



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

HIGH COURT CASE NO: A27/23

DPP REFERENCE NO: 10/2/5/1/3-32/21

LOWER COURT CASE NO: SH6/105/2019

In the matter between:

MABUTHI T. MAYA

APPELLANT

and

THE STATE

Neutral citation: *Maya v The State* (High Court Case no: A27/23) [2026]
ZAWCHC (18 March 2026)

Coram: **LEKHULENI J et MAYOSI, AJ**

Heard: 25 November 2025

Delivered: 18 March 2026

Summary: Appeal against conviction for two counts of rape and subsequent minimum sentence of life imprisonment – evidence not proving elements of the second rape charge – elements of attempted rape established - appropriate sentence.

ORDER

- 1 **On appeal from:** The Regional Court, Parow, against conviction for two counts of rape and the sentence of life imprisonment.
- 2 The appeal against conviction in respect of count 5 is hereby dismissed.
- 3 The sentence of life imprisonment imposed by the court *a quo* in respect of counts 5 and 7 is hereby set aside.
- 4 The appellant is hereby sentenced to imprisonment for a period of 15 years in respect of count 5.
- 5 The appellant's second conviction for the offence of rape in count 7 is hereby set aside, and is replaced with an order that the appellant is guilty of the offence of attempted rape.
- 6 The appellant is sentenced to imprisonment for a period of 12 years in respect of count 7.
- 7 The sentences of imprisonment in respect of counts 5 and 7 shall not run concurrently.
- 8 In terms of section 280(2) of the CPA, the sentences in respect of counts 6, 11, 12 and 13 shall run concurrently with the sentence in count 5 and 7.

JUDGMENT

Mayosi AJ (LEKHULENI J concurring):

Introduction

[1] The appellant was arraigned in the Regional Court, Parow, on sixteen counts ranging from rape, sexual assault and robbery with aggravating circumstances arising from events that allegedly happened between 2016 and 2018, involving different complainants.

[2] On 24 February 2020, the appellant pleaded not guilty to all sixteen counts, and elected to remain silent.

[3] On 29 August 2022, the appellant was convicted by the court *a quo* on six of the sixteen counts, namely on counts 5 (rape), 6 (attempted robbery with aggravating circumstances), 7 (rape), 11 (attempted robbery with aggravating circumstances), 12 (assault) and 13 (compelling or causing a person to witness a sexual offence). He was acquitted on the remainder of the charges that he faced.

[4] The court *a quo* sentenced the appellant as follows:

[a] Life imprisonment for counts 5 and 7 which were taken together for the purposes of sentence.

- [b] Fifteen years imprisonment for counts 6 and 11. They were also taken together for the purposes of sentence.
- [c] Three years imprisonment for count 12.
- [d] Ten years imprisonment for count 13.
- [5] The sentences were ordered not to run concurrently. The appellant was declared unfit to possess a firearm and, furthermore, it was ordered that his name be recorded in the Register for Sexual Offenders provided for in section 50(2) of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 (**the Act**).
- [6] On 19 September 2022, the appellant filed a notice to appeal against the conviction and sentence of life imprisonment (i.e., counts 5 and 7). Leave to appeal was denied for the other charges of which the appellant was convicted. The appellant subsequently exercised his automatic right of appeal in respect of the two life sentences.
- [7] The particulars of the charges faced by the appellant in counts 5 and 7, are as follows:

THAT [he] is guilty of the crime of contravening the provisions of Section 3 read with Sections 1, 55, 56(1), 57, 59, 60, 61 and 68 of [the Act] read with Sections 256, 257, 261 and 281 of Criminal Procedure Act 51 of 1977; the provisions of Sections 51 and Schedule 2 Part I, II, III of the Criminal Law Amendment Act 105 of 1997, as amended as well as Sections 92(2) and 94 of the Criminal Procedure Act 51 of 1977. – Minimum sentences are applicable.

