

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

NOT REPORTABLE

Case No: CA 19/2024

Regional Court case no: RC/469/2018

In the matter between:

JOSEPH
Appellant

BUTIKI

MOWANDI

and

THE
Respondent

STATE

Coram: Hendricks JP and Petersen ADJP

Heard: 19 March 2026 (On the papers)

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 10h00 on 24 March 2026.

Summary: Criminal law – Appeal against conviction – Condonation – Late noting of appeal by unrepresented incarcerated appellant condoned where explanation plausible, administrative failure at clerk of court established, and interests of justice favour examination of the merits – Housebreaking with intent to rape and rape – Conviction on both counts confirmed – Grounds of appeal framed in entirely general terms – No specific misdirection by trial court, no credibility finding identified as erroneous, and no particular improbability in the State's version articulated – Compelling convergence of DNA, medico-legal, and crime scene evidence – DNA profile of appellant recovered from blood on wardrobe door of complainant's bedroom at statistical probability of one in 29 trillion – Only reasonable inference consistent with proved facts being that appellant was present at scene and committed the offences – Absence of fresh genital injuries medically consistent with penetration of sleeping victim offering no physical resistance – Standard for circumstantial evidence satisfied – *R v Blom* 1939 AD 188 applied – Appeal against conviction on both counts dismissed.

JUDGMENT

PETERSEN ADJP (HENDRICKS JP CONCURRING)

Introduction

[1] This is an appeal against conviction by the appellant, Joseph Butiki Mowandi, who was convicted in the Regional Court for the Regional Division of North West, held at Potchefstroom, of *housebreaking with intent to rape* (count 1) and *rape* (count 2). He was sentenced, on 31 January 2020, to eight years' direct imprisonment, of which four years were suspended for

five years on conditions, resulting in an effective custodial term of four years. The appeal is brought in terms of s 309B of the Criminal Procedure Act 51 of 1977.¹

[2] The appeal serves before the present panel since the panel assigned by the Judge President previously failed to deliver judgment timeously.

Background

[3] The events giving rise to the charges occurred during the early morning hours of 3 September 2018 at House 1[...], Extension 11, Ikageng, in the district of J B Marks. The complainant, L[...] B[...] T[...] (32 years of age at the time), was sleeping in the main bedroom of that house together with her boyfriend, Richard Phale Kalaote, who was the occupant of the premises.

[4] According to the complainant's account, she was woken at approximately 02h00 when she realised that a man was committing an act of sexual penetration upon her. She initially assumed the person was her boyfriend, but then discovered that her boyfriend was lying beside her. She screamed, woke her boyfriend, retrieved a beer bottle, and struck the intruder on the head. The intruder fled.

[5] The appellant was charged with two counts. Count 1 alleged *housebreaking with intent to rape*, alleging that he unlawfully and intentionally broke into and entered the house of Richard Phale Kalaote with intent to rape, read with ss 262(1) and 261 of the Criminal Procedure Act. Count 2 alleged *rape* in contravention of s 3, read with ss 1, 2, 55, 56A, 57, 58, 59, and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act), read with s 51(2) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 and sections 256, 261, and 270 of the Criminal Procedure Act in that he unlawfully and intentionally committed an act of sexual penetration upon the complainant by inserting his genital organ into her vaginal canal without her consent.

[6] After a full-blown trial, the magistrate convicted the appellant on both counts and, on 31 January 2020, sentenced him to eight years' direct imprisonment, of which four years were conditionally suspended for a period of five years, resulting in an effective custodial sentence of four years.

¹ Act 51 of 1977 ('the CPA').

The evidence

[7] The documentary record before this court comprises the J88 medico-legal report, the biology (DNA) report under s 212 of the Criminal Procedure Act, and the crime scene investigation album with sworn statement and sketch plan.

The J88 medico-legal report

[8] Forensic nurse Ennie Xoyiya, attached to the Thuthuzela Care Centre at Potchefstroom, examined the complainant at 10h45 on 03 September 2018. The complainant had been smelling of alcohol at the time of the medical examination. The J88 was admitted by consent in terms of s 213 of the Criminal Procedure Act. The examination revealed no visible external physical injuries. The general examination recorded the complainant's clothing as dirty and noted the smell of alcohol. Mentally, she was recorded as stable, calm, and cooperative.

