabaniso* 2015 (2) SACR 553 (ECP).

s 94 of the CPA, to allege that the rape occurred on diverse occasions, instead of charging the appellant with three counts of rape. He submitted that the provisions of s 51(1) and Part 1 of Schedule 2 of the CLAA were applicable on the basis that the complainant was raped on diverse occasions.

[88] Similarly, he also relied on the decision of Borchers J in *Blaauw* where the court held the following:¹⁰

‘Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice . . . Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (ie the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place.’

[89] He conceded that the court *a quo* erred and committed a misdirection by omitting to make a pronouncement on count 3 as it stands and is consequently ‘left hanging on the head of the appellant’ as it is without a verdict. The correct approach would have been for the court *a quo* to provide a verdict that the court deemed fit or quash count 3. In terms of the provisions of s 106(4) of the CPA, an accused who pleads to a charge is entitled to demand that he be acquitted or convicted.

[90] He correctly acknowledged that the prosecutor charged the accused with many counts, and conceded that the court has an obligation to ensure that there is no duplication of convictions. He submitted that this court ought to invoke the provisions of s 88 of the CPA and find that the complainant was raped on diverse occasions, and consequently the provisions of s 51(1) and Part 1 of Schedule 2 of the CLAA are triggered.

¹⁰ *Blaauw* at 300a-d.

[91] As regards the convictions, the court *a quo* made a finding of guilt in respect of two counts of rape for which the appellant was charged. It did not pronounce on the third count of rape. Section 106(4) of the CPA entitles an accused who pleads to a charge to demand an acquittal or to be convicted. It reads as follows:

‘An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.’

[92] As the appellant pleaded to each of the individual counts in the charge sheet, in terms of s 106(4) he is entitled to demand an acquittal or to be convicted on the third count of rape to which he has pleaded.¹¹ Consequently, the appellant is entitled to a verdict on the third count of rape, in respect of which there has not been a pronouncement. This will be dealt with hereinafter once the further written submissions have been considered.

[93] I now turn to the submissions that this court ought to invoke the provisions of s 88 of the CPA. Regrettably, I do not agree with the respondent that it can be invoked, as it relates to a defect in the charge. There was no defect. What the respondent sought to do was rely on the provisions of Part 1 of Schedule 2 of the CLAA to invoke the prescribed minimum sentence of life imprisonment, in circumstances where it is alleged that the accused acted in common purpose with a co-perpetrator in raping the complainant.

[94] It sought to invoke these provisions to make the appellant aware of a possible term of life imprisonment on each count if convicted. The respondent’s reliance on s 88 is misplaced but it is not without a remedy. What then of s 94 of the CPA? It reads as follows:

‘Where it is alleged that an accused on divers occasions during any period

¹¹ *S v Delport and others* [2014] ZASCA 197; 2015 (1) SACR 620 (SCA) paras 33-34; *S v Sithole and others* 1999 (1) SACR 227 (T) at 229h-i.

committed an offence in respect of any particular person, the accused may be charged in one charge with the commission of that offence on divers occasions during a stated period.'

[95] The authors of *Du Toit: Commentary on the Criminal Procedure Act*¹² indicate that an accused's right to a fair trial 'is placed in jeopardy where the prosecution proceeds on a single count of rape while the evidence supports a multiplicity of rapes'. If the respondent is unable to specify each occasion on which the crime was committed, it ought to rely on s 94, as it was intended to cover the commission of the offence on diverse occasions, as in this instance.

[96] There is a lack of clarity in the court *a quo*'s finding on conviction, as it was silent in respect of the circumstances under which, and if, the CLAA was applicable. The problem faced by the respondent is the effect of the court *a quo*'s silence in not pronouncing on the aspect of common purpose, which is that the prescribed minimum sentence applicable to each individual count of rape is that of ten years' imprisonment, as argued by Ms Citera.

[97] There is also a further issue with the record in that exhibit B, which is the SAP69 form,¹³ reflects that the appellant was found guilty of three individual counts of rape and sentenced to life imprisonment, which does not accord with the verdict in the transcribed record. The verdict reads as follows:

'The Court finds that there were two counts of sexual intercourse. The accused is accordingly found guilty as charged on two counts of rape.'

[98] This clearly is a misdirection as there was no evidence to support the finding that the appellant acted in common purpose. The finding of the court *a quo* that there were two instances of non-consensual intercourse is correct. What is not correct was the finding that the appellant was found guilty as charged. There is no evidence that the appellant, when he committed the rapes, acted in furtherance of a common

¹² S Terblanche (general ed) *Du Toit: Commentary on the Criminal Procedure Act* (RS 72, 2024) at ch14-p38.

¹³ The record at 198 and 199.

purpose with a third party, as alleged in the charge sheet.

[99] What is evident from the evidence and the judgment of the court *a quo* on conviction, is that the court *a quo* considered that the complainant had been raped twice by the appellant on the same day. Such a finding is consistent with the evidence presented, specifically with the complainant's evidence that the appellant penetrated her on two separate occasions and ejaculated. Although she testified that he had 'raped her three times' this does not accord with the transcribed record. In my view the record established two separate acts of penetration. I agree with the respondent's reliance on *Blaauw* in this regard as the facts of this matter are distinguishable from that of *Tladi*.¹⁴

[100] Part 1 of Schedule 2 of the CLAA also provides for the minimum sentence of life imprisonment in circumstances where the victim was raped more than once by an accused. The facts support such a finding. In addition, no prejudice can be complained of by the appellant, as he was forewarned of the prescribed minimum sentence of life imprisonment on each count. His defence of consent would have remained unchanged if the respondent had at the outset relied on the provisions of s 94 and had merely charged him with one count of rape committed on diverse occasions. I am fortified in this view having regard to the Full Court decision in *S v Molaza*¹⁵ Specifically paragraph 126 of the judgment in which the court held..."The **number of counts** of rape of which an accused is convicted, does not dictate whether the 1997 Act is triggered. The facts underpinning the conviction/s do."