IN THAT on or about 28/06/2018 and at or near [home address], Welgemoed in the Regional Division of the Western Cape the said accused did unlawfully and intentionally commit and act of sexual penetration with a [female] person to wit [the complainant] (20 years) by inserting his penis into her vagina without [her] consent.

[8] The State called four witnesses in support of these charges, namely, the complainant, her mother, Dr Noordien and Warrant Officer Heyns.

[9] The convictions for counts 5 and 7 meant that the appellant was found guilty of two counts of rape as defined in section 3 of the Act. The significance of this for the purposes of this appeal lies in the fact that an accused convicted of having raped his victim more than once must, in terms of section 51(1) (as read with Part I of Schedule 2) of the Criminal Law Criminal Amendment Act 105 of 1997 (**the Criminal Law Amendment Act**), be sentenced to life imprisonment unless the court in terms of section 51(3)(a) of the Criminal Law Amendment Act is satisfied that substantial and compelling circumstances justifying a lesser sentence exist.

[10] For the purposes of this appeal the appellant contends that:

[a] only one act of rape occurred as per the testimony of the complainant;

[b] the first time when he attempted to penetrate the complainant vaginally, no penetration occurred because the complainant tightened her leg muscles, thereby preventing the rape from occurring; and

[c] when he later attempted to rape the complainant again, this time in the presence of her mother, no penetration occurred because his penis was flaccid.

[11] It is clear therefore that in this appeal the appellant does not take issue with the first conviction for rape as it is common cause that sexual penetration as defined did occur in that instance, and further that the remaining elements of section 3 of the Act were present.

[12] It is the second conviction for rape that is attacked in this appeal, on the grounds that there was no evidence upon which the court *a quo* could find that it had occurred.

[13] The sentence of life imprisonment that was imposed by the court *a quo* is attacked because of the legal consequences that follow when an accused is convicted of having raped his victim more than once in terms of the provisions of the Criminal Law Amendment Act. Since it is contended by the appellant that the second rape did not occur, then in that case the sentence of life imprisonment cannot be sustained.

[14] The appeal is opposed by the State.

Relevant factual background

[15] The events that resulted in the two rape convictions that form the subject matter of this appeal occurred on 28 June 2018, at the complainant's parental home in Welgemoed, in Cape Town. The complainant shared this home with her mother and two sisters, her father having passed away a year or so earlier. The complainant was 20 years old at the time of the incident.

[16] In her evidence, the complainant estimated that her ordeal began at about 11h30 that morning. She had arrived earlier that morning for vacation from Stellenbosch University where she was a student in the engineering faculty. The complainant was alone at home after her mother had gone to work earlier that morning. She was outside attending to a task that her mother had asked her to do when the appellant, having accessed the property, appeared before her and forcibly led her back inside the house. Once inside the house he wanted to know who else was home and after establishing that she was alone, he walked around the house assessing items

and repeatedly asked her: *'where is the money, where is the gold'*, by which she understood him to be demanding valuables. As he walked around the house doing his appraisal, she noticed that whenever he touched items, he would wear gloves.

[17] This forced tour of the house took them to various rooms until they came upon a small room near her mother's bedroom which the complainant referred to as a safe room. I will maintain this term in my judgment, as this room is integral to the events that occurred on that day. When she gave her evidence the complainant's mother described the safe room as being about a metre wide and a metre and a half long with shelves on both sides running length wise. At the far end of the safe room there was a small safe – the type that is typically found in hotel rooms mounted to a wall and requires a combination code to open. The safe room did not have any lights or windows and was completely dark inside.

[18] The complainant unlocked the door to the safe room and there were at least four laptops inside, which the appellant took. He also took her mother's Nikon camera that was in there. This camera carried a great deal of sentimental value for the family as it contained numerous pictures of her recently deceased father. In addition, the appellant took the complainant's cell phone.