[9] The gynaecological examination recorded all external structures, including the clitoris, frenulum, urethral orifice, para-urethral folds, labia majora, labia minora, posterior fourchette, fossa navicularis, and perineum, as intact. The hymen was recorded in a remnant configuration. No fresh tears, scarring, bleeding, bruising, or increased friability were observed. The cervix was visualised, showing erosion and a thick white discharge. The anal examination revealed no injuries. The forensic specimens collected under evidence collection kit seal number 16D1AD6022JJ were delivered to the investigating officer. A urine pregnancy test was negative.

[10] Forensic nurse Xoyiya's conclusions were: (a) the absence of visible physical injuries does not exclude violent behaviour; and (b) the absence of fresh genital injuries does not exclude sexual penetration. These medical opinions are both scientifically sound and well-recognised in our courts.⁴ The absence of physical injury is a common finding in adult victims who are penetrated without resistance, whether due to sleep, incapacitation, or fear, and carries no probative weight in the appellant's favour.

The DNA evidence

[11] Warrant Officer Motjile Oduetse Chriswell Makapan, a forensic analyst at the Biology Section of the Forensic Science Laboratory, Arcadia, Pretoria, deposed to a s 212 affidavit in respect of laboratory numbers 342470/18 and 346317/18. His qualifications include a National Diploma in Biotechnology (majoring in Microbiology and Biochemistry) from the Tshwane University of Technology, twelve years' experience in biological sciences, and extensive in-house training in serological and DNA techniques. The affidavit and its appendix explaining the STR profiling methodology were admitted in terms of s 212 of the Criminal Procedure Act.

[12] The following findings are material. Two swabs constituting Exhibit B2 (kit seal number 14DCAA4368) were collected from possible human blood stains at the crime scene. Swab B1 from the duvet on top of the bed in the main bedroom, and swab B2 from the left door of the wardrobe in the main bedroom. A reference DNA sample from the accused (barcode 13DBAC1501, case number PA5002283242) was submitted for comparative analysis. The DNA profile of the reference sample reads into the mixture DNA result obtained from Exhibit B2 (swab B2). The most conservative estimate of the DNA result from that swab, calculated across all possible contributors and all four main population groups in South Africa (Black, Caucasian, Coloured, and Asian), is 1 in 29 trillion persons. The donor of the reference sample was excluded as the donor of DNA on the J88 evidence collection exhibits (seal number 16D1AD6022, case number PAD001972580).

[13] The DNA evidence is of very considerable probative weight. A statistical probability of one in 29 trillion effectively identifies the appellant as the individual whose blood was deposited on the wardrobe door in the main bedroom. The only reasonable explanation consistent with this finding is that the appellant was physically present in that room and suffered a bleeding wound there, as the complainant's account of striking the intruder on the head with a beer bottle explains.

[14] The circumstance that the appellant's DNA was not recovered from the J88 evidence collection kit, that is, from the complainant's person, is not exculpatory. The absence of male DNA from a complainant's person is a common finding and does not negate sexual penetration.² This is particularly

² *S v Ferreira* 2004 (2) SACR 454 (SCA) para 22; *S v NMO* 2013 (2) SACR 177 (WCC) para 11.

so where ejaculation does not occur, where the examination is delayed (here, approximately eight hours), or where the complainant has bathed or urinated in the interim, a possibility not excluded on the record, as the J88 records that the complainant urinated after the incident.

The crime scene evidence

[15] Constable Lomile Sarel Moremi of the North West Provincial Crime Scene Investigation Team attended the scene on 06 September 2018 at the request of Lt Colonel T Maine. His sworn statement, key to photographs, and sketch plan, forming Exhibit A in the court a quo, are part of the record before this court.

