IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable / Reportable
Appeal case no: **A13/2025**
Case no: **RC322/2021**

In the matter between:

KABELO WILLIE MOKOENA **APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Mokoena v The State* (A13/2025) [2025] ZAFSHC 240 (12 August 2025)

Coram: Mbhele AJP and Benade AJ

Heard: 05 May 2025

Delivered: 12 August 2025

Summary: Criminal Law – rape – whether the appellant had raped the complainant more than once. Appeal upheld – sentence altered.

ORDER

1 The appeal against conviction is upheld.
2 The conviction is set aside and replaced with the following:

'The accused is found guilty of the offence of rape as contemplated in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 read with s 51(2) of the Criminal Law Amendment Act 105 of 1997.'

3 The appeal against sentence is upheld.

4 The sentence is set aside and replaced with the following:

'The accused is sentenced to ten (10) years' imprisonment.

The sentence is antedated to 9 April 2024.'

JUDGMENT

Benade AJ

Introduction:

[1] This is an appeal against conviction and sentence with leave of the trial court. The appellant was found guilty of having raped the complainant more than once by the Regional Court sitting in Welkom on 9 April 2024. He was sentenced to twelve years' imprisonment in terms of s 276(1)*(b)* of the Criminal Procedure Act 51 of 1977.

[2] Regarding the sentence imposed following the conviction upon the aforementioned charge, it was submitted by advocate Potgieter on behalf of the appellant, that the sentence is not challenged if this court upholds the trial court's finding that there were two acts of penetration. The appellant calls upon us to interfere with the sentence imposed by the trial court only if we find that there was only one act of penetration. He submitted that if this court finds that the appellant is guilty of only one act of rape, there would then be no factual finding bringing the alleged offence within the ambit of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLA), and s 51(2) would thus be applicable.

[3] The State led the evidence of three witnesses in support of its case, namely, P[…] G[…] S[…] (the complainant), T[…] J[…] M[…] (the complainant's husband), and Mamello Tabita Ramateletse (a constable attached to the service centre at the

Thabong police station). The appellant testified on his own behalf and also called Mr Magoa Piet Letsele.

[4] The complainant testified that the appellant is an ex-boyfriend from an intimate relationship that lasted for five years from 2012 to 2017. It was an on-and-off relationship. In 2017 she met her current husband whom she married in March 2018. In November 2018 she started receiving calls from the appellant and it did not sit well with her

[5] She informed her husband about the calls. On 25 November 2018 her husband went to Virginia. He took her to her parental home in Thabong where she was to stay for the whole day. They had arranged that her husband would fetch her on his way from Virginia. While at her parental home, she received a call from the appellant asking her to meet him at Lesiba tavern which is close to her parental home. When she asked the reason for the requested meeting, the appellant told her that he just wanted to talk to her. On her arrival at the tavern the appellant was sitting in a police vehicle with another police officer. The appellant invited her in and the vehicle drove away with her to an area in Thabong called 2010. They went to a house rented by the appellant's friend. On their arrival the appellant and the complainant alighted and got into an empty house while the driver drove off.

[6] They were the only persons inside the house. The appellant started kissing her while in the kitchen, she resisted and pushed him away. The appellant told her he wants to have sexual intercourse with her and pushed her aggressively to the bedroom. When she asked the appellant what he was doing he told her that he has sexual desires. His facial expression changed and he became aggressive. She tried to escape but the appellant dragged her and took her blouse off, pushed her to the bed and pulled down her skirt, undressed himself and put on a condom on his erect penis. He then penetrated her vaginally with his penis and had sexual intercourse with her without her permission. There was a physical struggle between them but the appellant overpowered her. He eventually got off her and told her to leave her husband and fix things with him, which she objected to.

[7] After the sexual intercourse, the appellant went to the bathroom and when he returned, he got onto the bed again and fell asleep. When he was asleep, she took the house keys out of his trousers, opened the door, and stood on the side of the house where it was dark. She phoned her husband and told him that she had just been raped and that she was on her way to the police station. Her husband asked her about her exact location and she told him she was in the 2010 area of Thabong.

[8] She managed to get a taxi just outside the premises and while in the taxi her husband called her back asking her exact location. When she could not tell him, he spoke to the taxi driver who told him where they were. Her husband requested the taxi driver to wait at that spot until his arrival. As her husband arrived, she, at his request, took him to the place where she was raped. On their arrival he went into the house and came back to report that the appellant was still asleep. They thereafter went to police station where she laid a charge of rape. She was later taken for medical examination.

[9] During cross-examination it was put to her that on 24 November 2018 she was the person who initially called the appellant. She denied it and insisted that the appellant was the one who called her and requested that they should meet up. She also denied consenting to sexual intercourse with the appellant.