[19] The appellant demanded that the complainant open the safe, but she could not, as she did not know the access code to do so. He did not believe her. The appellant persisted with his demands, which were re-enforced by a knife that he held to her throat. Ultimately, when his threats did not produce the desired result, he resolved that in that case they should wait for her mother to return from work, having elicited from the complainant the

information that her mother might know the code and that she would be returning from work at lunchtime.

[20] It was during this period of waiting for her mother to return from work that the first rape for which the appellant was convicted occurred. Apparently bored and whiling away the time whilst waiting for her mother's return, the appellant wandered around the house. He and the complainant were standing in her bedroom when he ordered her to take off her clothes. He pushed her against one of the cupboards in her room with her back towards him. The complainant could feel him trying to insert his penis into her vagina from behind, but she tightened her leg muscles and made it hard for him to succeed in doing so.

[21] The appellant then took her to her sister's room next door to hers and pushed her down onto the bed. The complainant was pleading with him not to do this, telling him that she did not want this, but he ignored her. She was still protesting when he took the knife and held it against her throat. He pushed her legs open, inserted his penis into her vagina; proceeded to copulate until ejaculation. After that, he told her to take a shower. She refused to do so and proceeded to use a blanket to wipe off his liquid.

[22] That blanket was later taken into evidence, and it was from that blanket, the complainant's underwear and her vaginal fluids that DNA matching that of the appellant was extracted and obtained, securing the appellant's conviction for this count of rape. Dr Noordien and Warrant Officer Heyns gave evidence in this regard, which proved beyond reasonable doubt that the appellant had raped the complainant.

[23] I pause to mention that in the record that served before us for the purposes of this appeal, the cross-examination of Dr Noordien by the appellant's legal representative was absent. Efforts to reconstruct and

complete the record did not cure this problem. However, given the ambit of the appeal (i.e., whether or not the appellant penetrated the complainant once or twice), it was agreed by both parties that there was no prejudice caused by the absence of Dr Noordien's cross-examination from the record, and that the appeal could proceed. In the circumstances, the Court held the view that it served the interests of justice to proceed with the appeal.

[24] I return to the events of the day in question.

[25] After raping her, the appellant took the complainant back to the safe room, told her to be quiet and locked her inside. Whilst there waiting for her mother's return, the complainant pondered for a moment whether keeping quiet as instructed was the correct thing to do when her mother returned. She heard the garage door open and close as her mother returned in her car. The time was now approximately 13h15.

[26] The complainant had up until that point chosen the path of least resistance by appearing to be compliant with the knife-wielding appellant, in order not to aggravate him, and in the interests of self-preservation. She decided not to be quiet when she heard her mother. Driven by a desire to protect her mother and prevent an already bad situation from turning worse, the complainant yelled: '*run mom, run*' as loudly as she could, although she was not certain if her mother could hear her.

[27] The mother testified that she did in fact hear her daughter screaming for her to run, although she sounded muffled. Upon hearing her daughter, this had the effect of making her walk towards the direction that the complainant's voice came from rather than away from it, as she had by then gathered the sense that there was something very wrong.

[28] After her mother arrived, the appellant held a knife to her throat and dragged her to the safe room where she joined the complainant. He had

already taken the mother's cell phone from her and a bunch of keys that were in her pocket. The appellant demanded that the mother give him her wedding and engagement rings as well as her watch. These were gifts from her late husband. In anger, the mother took these items off and threw them with force on the floor where they became concealed under the clutter that was there. It took them about a week after the incident before they found them.

[29] And so the ordeal continued, this time with the appellant demanding that the mother open the safe. She refused to do so, telling him that the only person who knew the code was her late husband. This made the appellant very angry, and he persisted with his demands whilst holding a knife to the mother's throat.

[30] When he could see that he was not succeeding with the mother, the appellant told her that if she did not comply with his demands, he would rape her daughter in front of her. At which point the mother started pleading with the appellant, basically begging him not to do this and to leave her daughter alone. These pleas fell on deaf ears.

