



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

Case no: AR431/2024

In the matter between:

NEVISHEN GOVENDER

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: the Regional Court for the Regional Division of KwaZulu-Natal, held at Durban (sitting as a court of first instance):

1. The appeal on both conviction, and sentence is dismissed.
2. The order that the sentences shall not run concurrently is set aside and substituted.
3. It is ordered that the sentence on count 2 shall run concurrently with the sentence on count 1 in terms of s 39(2)(a)(i) of the Correctional Services Act 111 of 1998.

JUDGMENT

Hlatshwayo J (Mossop J concurring)**Introduction**

[1] This is an appeal in terms of s 309 (1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA). The appellant stood trial in the Regional Court, Durban, on one count of rape as stipulated in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA). In addition, he faced one count of sexual assault as defined in s 5 of the above-mentioned Act. He was thereafter convicted on both counts on 18 October 2023 and was sentenced to an effective 10 and 5 years' imprisonment respectively. He now appeals against both conviction and sentence with leave of this court.

Factual background

[2] The incidents commenced around March 2013 when the complainant was 12 years old. When she testified in 2022 she was 21 years old. The case for the prosecution is that the appellant is the uncle of the complainant. Sometime in the first half of 2013, the complainant's brother participated in a sport activity and her parents had accompanied him to Johannesburg. As a result, the complainant was left behind and stayed with her father's relatives where the appellant also resided.

[3] On the night in question the complainant was seated in the lounge together with the appellant and the appellant's sister, named K[...], watching television. After the appellant's sister retired for the night, the appellant pulled the complainant by her hand from the lounge to the kitchen. He began kissing her and proceeded to insert his hand inside her underwear and inside her vagina. This occurred for sometime, and the appellant thereafter stopped. There was nothing said by either of them during this incident and the complainant thereafter went to sleep. She did not tell anyone about the incident because she was scared and did not know what to do.

[4] The following day the complainant was due to attend her friend's party in the afternoon in Durban. A prior arrangement had been made by the complainant's father for the appellant to transport her to the said party. Along the way whilst the

appellant was driving, he instructed the complainant to take off her pants. The complainant did not do so. When they reached the stop street, the appellant reached over from his driver's seat and forcibly pulled down her pants. He proceeded to place his hand on top of her underwear and eventually inside her underwear. The appellant then moved his hand while touching her vagina. The appellant continued to drive for a short while and thereafter pulled out his hand. The last time she saw him was when he dropped her off at the party as she did not return to his house.

[5] Another incident occurred in 2014 when the complainant and her family attended the appellant's birthday celebration at one of the holiday homes in the South Coast. The complainant slept in the same room with her brother but used different beds. On the second night the appellant entered her room and attempted to climb onto her bed by pushing the complainant to the side. During this encounter the appellant was drunk, and the complainant pretended to be asleep. When the appellant was not successful in his endeavours, he grabbed the complainant's wrist and attempted to pull her out of the bed whilst also attempting to push her head towards his pants. As a result of the commotion the complainant's father who was sleeping in the room next door came to her room. Upon his arrival, the appellant acted as if he wanted to climb onto the top part of the bunk bed by grabbing the staircasing.

[6] Due to the appellant's state of intoxication the complainant's father could not convince him to leave the room. As a result he instructed the complainant to sleep with her mother in the next room whilst he slept in the bunk bed. After some time the appellant came to where she slept and again tried to pull her out of bed. He once more did not succeed and eventually left.

[7] The complainant testified that her father at some stage requested the appellant to repair the complainant's cell phone. Subsequently, the appellant claimed that he had seen her inappropriate photos with a pillow and would forward those photos to her parents. The complainant was startled and did not know what photos the appellant was referring to. The appellant did not share any information about these photos despite her requests.

[8] The final incident occurred in 2019 during the wedding of the complainant's cousin, which was held at the cousin's residence. When the said the wedding was over and the complainant was walking from the back of the house towards the car, she encountered the appellant in the passage. The appellant pushed her against the wall and told her that he wanted to have sex with her. She managed to push past him and left. The complainant did not tell anyone about all these incidents because she was scared and did not think anybody would believe her. She eventually mustered the courage in 2020 and informed her boyfriend Mr S[...] S[...]. This was prompted by the events of rape and the killing of the young woman by the name U[...] M[...] at a post office in Cape Town. In addition, she was much more comfortable to share the events with her boyfriend but also implored him not to divulge any of the said information.