[10] In his evidence, the appellant testified that on 24 November 2018, the complainant sent text messages to him wanting to meet him. He initially ignored the messages until she called him. Eventually he told her that they should meet at Lesiba's tavern. The complainant came to Lesiba's tavern. They got into the car and drove off. It was in a police vehicle driven by his colleague Piet Letsele. According to him prior to driving off they had already agreed that they were going to sleep over at 2010 section. They drove off to the house of a former colleague of his and they did so because he and the complainant had agreed that they were going to sleep over there. At the house, he unlocked the door, entered and sat on the bed while having a conversation. They spoke about many things, like her altercation with her husband.

Eventually, the complainant undressed herself and he also took his clothes off whereafter they had consensual sexual intercourse. He, thereafter, fell asleep. In the morning when he woke up, he noticed that he was alone in the house. In the early morning hours of 25 November 2018, he was alerted by his friend, Piet Letsele, that a case docket for rape had been opened in 2010 section and that the suspect was a police officer. Piet Letsele encouraged him to phone the complainant. When he phoned the complainant, she said that she tried to wake him up on several occasions but could not succeed. She then left. The appellant was advised to rush to the police station, which he did. He found the complainant at the police station in the 'victim empowerment room' and asked her what went wrong, but she did not respond.

[11] He wanted to show the text messages he received from the complainant, on his phone, when she asked him for a meeting. He discovered that all the messages were deleted. He suspected the complainant deleted them.

[12] The complainant was subjected to gruelling cross-examination and she was not shaken. The same cannot be said of the appellant who changed his version as he went by. From the record, the complainant came to the fore as a credible and reliable witness. As against her version, important parts of the appellant's version were not put to her.

[13] The appellant's version that the complainant agreed that they were going to sleep over at 2010 section, or that they initially sat and talked inside the house, that the sexual intercourse was consensual, that after he woke up, he called her and got a report that the complainant tried to wake him up several times to no avail, whereafter she left, as well as the allegation that complainant left him a message explaining why she left without his knowledge, were not put to the complainant during her testimony.

[14] The appellant's counsel submitted that the trial court ignored material contradictions between the testimony of the complainant and her husband, namely

when they got married, when the appellant and the husband had an altercation in the tavern, where the complainant was on 24 November 2018, the day leading up to the rape incident and how she was dressed when she met her husband after the incident. These contradictions were immaterial and none of it pertains as to her version regarding the rape and events leading up thereto.

[15] The appellant's counsel argued that it is improbable that the complainant would have agreed to see the appellant at a tavern (given that her husband may return at any stage to pick her up from her parental place), that it is improbable that the complainant then left with the appellant in a vehicle to talk to the appellant at his request when this conversation could have been done over the phone when at her parental home. In his view the complainant's actions are an indication that she left with the appellant to have consensual sexual intercourse with him.

[16] To assess the conviction of the regional court, the credibility of the complainant and her reliability must be assessed against the probabilities. Regarding her credibility, her veracity will have to be evaluated as against subsidiary factors such as her candour, her bias, internal contradictions in her evidence, external contradictions as to what was put on her behalf, the calibre and cogency of her performance compared to that of other witnesses and the probability or improbability of particular aspects of her version. Her reliability will depend on the opportunity she had to experience and observe the event in question, and the quality and integrity of her recollection thereof. The above will then be evaluated against the probability or improbability of her version as against that of the appellant.[1]

[17] In *S v Jackson* 1998 (1) SACR 470 (SCA) at 476 E-F, the erstwhile cautionary rule that applied to the evidence of female complainants in sexual cases was abolished. The burden is now on the State to prove the guilt of an accused beyond a reasonable doubt – no more and no less. Section 60 of the Criminal Law Amendment (Sexual Offences and Related Matters) Act 32 of 2007 also now provides as follows since 16 December 2007:

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[1] *SFW Group Limited v Martell* 2003 (1) SA 11 (SCA) para 5; *Commercial Union Insurance Company of SA Ltd v Wallace N.O.* 2004 (1) SA 326 (SCA) para 41.

'Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.'

[18] The trial court evaluated the evidence and came to the conclusion that the state witnesses were truthful and rejected the version of the appellant as improbable. It is trite that factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. The acceptance by trial court of oral evidence and conclusions thereon are presumed to be correct, absent misdirection.[2] A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong.[3]

[19] Accordingly, the appeal against the conviction on the charge of rape, cannot be upheld. What further needs consideration is whether the appeal against the conviction on the basis that the complainant was raped more than once, should be upheld.