[31] The appellant instructed the complainant to take off her pants, which she did. He took out his penis and tried to insert it inside her vagina. His penis was flaccid and he could not insert it inside her vagina. He then shoved the complainant towards her mother, who was behind her in the safe room and proceeded to lock them both inside again. At that point, when they were left alone in the safe room, the complainant told her mother not to worry - the worst thing that could happen had happened because the appellant had already raped her.

[32] The ordeal continued, with the appellant repeatedly locking the mother and daughter inside the safe room, only to return to threaten them

some more if they did not open the safe. Neither the complainant nor her mother could remember how many times the appellant did this. At some point he returned to them holding a kettle filled with boiling water, and threatened that if they did not open the safe, he would pour the hot water over them.

[33] The appellant demanded that the complainant's mother give him her bank cards. At which point the complainant remembered that their house had an old Telkom fixed line telephone that nobody paid any attention to, the type with a portable handset. Looking for an opportunity to retrieve this phone, the complainant offered to give the appellant her own bank cards. He went with her out of the safe room to get them, leaving her mother locked inside. The complainant got to her bank cards and whilst she was writing down fake PIN numbers for him, he got distracted and she managed to pick up the telephone handset and put it in the back pocket of her jeans. When she was back in the safe room with her mother, she gave her the phone and told her to hide it.

[34] At some point whilst they were back inside the safe room and the appellant was demanding that her mother open the safe, the complainant noticed a bunch of keys on one of the shelves inside. She knew that this bunch had a key to the safe room door, as she had used the key on this bunch to open the safe room for the appellant earlier that day. The safe room key that the appellant had in his possession, and which he had been using to repeatedly lock and open the door, was on the bunch of keys that he had confiscated from her mother. With a fair amount of care and caution, so as not to draw the attention of the appellant with crackling keys, the complainant managed to pick up this bunch of keys, isolate and remove the key for the safe room door (it had distinct features) from it, and carefully

place the bunch of keys back on the shelf so that the appellant would not notice anything being amiss in case he had seen the bunch of keys on the shelf earlier.

[35] After finally coming to the realisation that he was not going to get what he wanted from the complainant and her mother (i.e., to open the safe), the appellant locked them inside the safe room and he left. Before he did so, the complainant's mother protested insistently that he could not leave them inside the safe room as they would have no way of getting out for at least three days when one of her daughters returned from school camp. The mother did not know at that point that the complainant had managed to secure the key to the safe room door. The appellant nevertheless locked them inside and left. They heard him attempting to start the mother's car in the garage, but for some reason he could not drive it off and he left the property, presumably on foot.

[36] After a moment of quiet, the complainant used the safe room key that she had earlier isolated to unlock the door and free them from the room. In the mother's bedroom, they pressed the panic button linked to their security company. Still feeling unsafe and unsure that the appellant was actually gone, they locked themselves inside the mother's bathroom which had a reinforced door and small windows. Using the handset that she had earlier taken from the house, the complainant called her uncle and told him what had happened, and to call the police. Thereafter the complainant left the bathroom, made sure that her mother locked herself inside whilst the complainant went to her mother's bedroom which had bigger windows. From there she could see the men from the security company. She jumped out of the window of her mother's bedroom, opened the gate and gave them access to the property. The police arrived shortly thereafter.

[37] And so it was that their nightmare came to an end. The time was approximately 14h30.

[38] Dr Nadia Noordien examined the complainant later that same day at Karl Bremner Hospital, and compiled the J88 report of her examination and findings. A rape kit was compiled consisting of the complainant's bloodstained underwear and specimens collected from her vaginal area, and it was sent away for analysis.

[39] Warrant Officer Christie Heyns, employed as a forensic analyst in the South African Police Service, testified that she analysed the exhibits that were handed to her and compiled a report. She testified that the DNA that was found on the blanket that was retrieved from the scene and from the specimens obtained from the complainant's underwear matched the reference sample that was obtained from the appellant, meaning that the appellant's DNA was found on these items.