[101] There is also no reason to amend the charge sheet, in my view, as the facts support a finding of rape in circumstances contemplated by item (a)(i) of Part 1 of Schedule 2 of the CLAA¹⁶ in circumstances where the appellant raped the

¹⁴ *S v Tladi* [2013] ZASCA 85; 2013 (2) SACR 287 (SCA).

¹⁵ *Molaza v S* [2020] 4 All SA 167 (GJ) paras 103 and 104.

¹⁶ The wording of Part 1 of Schedule 2, prior to the amendment by the Criminal and Related Matters Amendment Act 12 of 2021, would be applicable as the offence was committed in 2011. Item (a)(i) of Part 1 of Schedule 2, at the time when the offence was committed, provided as follows:

'Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007:

(a) when committed
(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice...'

complainant on two occasions.

[102] In my view for the reasons aforementioned and on the objective evidence, the appellant is entitled to be acquitted on one count of rape in terms of s 106(4) and the appeal on the two counts of rape ought to be upheld. However, a verdict of guilty on one count of rape as contemplated in item (a)(i) of Part 1 of Schedule 2 is warranted as the complainant was raped more than once by the appellant.

Sentence

[103] The powers of an appellate court to intervene in a sentence imposed by a lower court is circumscribed. This is consistent with the principle that the imposition of an appropriate sentence resides pre-eminently within the discretion of the trial court.

[104] An appellate court may interfere with the sentence imposed where there are material misdirections, which vitiate the exercise of its discretion. In such instance, the appellate court is then entitled to consider the question of sentence afresh. In the absence of a material misdirection, the appellate court may interfere with the sentence imposed if ‘the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed ... is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”’.¹⁷

[105] The court *a quo* found that there were no substantial and compelling circumstances and found the personal circumstances of the appellant without moment. It concluded that given the nature of the offences, there was no reason to depart from imposing the prescribed minimum sentence of life imprisonment. When imposing sentence, the court *a quo* held that the appellant had ‘being found guilty of rape committed more than once, and especially on two occasions’.

[106] Whilst Ms Citera was correct that the court *a quo* did not find that the appellant acted in common purpose, I disagree with the submission that, given this, the prescribed minimum sentence was ten years on each count. What the court a

¹⁷ *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

quo had in mind was that the appellant was guilty of raping the complainant more than once. This would mean that the applicable minimum sentence was that of life imprisonment, as held by the court *a quo*, as item (a)(i) of Part 1 of Schedule 2 was applicable.

[107] In arriving at an appropriate sentence, I have had regard to the personal circumstances of the appellant, that he is a first offender and has two children. These personal circumstances must be considered in light of the triad of *Zinn* against the nature of the offence. Rape is regarded by society as one of the most heinous crimes. Women have the right to walk freely in the streets and to feel safe in their homes. The Supreme Court of Appeal has voiced its view that

‘The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.’¹⁸

[108] For reasons aforementioned relating to the conviction, the appellant raped the complainant more than once, namely on two occasions. I accept, having regard to the principle set out in *Blaauw*, this court can ameliorate the conviction by taking the sentence as one for purposes of the individual rape counts. However, this is not necessary in this instance as the appellant has been convicted of one count of rape.

[109] The starting point is the prescribed minimum sentence of life imprisonment. I am mindful that where violent crimes are committed by men against women, the prescribed minimum sentences were enacted to abate the commission of these offences. In this instance I must also take into account the fact that the rapes were committed closely in time and space.

[110] In the result, I am of the view that the sentence of life imprisonment imposed is disproportionate, having regard to the nature of the offences, the circumstances under which they were committed, the time the accused spent in custody, and his

¹⁸ *S v Chapman* 1997 (3) SA 341 (SCA) at 345C-D.

personal circumstances. I am also of the view that, given the fact that alcohol played a role in the commission of the offences, this too must be factored into the equation when deciding on an appropriate sentence. I am of the considered view that a sentence of 25 years' imprisonment is more appropriate in the circumstances.

Order

[111] In the circumstances the following order will issue:

1. The appeal against the conviction on two counts of rape is upheld.
2. The judgment of the court *a quo* is set aside and substituted with the following:

‘2.1. The accused is found not guilty on counts 1 and 2.

2.2. The accused is convicted on one count of rape in circumstances where the victim was raped more than once by the accused namely on two occasions, as contemplated in item (a)(i) of Part I of Schedule 2.’

3. The appeal against sentence is upheld.
4. The sentence of the court *a quo* is set aside and replaced with the following sentence:

‘The accused is sentenced to 25 years imprisonment.’

5. Such sentence is ante-dated to 25 October 2012.

HENRIQUES J

PP MPONTSHANA AJ

CASE INFORMATION

Date of Hearing:	24 May 2024
Date of Supplementary Heads of Argument and written submissions:	21 June 2024
Date of Judgment:	29 October 2024
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This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h000 on 29 October 2024.