[20] It is an immutable principle of procedural law that leading questions may not be put during examination-in-chief.[4] The test is whether the question has been phrased in such a manner as to suggest the answer to the witness – even the questioner's inclination or bearing may play a role.[5] The reason for the general prohibition of leading questions in examination in chief is the risk that a witness on hearing such questions may think it an invitation, suggestion or even instruction to him to not answer the question unbiasedly and truthfully, but to answer it in a way that favours a party calling him or her.[6] Evidence elicited as a result of leading questions carries little, if any, weight as it has the potential to lead to injustice.[7] In this case flagrant leading questions as to the crucial aspect of whether rape

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[2] *S v Francis* 1991 (1) SACR 198 SCA at 204E-D.
[3] *R v Dhluwayo & another* 1948 (2) SA 677 (A) at 705-706.
[4] *Pretorius, J.P.: Cross-examination in South African Law* (LexisNexis, 1997 at 93).
[5] C Schmidt and H Rademeyer *Law of Evidence* (Service Issue 1) para 9.2.4.1 at 9-51.
[6] *S v Rall* 1982 (1) SA 828 AD at 831E; *R v Elijah* 1963 (3) SA 86 SR at 90D; *R v Ngcobo* 1925 AD 561 at 564.
[7] *S v B* 1996 (2) SACR 543 CPD at 556 a-b.

happened more than once, was put to the complainant by the prosecutor, and without interference by the court or objection thereto by the defence attorney.

[21] After the complainant testified that after the one round of sexual intercourse the appellant got up, went to the bathroom, came back, got onto the bed again and fell asleep, the following question came from the prosecutor:

'I want to take you back before you fell asleep. Before that, I want to first talk about that. In other words, before you took the key as you have indicated now. After the initial sexual intercourse, think back, try to refresh your memory, what happened then? After the initial sexual intercourse what happened before you fell asleep and she took the key?'

[22] As already alluded to, the appeal against sentence is only on the basis that if the court of appeal overturned the court *a quo*'s finding that the complainant was raped more than once, then the court should consider imposing a sentence afresh.

[23] In answer to the question, the complainant again testified that the appellant got onto the bed and that is when he fell asleep, as he was intoxicated. Unsatisfied, the prosecutor then put the following question: 'Was there only one round of sexual intercourse? That is what I am trying to ascertain.' Thereupon, the complainant said it was twice. Following that answer, she was prompted as to how the second round of sexual intercourse came about. The test as to whether a question was a leading question or not is, as held above, whether it has been phrased in such a manner as to suggest the answer to the witness – and even the questioner's inclination or bearing may play a role.[8] In this case it happened twice as can be seen from the above two quotations of the record. The effect thereof is that her answer elicited carries little, if any, weight. It is, therefore, apparent from the record that the complainant did not voluntarily (without being prompted) testified that she was raped more than once.

[24] Therefore, the trial court misdirected itself when it found that the appellant raped the complainant more than once. Accordingly, the appeal against conviction of

[8] Footnote 5.

rape as defined in part 1 of schedule 2 of the Criminal Law Amendment Act 105 of 1997, ought to succeed. The appellant ought to have been convicted of raping the complainant only once.

[25] The court *a quo* found the following personal circumstances of the accused as compelling and substantial circumstances warranting deviation from imposing the prescribed minimum sentence of life for the offence of rape falling within the ambit of s 51(1) of the Criminal Law Amendment Act: the appellant was a first offender, is a police officer, the complainant did not sustain any physical injuries, the appellant and complainant were in a sexual relationship previously, the appellant is a breadwinner with children and had a partner who depended on him and further that the appellant has been drinking on the day in question, which in the court's view, might have affected his judgment on that day.

[26] The prescribed minimum sentence for the conviction of rape falling within the ambit of s 51(2) is 10 years' imprisonment. When considering the totality of the facts and circumstances, as well as the applicable principles in relation to sentencing, I am unable to agree with the court *a quo`s* finding that there are substantial and compelling circumstances warranting the imposition of a lesser sentence. The appellant is a police officer, he lured the complainant into a trap knowing very well what his true intentions were about her. He even used a police vehicle as an instrument to perform his despicable act. Society expected him to protect the complainant; unfortunately, he betrayed the trust bestowed on him.

Order:

In the result the following order is issued:

1 The appeal against conviction is upheld.

2 The conviction is set aside and replaced with the following:

‘The accused is found guilty of the offence of rape as contemplated in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 read with s 51(2) of the Criminal Law Amendment Act 105 of 1997.’

3 The appeal against sentence is upheld.

4 The sentence is set aside and replaced with the following:

‘The accused is sentenced to ten (10) years’ imprisonment.
The sentence is antedated to 9 April 2024.’

BENADE AJ

I concur:

MBHELE AJP

Appearances:

For the Appellant:	J Potgieter
Instructed by:	Jacobs Fourie Attorneys
For the Respondent:	S Mdazuka
Instructed by:	Office of the Director of Public Prosecution, Bfn