[9] Fast forward to May 2021, the appellant sent a WhatsApp message to the complainant asking if she told anyone about what occurred between them and if she enjoyed it. The complainant's response was that she vividly remembers the appellant taking advantage of her when she was 12 years old and thereafter proceeded to recount what the appellant had done to her. She also recounted the alleged threats by the appellant to send photos of her to her parents. She requested that the appellant must not remind her of these incidents in future and the appellant apologised. The complainant thereafter reported the incidents to her mother and showed her the above-mentioned messages. The appellant was thereafter arrested and charged.

[10] When the appellant testified, he denied all allegations of rape and sexual assault. He alleged that the complainant did not visit his home in March 2013 but visited in August 2013. He remembers this because the following day was his grandmother's birthday. He testified that he got married on 17 March 2013 and when the complainant visited them, his wife was present at all material times. He alleged that he arrived at night around 7.00 pm from work and greeted both the complainant and his sister and proceeded straight to his own room where his wife was. He denied watching television with the complainant and refuted the allegations of kissing her and rape. He also denied undressing her and touching her vagina when his motor vehicle was stationary.

[11] He alleged that the real reason the complainant filed the charges against him is because he had observed nude videos of her whilst fixing up her phone. He wanted to inform the complainant's parents about this inappropriate behaviour however the complainant requested him not to. He also denied that he attempted to get into the complainant's bed during his birthday celebration in South Coast. He alleged that on that occasion he spent most of his time with his wife and did not spend any time with the complainant who was a child. He also denied that he told the complainant he wanted to have sexual intercourse with her during the wedding of her cousin and alleged that the first time he became aware of any allegations against him was in 2021 when he was contacted by the police.

[12] His wife Mrs Govender confirmed his evidence regarding when the complainant visited their home and alleged that after his arrival from work he spent the rest of the night with her. She went further to allege that when the appellant fixed the complainants cell phone, he discovered inappropriate videos of her and the appellant showed it to her. She confronted the complainant and the latter pleaded with her not to tell her parents.

Legal submissions

[13] Before us the appellant attacks his conviction on the basis that the State failed to prove the crucial elements of the offences, namely, the absence of consent to the sexual acts and mens rea. Ms Barnard on behalf of the appellant argued that even though the defence of consent was not raised during the trial, he is entitled to raise it on appeal as a legal point. Reliance was placed on *S v MN*¹ Where this Court stated the following on this issue:

‘...While this defence was not raised at the trial, it is certainly open to be raised on appeal, as a legal point. It is for the State to prove the requisite mens rea. On the facts it cannot be said that the State proved that the appellant knew that the complainant did not consent to the sexual intercourse...’

[14] It was submitted that, on the evidence on record it is apparent that the complainant did not do or say anything to suggest that she was not a consenting

¹ *S v MN* 2010 (2) SACR 225 (KZP) (*S v MN*) para 13.

party to the acts. She did not push the appellant away nor did she cry or report the matter to anyone which would be an indication that she had not consented to his conduct. In addition, when the appellant pulled off her pants she did not hold on to them and did not suggest she was against what he was doing. We were implored to consider *S v MN* where the complainant was 13 years old and the court concluded that the State did not prove by necessary inference that the appellant knew that the complainant did not consent. In casu it was contended that in light of the State's failure to prove that there was no consent, the only offences the appellant should have been convicted of, in the event it proved he committed the said acts, is contravention of s 15(1) of SORMA which reads:²

'A person ('A') who commits an act of sexual penetration with a child ('B') who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child...'

S 16(1) is worded the same but regulates sexual violations.