The appeal against conviction

[40] Section 3 of the Act stipulates that any person who unlawfully and intentionally commits an act of sexual penetration with a complainant without the consent of the complainant is guilty of the offence of rape.

[41] There is no reasonable doubt, factually or legally, that rape is what the appellant did to the complainant when, on 28 June 2018, he instructed her to take off her clothes, moved her from her sister's bedroom to her own bedroom where he threw her on the bed, pushed her legs open, inserted his penis inside her vagina and ultimately ejaculated inside of her, all without her consent and whilst holding a knife against her throat.

[42] The DNA evidence of Dr Noordien and Warrant Officer Heyns put this beyond reasonable doubt. The appellant seems to accept in this appeal that the magistrate was correct to find him guilty of rape in this instance.

[43] The appellant's version in the court *a quo*, which in the main consisted of a bare denial but also included a claim that his DNA was planted where it was found in order to frame him for the crime, could not be reasonably possibly true and the magistrate, in my view, was correct to reject it and convict the appellant of rape on count 5.

[44] As mentioned previously, the appellant's appeal on conviction lies against his second conviction for rape, which in my view stands on a different footing. It calls for an enquiry into the definition of sexual penetration for the purposes of determining whether the evidence before the court *a quo* was such as to establish, beyond reasonable doubt, all of the elements of rape under the Act. In my view, and for the reasons that appear below, the evidence did not establish that the appellant raped the complainant a second time.

[45] The Act stipulates that sexual penetration includes any act which causes penetration to any extent whatsoever by:

[a] the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

[b] any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

[c] the genital organs of an animal, into or beyond the mouth of another person,

and "sexually penetrates" has a corresponding meaning.

[46] There was no evidence that penetration occurred during the appellant's other attempt to rape the complainant.

[47] The complainant's evidence in chief regarding the appellant's next attempt to rape her after the first rape, this time in the presence of her mother, was thus, in relevant part:

COMPLAINANT: ...so he told me that, he told [her mother] that he would rape me in front of her again if she did not comply and she still refused to open the safe so he told me to take off my pants. So he tried to stick his penis back in but it was flaccid and I do not think that he actually would have been able to but he did not do it and then he sort of shoved me back in with mom.

PROSECUTOR: You are saying when he tried to stick his penis it was erected or not?

COMPLAINANT: It was mostly flaccid.

PROSECUTOR: Is it possible for you to tell the Court you are saying he tried to stick it in where did he put his penis?

COMPLAINANT: He would have tried to put it back in my vagina but...[incomplete].

[48] This evidence was not disturbed in cross-examination, which went as follows, in relevant part:

MS CUPIDO: Okay you say his penis was mostly flaccid it was not erect.

COMPLAINANT: Yes.

MS CUPIDO: Okay. So, at any stage did he then touch you with his flaccid penis or not.

COMPLAINANT: As far as I remember he did.

MS CUPIDO: He what? He.

COMPLAINANT: Touch me with his flaccid penis.

COURT: In your vagina?
COMPLAINANT: Near it.

[49] The mother in her evidence confirmed that the rape was threatened in her presence, but it did not happen.

[50] The magistrate's finding that the appellant penetrated the complainant's vagina twice on 28 June 2018 is therefore not borne out by the evidence that was before her. It was a patent error her part, and the subsequent conviction of the appellant for rape falls to be set aside.

[51] Section 256 of the Criminal Procedure Act 51 of 1977 (**the CPA**) stipulates that if the evidence in criminal proceedings does not prove the commission of the offence charged but proves an attempt to commit the offence, the accused may be found guilty of an attempt to commit that offence. I believe that this is such a quintessential case.

[52] The evidence supports a finding that the appellant is guilty of the offence of attempted rape set out in section 55 of the Act, which provides that a person who attempts to commit a sexual offence in terms of the Act is guilty of an offence, and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

[53] From the evidence it is clear that on the second occasion the appellant intended to have sexual intercourse with the complainant, and to have it without her consent. He acted out his intention by causing the complainant to undress against her will; by taking out his penis and approaching the complainant's body to insert it inside of her vagina. In the process, his penis touched the complainant's body, near her vagina. Mercifully for the complainant and her mother, his penis failed to execute that which he

intended and was attempting to do. It is rather like the hypothetical example where A holds a loaded gun against B's head intending to shoot and kill B; A pulls the trigger to fire into B's head but for some reason he misses B's head or the gun jams and fails to fire the shot. That cannot on any standard be said to be tantamount to murder.

[54] I am satisfied that the evidence that was before the magistrate established beyond reasonable doubt that the appellant intended to commit sexual penetration without the complainant's consent; he took steps to do so but failed to complete the act. The appellant had a '*finally formulated intention*' to penetrate the complainant. See in this regard **R v D 1958 (1) SA 199 (A) at 203H-204D**; and **S v Du Plessis 1981 (3) SA 382 (A) at 400B-D**, both of which cases were cited with approval by the Supreme Court of Appeal in **Fortuin v S**,¹ at para 6.

[55] For these reasons, the second conviction for rape under count 7 must be set aside, and the appellant must be found guilty of the offence of attempted rape in terms of section 55 of the Act read with the provisions of section 256 of the CPA. I now turn to consider the appeal against sentence.

The appeal against sentence

[56] The Criminal Law Amendment Act provides for a minimum-sentence scheme in respect of certain offences. The prescribed minimum sentence should be imposed by a court as a point of departure, unless the court finds that substantial and compelling circumstances exist. The minimum sentence

¹ Unreported SCA case no 838/2017 [2018] ZASCA (13 February 2018).

legislation ‘was introduced by the legislature to address the rising levels of criminality in this country.’ See **S v Mbulelo** [2019] ZASCA 154.²

[57] The Criminal Law Amendment Act provides that a Regional Court or a High Court shall sentence a person it has convicted of the offence of rape to imprisonment for a period of not less than 15 years if that person is, like the appellant, a first offender.

[58] In **S v N**³ it was held that in determining whether ‘*substantial and compelling circumstances*’ existed justifying a sentence less than the prescribed minimum sentence, the court is to consider all facts relevant to sentence, both aggravating and mitigating and in the light thereof decide whether the prescribed minimum sentence is grossly disproportionate to the crime committed.

[59] After convicting the appellant of the two charges of rape which then triggered the minimum sentence provisions of the Criminal Law Amendment Act, the magistrate considered whether there were any substantial and compelling circumstances justifying her departure from the prescribed sentence. She found there to be none.

[60] It is contended for the appellant that the magistrate erred in not paying sufficient attention to his personal circumstances. I am not convinced that this is correct. The record shows that she did in fact consider them, and then correctly proceeded to balance those personal circumstances with the seriousness of the offences that she had found the appellant guilty of as well as the public interest. Had the magistrate been right about the second rape conviction, the prescribed minimum sentence imposed would have accorded

² Unreported SCA case no 148/2019, 26 November 2019 at [10]

³ 2000 (1) 209 (W)

with the interests of justice in the absence of substantial and compelling circumstances.

[61] The setting aside of the second rape conviction, however, necessitates that this Court consider what the appropriate sentences are for the offences of rape, for which a minimum sentence is prescribed, and attempted rape that the appellant is guilty of.

[62] The following are said to the appellant's personal circumstances:

[a] The appellant was 29 years old at the time of the sentencing in 2022.

[b] He left school at grade 8.

[c] He was unmarried and had no children.

[d] The appellant was assisting his family through casual work.

[e] He had been awaiting trial for more than 3 years at the time of sentencing.

[f] He had a relevant previous conviction that should not be over-emphasised.