[15] It was further submitted that the State failed to prove that the complainant was penetrated. It was argued that her evidence in this regard was inconsistent with the evidence of the first report, Mr S[...]. On count 1 the complainant alleged the appellant inserted his finger inside her vagina. Mr S[...] on the other hand testified that he merely put his hands on her pants. Regarding count 2, the complainant alleged that the appellant put his hands inside her underwear. Under cross-examination she changed her testimony and alleged that he touched her underwear and allowed her to get dressed. Mr S[...]’s evidence was different since it alleged that he put his hand inside her vagina. The appellant contends that the above inconsistencies render the complainant’s evidence unreliable.

[16] The respondent drew our attention to *Director of Public Prosecutions Eastern Cape v Coko*³ where the Supreme Court of Appeal (the SCA) remarked that a mere submission or acquiescence, or lack of resistance does not convey a willingness to engage in a penetrative sexual act and none of these would constitute consent. The complainant in this matter was 12 years old. She repeatedly testified that during the

² In respect of count 2 s 16(1) of SORMA would find application.

³ *Director of Public Prosecutions Eastern Cape v Coko* [2024] ZASCA 59; 2024 (2) SACR 113 (*DPP Eastern Cape v Coko*) para 56.

incidents she was scared and did not know what to do. The appellant was her uncle and she was on her own in the appellant's house and away from her home. Regarding the second incident in the appellants car, she testified that when it occurred, she froze. Ms Moosa for the Respondent contended that the mere submission to the appellants conduct does not amount to consent.

[17] When it comes to the inconsistencies between the evidence of the complainant and first report, Mr. S[...], it was submitted that this does not detract from the credibility of the complainant who rendered a clear account of when and how the incidents occurred. Her evidence of sexual violations by the appellant is supported by WhatsApp communications. On the other hand, the appellant and his wife gave contradictory versions regarding the events that took place and the appellant did not refute the allegations made against him in the WhatsApp communication.

The law on appeals

[18] It is now trite that an appeal court is slow to interfere with a trial court's factual findings unless there has been material misdirection or the trial court has overlooked important evidence or misconstrued the evidence it considered. In general, the trial court is in the best position to make findings on fact because it observes all witnesses and is steeped in the atmosphere of the case. In *S v Shaik and Others*⁴ the SCA echoed the following principle:

'It is settled law that a Court of appeal will not lightly disturb a trial Court's factual findings, including conclusions on credibility, where the trial Court has been able to hear the evidence being given and observe the witnesses while giving it. This is because a trial Court has that peculiar advantage and a Court of appeal does not...'

[19] Again in *S v Hadebe and Others*⁵ the following was said:

'...in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong...'

⁴ *S v Shaik and Others* [2006] ZASCA 105; 2007 (1) SA 240 (SCA) para 87.

⁵ *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645E-F.

[20] It is settled that the onus of proof in a criminal matter rests upon the prosecution to prove the guilt of the accused person beyond a reasonable doubt. Equally trite is that proof beyond a reasonable doubt does not equate to proof beyond a shadow of doubt or absolute certainty as to the guilt of the appellant person. The proper approach on how to evaluate the evidence was well enunciated in *S v Chabalala*⁶ where Heher AJA stated:

‘...The correct approach is to weigh up all the elements which point towards the guilt of the appellant 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 appellant’s guilt...’

Discussion

Mens rea

[21] Section 3 of SORMA defines the offence of rape as:

‘Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape.’

Accordingly, there are two crucial elements of the crime of rape that the State must establish in order to secure a conviction on rape. They are (a) an act of sexual penetration without consent, and (b) intent, commonly known as *mens rea*. SORMA also extensively describes what is consent and broadens what constitutes sexual penetration.

[22] The element of intention is vital because rape can only be committed intentionally. The principle of our criminal justice system is expressed in the maxim *actus non facit reum nisi mens sit rea*, the act is not wrongful unless the mind is guilty. *In casu* it means that intentional sexual intercourse had to take place with the appellant knowing that there was no consent by the complainant.⁷

[23] Before us the appellant raised a legal point that the State failed to prove the requisite *mens rea*. In support of his proposition our attention was drawn to *S v MN*. The court in *S v MN* was seized with the question of whether the State discharged

⁶ *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

⁷ *S v Zuma* 2006 (2) SACR 191 (W) at 205E.