[63] It is contended that whilst these personal circumstances when taken individually may not constitute substantial and compelling circumstances, when they are assessed cumulatively, they can be regarded as such, justifying this Court deviating from the applicable prescribed minimum sentence.

[64] For the purposes of this sentencing exercise, I set out below what I consider to be the aggravating factors in this case.

[65] First, the calm manner in which the appellant executed his reign of terror on that day is nothing short of chilling. The complainant had the right to freedom and security of her person, which included the right to be free from all forms of violence. Rape is a particular form of violence that not

only shattered the complainant's security of her person, but also degraded her dignity as is apparent from the contents of her victim impact statement. The appellant treated the complainant's body as though it possessed no intrinsic value, other being a means to his ends.

[66] Second, the rape was a gross violation of the complainant's right to bodily and psychological integrity. The indelible compromise to the complainant's psychological integrity is evident from how this event changed the trajectory of her life. She was a 20 year engineering student at Stellenbosch University at the time. After the incident she dropped out of university and could not return for some time; she avoided all social contact for more than 6 months; became severely depressed and suicidal to such an extent that she was put under suicide watch. She engaged in reckless behaviour as a result of depression. She suffered from social anxiety; struggled with intimacy; feared strangers and became overwhelmed by feelings of shame; embarrassment; lack of self-esteem and what seems to me to be a general inability to retrace a path that might lead her to a version of herself that she loved and wanted to live with. Worse, after she was raped, she had to endure a course of ARV medication (to prevent her from contracting HIV from the appellant if he had the virus) to which she suffered a series of bad reactions that she took months to recover from. She still suffers from post-traumatic disorder from the incident; has been in therapy since July 2018 and she takes anti-depressants to treat her anxiety and depression. In her victim impact statement, the complainant told the Court that she struggles to come to terms with the incident and continues to suffer from PTSD.

[67] Third, the appellant's conduct after he raped the complainant is indicative of a person possessed of a sense of entitlement to do what he was

doing. This is apparent from the fact that after he raped her, the appellant kept telling the complainant that he had not raped her; that they were just friends having a bit of fun. The complainant had never seen the appellant before that day. His conduct was self-serving and manipulative, indicative of a person who not only saw himself as entitled to rape the complainant and take whatever he wanted in her home; but also, a person who did not in fact see anything wrong with what he was doing. Whilst he was in reality dismantling the good prospects of a young woman's life, he saw the entire episode as a bit of fun for him. This casual attitude, whilst inflicting trauma on that scale, is a further chilling factor in the appellant's entire demeanour on that day.

[68] Fourth, the appellant then proceeded to torture, first, the complainant and then her mother for a solid four hours. Using rape as a weapon, he attempted to rape the complainant again, subjecting her mother to the unspeakable prospect of having to witness the rape, all so that he could gain access to whatever was inside that locked safe. And then there was the threat to throw boiling water over them. He kept them in a dark confined space that entire time, and just before he left proceeded to ask for hugs from the complainant and her mother. Finally, he locked them inside that dark room from which, for all he knew, there was no means for them to escape. Had the complainant not earlier isolated the key to the safe room door, she and her mother could very well have perished in that room after the appellant left them there.

[69] Fifth, it was not just the complainant's rights that the appellant violated, but also those of her mother and her sisters. An entire family was robbed of the sanctity of their own home; the simple pleasure which many are fortunate to take for granted, of enjoying their homes as places of refuge

and peace. The appellant shattered that for this family on that day. Pursuant to that ordeal, they moved out of the house and returned some eighteen months later. In a bid to help her family cope and protect them, the complainant's mother moved to Wellington, taking her youngest daughter out of the English medium school that she was attending in Stellenbosch to an Afrikaans medium school in Wellington, which caused her to struggle. To top it off, the appellant's theft of the Nikon camera and the laptops, all of which were never recovered, meant that the family lost irreplaceable pictures of their husband and father who had recently passed away, which was a version of yet another loss of their father. There is no member of the complainant's family that was left unsullied by the appellant's conduct on 28 June 2018.

[70] Sixth, as if what he had done on that day were not enough, the appellant continued his torture of the complainant. He called her on her cell phone later that same day. She hung up the phone after she recognised his voice. He followed this up with WhatsApp messages a few days later, referring to her as '*sweetheart*'; at one point writing: '*I LOVE u Sweet heart hey*'; and then:

'I want to say sorry for the
Weapon that I Did Point to
your neck, i feel very sad for
that...
I feel Sorry for that
Pls put ur Profile pic I would
like to see u on it pls
i want to send u my Pic But I
dont Know u would like it

Can we meet together’

[71] These messages caused the complainant and her mother to harbour the reasonable fear that the appellant would return to their home, and so his reign of terror continued even after the day of the incident. The notion that the events of that day had somehow initiated some kind of romance between him and the complainant is repugnant. It is consistent with the brazenness and entitlement displayed by the appellant.

[72] It is fair to say that in the rising levels of criminality that the minimum sentence legislation was intended to address, rape is a scourge that is at epidemic proportions in our country. It is inflicted mostly, but not exclusively, by men on other men and women of all ages, babies included. It cuts across race and class lines. For far too many people than should ever be the case in any society, rape has become a lived reality that they have had to survive and live with the grim consequences of. The complainant, and to some extent her mother and sisters, are now in the ranks of this unfortunate group of people.

[73] All of these aggravating factors, which are relevant with equal force to the conviction for attempted rape, outweigh the mitigating factors presented by the appellant’s personal circumstances for the purposes of sentencing. More so, in *S v Vilakazi*⁴ the Supreme Court of Appeal held that in cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. The court held that once it becomes clear that the crime is deserving of a substantial period of imprisonment, the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment,

⁴ [2009 \(1\) SACR 552](#) (SCA) para 58.

are in themselves largely immaterial to what that period should be, and those seem to be the kind of 'flimsy' grounds that *S v Malgas*⁵ said should be avoided.

[74] Consequently, when regard is had to the seriousness of the sexual offences of which the appellant is convicted, the accused's personal circumstances, the aggravating factors and the interests of the public, I see no reason to depart from the prescribed minimum sentence of imprisonment for 15 years for the offence of rape. There are no substantial and compelling circumstances that justify such a departure.

[75] Section 55 of the Act empowers this Court to impose of the offence of attempt the same punishment for which a person convicted of rape would be liable. For all of the reasons set out above, and in the circumstance of this case, a sentence of imprisonment for a period of 12 years for the offence of attempted rape is just.

Conclusion

[76] For all the reasons set out in this judgment, the appeal is partially upheld and, in the circumstances, the following order is proposed:

[1] The appeal against conviction in respect of count 5 is hereby dismissed.

[2] The sentence of life imprisonment imposed by the court *a quo* in respect of counts 5 and 7 is hereby set aside.

[3] The appellant is hereby sentenced to imprisonment for a period of 15 years in respect of count 5.

⁵ 2001 (1) SACR 469 (SCA).

[4] The appellant's second conviction for the offence of rape in count 7 is hereby set aside, and is replaced with an order that the appellant is guilty of the offence of attempted rape.

[5] The appellant is sentenced to imprisonment for a period of 12 years in respect of count 7.

[6] The sentences of imprisonment in respect of counts 5 and 7 shall not run concurrently.

[7] In terms of section 280(2) of the CPA, the sentences in respect of counts 6, 11, 12 and 13 shall run concurrently with the sentence in count 5 and 7.

N MAYOSI
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

J LEKHULENI
JUDGE OF THE HIGH COURT

APPEARANCES

For appellant: Ms A. De Jongh, Cape Town Justice Centre

For the State: Advocate EA Kortje, National Prosecuting Authority