the onus to prove that the appellant had the necessary intention to commit rape. The salient facts in *S v MN* were very brief. The complainant was 13 years old at the time when she was allegedly raped by her biological father. She subsequently became pregnant from the said incidents and later gave birth. She had not consented to the sexual intercourse. Having found that the magistrates' findings on the credibility of the complainant was correct, the court went on to state the following:⁸

'...On the facts it cannot be said that the State proved that the appellant knew that the complainant did not consent to the sexual intercourse. The fact that the appellant had approached in the dead of the night does not lead to the necessary inference that he intended to rape the complainant. This is particularly so after the first occasion on which no subsequent protest was raised. The complainant did not cry, she did not raise the matter with anyone or in any way give any indication that she had not consented to this conduct. A further factor is the enquiry by the appellant, when the complainant stretched after the second occasion, as to what she was doing. This does not appear to me to be consistent with a guilty mind on the part of the appellant. The test for *mens rea* must be distinguished from the test concerning whether the complainant in fact consented. She did not. I cannot find, however, on the evidence before the court *a quo*, that it was proved by necessary inference that the appellant knew that the complainant did not consent.'

[24] I respectfully disagree with the reasoning in *S v MN*. It is well settled that the test for *mens rea* is subjective but is often objectively assessed. In *S v Mini*⁹ Holmes JA outlining the enquiry on this issue held that:

'...Hence there is no direct testimony as to his subjective state of mind at the time of the stabbing. The question is therefore whether an inference can be drawn, from the proved facts, that he foresaw the possibility of death resulting from stabbing the deceased, and was reckless of the result. In this connection regard must be had in the main to factors indicating what was in his mind *before* he struck the blow, and to some extent to what was in his mind as he was striking.'

[25] It follows that the proper approach to determine *mens rea* is to consider the accused state of mind when he had sexual intercourse with the child. The court in *S vs MN* did not do so. It focused only on what the child did not do to demonstrate that she did not consent and concluded that *mens rea* was not proved by necessary

⁸ *S v MN* para 13.

⁹ *S v Mini* 1963 (3) SA 188 (A) at 190G-H.

inference. It has been held that a mere submission, or acquiescence or lack of resistance does not convey a willingness to engage in a penetrative sexual act¹⁰.

[26] The correct approach in determining *mens rea* in rape matters was aptly articulated in *DPP Eastern Cape v Coko*¹¹ as follows:

‘As to the element of mens rea, it is beyond question that intention is a prerequisite for a conviction as it is an integral part of the definition of the statutory crime of rape. A must know that B had not consented to a penetrative sexual act. Therefore, the appellant may “escape [criminal] liability on the ground of absence of knowledge of unlawfulness of his conduct if he [or she] believed the complainant . . . was in fact consenting”. Even dolus eventualis suffices, which means that it is sufficient to prove that A foresaw the possibility that B’s free and conscious consent might be lacking, “but nevertheless continues to act [recklessly] appreciating that [he/she may be acting without her/his consent], therefore ‘gambling’ as it were [with the security, bodily integrity and dignity] of the person against whom the act is directed.”’ (Footnotes omitted.)

[27] Applying the correct legal test of *mens rea* the court in *S v MN* would have been impelled to find that the appellant foresaw the possibility that his sexual intercourse with his daughter who had been asleep, was not with her consent, but nevertheless continued, reckless as to the result, and thereby gambled with the bodily integrity of the said child. It certainly would not have drawn a negative inference from the child’s lack of resistance or protest. The power imbalance between the father and child would have dissuaded it from the finding that the child’s failure to cry or report the matter to anyone was an indication to the appellant that there was consent. Moreover, the appellants’ version that he did not have sexual intercourse with the child was correctly rejected based on the DNA evidence. There was thus no basis to conclude that he lacked the requisite intention.

[28] Nonetheless, facts in *S v MN* differs to a certain extent with this matter. *In casu*, whilst the complainant was sitting in the lounge watching television the

¹⁰ *DPP Eastern Cape v Coko* para 56 supra.

¹¹ *DPP Eastern Cape v Coko* para 62.

appellant without any discussion or conduct on her part pulled her to the kitchen. That is where penetration occurred. Clearly, he knew at that stage that the complainant did not consent to his actions. It is also without question that he foresaw the possibility that his actions were without the consent of the complainant but nevertheless proceeded reckless as to the consequence. He thus possessed the requisite *mens rea* to commit rape. The same conclusion must be reached regarding the incident that occurred the following day in his car. During this incident he asked the complainant to undress, and she refused to comply. The subsequent forcible removal of her pants and the touching of her vagina by the appellant was once more without her consent.

[29] The appellant's contention that the complainant's failure to push him away and to do anything during the incidents suggested, or gave the appellant an indication, that she was a consenting party to his conduct is untenable. For starters the appellant denied committing any of the acts of rape and sexual assault. Secondly, I have found that there is strong evidence that the appellant knew the complainant did not consent. More pertinently this contention is not founded on anything tangible regarding the conduct of the complainant but is based solely on myths alluded to earlier concerning the victim's behaviour during the rape.

[30] There is also no question of the applicability of sections 15 and 16 of SORMA. For these sections to be contravened, the victim must have consented to the sexual acts. In this matter no such consent by the complainant was established.

[31] Turning to the issue of penetration, the trial court found the evidence of the complainant credible. She related the events that took place in a clear manner. I cannot fault the trial court's finding on the credibility. The complainant was unshaken despite the lengthy cross-examination. The appellant's criticism of her evidence is based on certain inconsistencies with the evidence of the first report, Mr. S[...]. It goes without saying that the value of evidence of the first report cannot be placed on the level with the evidence of an eyewitness who observed the events testified about. The evidence of the eyewitness, such as the complainant, carries much more weight as compared to the first report whose evidence is secondary and serves to show consistency.

[32] Both the prosecutor and the defence counsel did not challenge Mr. S[...] regarding his omission that the appellant inserted his finger inside her vagina and this untested evidence cannot detract from the reliability of the complainant's evidence which was given in a clear manner. The evidence of the complainant regarding the existence of sexual abuse by the appellant is supported by WhatsApp communications between the appellant and the complainant where the latter recounted the abuse suffered when she was 13 years old. It is obvious from the chronology of events that criminal proceedings were not even contemplated when the WhatsApp exchanges took place thereby enhancing her credibility. Interestingly the appellant never denied any of the appalling allegations against him. I find no basis to interfere with the trial courts credibility finding.

[33] Ms Barnard conceded that the appellant's version was poor and was rightly rejected by the trial court. I do not intend to dwell on the merits of his defence. It will suffice to point out that his evidence that the complainant visited his home in August was inconsistent. His lawyer broadened the appellants versions regarding the dates that the complainant visited his home. Moreover, he contradicted himself on whether he observed nude pictures or videos of the complainant. His wife also did not do him any favours and contradicted his evidence regarding what took place when the complainant visited and the content of the alleged nude material. She further alleged that she confronted the complainant about the alleged nude pictures, yet the appellant claimed he did not show anyone. Taking into account the totality of the evidence, I am satisfied that the appellant was correctly convicted on both counts.

Sentence

[34] The appellant submitted that the effective sentence of 15 years imprisonment is unduly harsh and induces a sense of shock. This is in light of his favourable personal circumstances and compelling reasons for a sentence that is proportionate to the offence. It is trite that s 51(1) read with Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (CLAA) is applicable to the offence of rape. This is so, because the offence was committed against a complainant who was a child of 12 years at the time and life imprisonment is the prescribed minimum sentence. The only time the sentencing court may impose a lesser sentence is where there exist

substantial and compelling factors that cry out for the court to deviate from the prescribed sentence.

[35] Our courts have consistently stressed that the minimum sentences ordained by the legislature must ordinarily be imposed and must not be departed from lightly or for flimsy reasons.¹² The discretion of the court regarding what constitutes substantial and compelling factors however is unlimited and where there are objectively convincing reasons such as the circumstances of the case or the personal circumstances of the accused are such that they warrant a deviation from the prescribed minimum sentence, the court would be entitled to depart from the prescribed minimum sentence.

[36] In arriving at the sentence, the sentencing court took into account the appellant's personal circumstances *inter alia* his age of 34, that he was a first time offender, the fact that he is married with two minor children and that he was gainfully employed. The lapse of time from when the incidents occurred and the circumstances of how rape occurred by penetration with a finger as opposed to a penile penetration weighed heavily in mitigation of the sentence and called for a reduced sentence.

[37] It must be said that the appellant was convicted of a violent and heinous crime of rape. The complainant was twelve years old at the time. He took advantage of the trust placed in him both as her uncle and by her family. By violating the complainant, he had left her with trauma and long-lasting psychological scars which still affect her as an adult. The appellant's conduct is frowned upon by all right-thinking and self-respecting members of society.

[38] Rape of children and women in our country has become a pandemic. Not a day passes by that we do not hear of cases of sexual violence against children in our courts. It is the duty of our courts to play their role in the eradication of this scourge

¹² *Director of Public Prosecutions, Gauteng v Tsotetsi* [2017] ZASCA 83; 2017 (2) SACR 233 (SCA) para 27; *S v Malgas* 2001 (1) SACR 469 (SCA) para 9.

and impose severe sentences against those who commit these crimes. In *Director of Public Prosecutions, North Gauteng v Thabethe*¹³ the SCA made these remarks:

‘...Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting members of society. Our courts have an obligation to impose sentences for such a crime – particularly where it involves young, innocent, defenceless and vulnerable girls – of the kind which reflects the natural outrage and revulsion felt by law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system...’

[39] The presiding magistrate was quite entitled to deviate from a sentence of life imprisonment having regard to the circumstances of the case. The sentences of ten years and five years, respectively, are fair and proportionate to the crimes. I am not persuaded that the sentencing court erred.

[40] The above sentences were ordered not to run concurrently. Section 39(2)(a)(i) of the Correctional Services Act 111 of 1998 makes provision for the sentences to run concurrently and the court is called upon to consider whether it is appropriate to make this order by taking relevant circumstances. In making the above order the presiding magistrate reasoned that the aggravating circumstances of the case are such that the sentences must not run concurrently. The SCA in *Nemutandani v S*¹⁴ succinctly outlined that the following must be considered:

‘...the murder committed by the appellant was inextricably linked to the robbery of the deceased during which the deceased’s canvass shoes were removed and taken. It is trite law that an order for sentences to run concurrently is always called for where the evidence shows that the relevant offences are inextricably linked in terms of locality, time, protagonists and, importantly, the fact that they were committed by one common intent.’ (Footnote omitted.)

¹³ *Director of Public Prosecutions, North Gauteng v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA) para 22.

¹⁴ *Nemutandani v S* [2014] ZASCA 128 unreported case no 944/13 (22 September 2014) para 9.

[41] It is beyond question that the sentencing court misdirected itself when it took into consideration the aggravating circumstances as the only factor in ordering these sentences not to run concurrently. Those factors played a critical role in determining the sentence that is appropriate. In this matter, the order that the sentence shall run concurrently was called for considering that the offences in question are interrelated and there was no significant lapse of time between the two offences. For those reasons the appeal on both conviction and sentence must fail. However, the order that the sentences shall not run concurrently must be set aside and substituted with an order that they run concurrently, in terms of s 39(2)(a)(i) of the Correctional Services Act.

Order

[42] In the result, the following order is made:

1. The appeal on both conviction, and sentence is dismissed.
2. The order that the sentences shall not run concurrently is set aside and substituted.
3. It is ordered that the sentence on count 2 shall run concurrently with the sentence on count 1 in terms of s 39(2)(a)(i) of the Correctional Services Act 111 of 1998.

Hlatshwayo J

I agree.

Mossop J

Case information

Heard on : 06 February 2026

Delivered on : 20 February 2026

Counsel for the appellant : Ms D Bannard

Instructed by : P Naicker Attorneys
First Floor, Rennie House
Kingsmead Boulevard

Email : Pnaickerlaw@gmail.com

Counsel for the respondent : Mr N Moosa
Instructed by : Director of Public Prosecutions
KwaZulu-Natal
88 Joe Slovo Street, Durban
031 334 5265

Email : nmoosa@npa.gov.za