[16] The sketch plan and photographic album establish the following material features. Point A on the sketch plan, identified to Constable Moremi by the complainant, indicates the window on the exterior of the house through which the intruder is alleged to have gained entry. The photographs (Photos 1–9) show that this window provides access to the dwelling’s interior. Point B indicates the bed in the main bedroom where the complainant and her boyfriend were sleeping before the incident and where the incident took place (Photos 9–13). Possible human blood stains were observed and photographed on the duvet (Photos 12–13) and on the left door of the wardrobe in the main bedroom (Photos 22–25), from which the DNA evidence swabs were collected. A face cloth with possible human blood was found inside a plastic bag in a drawer of the kitchen unit and was sealed as Exhibit FR1 (Photos 52–56), consistent with an intruder who, after being struck on the head, made his way through the house. Point C on the sketch plan indicates the bed where Mr. Dan, identified as a friend of the complainant’s boyfriend, was sleeping in the adjacent room during the incident (Photos 40–43).

[17] The physical evidence at the scene coheres precisely with the complainant’s account. Entry through the window. The incident occurred in the main bedroom. The intruder was struck on the head, depositing blood on the duvet and wardrobe. The intruder fled towards and through the kitchen.

The grounds of appeal

[18] The appellant's grounds of appeal, as set out in the application for leave to appeal dated 20 July 2022, are confined to the conviction. No substantive grounds directed at the sentence are articulated. The grounds of appeal against conviction may be distilled as follows. The court erred in finding that the State had proved guilt beyond a reasonable doubt. The court erred in finding there were no improbabilities in the State's version. The court failed to analyse or evaluate the evidence of the State witnesses properly. The court failed to consider the improbabilities inherent in the State's version properly. The court erred in rejecting the appellant's evidence as not reasonably possible while accepting the evidence of State witnesses, notwithstanding material contradictions. The court erred in holding against the appellant that there were contradictions between his evidence and the facts put to witnesses in cross-examination, and in giving undue weight to minor discrepancies in the defence case.

The test on appeal against conviction

[19] The test on appeal against a conviction is not whether this court would have reached the same conclusion on the facts as the trial court, but whether the trial court was correct in its assessment of the evidence. An appellate court will not lightly interfere with the factual findings of a court *a quo* that had the advantage of observing the witnesses. It will do so only where the trial court committed a material misdirection in its assessment of the evidence, applied incorrect legal principles, or reached a conclusion that is not reasonably supported by the evidence as a whole.³

[20] Where a trial court's reasoning appears on the court record and has not been included in the documents placed before this court on appeal, it is incumbent upon an appellant to identify, with sufficient particularity, the specific finding or reasoning to which exception is taken. The grounds of appeal in this matter are framed entirely in general terms. No specific witness is identified as lacking credibility. No particular improbability in the State's version is articulated. No factual finding of the magistrate is identified as demonstrably incorrect. This court is accordingly unable to

³ *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645e–f; *S v Liebenberg* 2005 (2) SACR 355 (SCA) para 15; *S v Toms* [1990] 2 All SA 222 (A) at 229.

identify any specific misdirection on the part of the trial court from the grounds as formulated.

The convictions

[21] Notwithstanding the general terms in which the grounds of appeal are framed, this court has considered the documentary record in its entirety. The evidence against the appellant on the rape count is compelling.

[22] The single most powerful piece of evidence is the DNA result. The appellant's DNA profile was found in the blood on the wardrobe door of the main bedroom, the very room in which the rape is alleged to have been committed. The probability that this occurred by chance or by innocent explanation is one in 29 trillion. This evidence places the appellant inside the main bedroom at or around the time of the incident. The presence of blood at that location is explicable only based on the complainant's account, that she struck the intruder on the head with a beer bottle, causing a bleeding wound, and is wholly inconsistent with any innocent presence.

[23] The complainant's account is entirely consistent with the physical evidence. Entry through the window, the incident in the main bedroom, blood deposited on the duvet and wardrobe, and the face cloth with blood found in the kitchen drawer, all cohere with the narrative of an intruder who entered the sleeping household, committed the rape, was struck on the head, and fled. This is a compelling convergence of direct and circumstantial evidence.

[24] The standard applicable to circumstantial evidence requires that the proved facts be consistent with the hypothesis of guilt, and that they be inconsistent with any other reasonable conclusion.⁴ On the facts established by the record, and particularly in light of the DNA evidence, no reasonable alternative explanation for the appellant's blood being found in the complainant's bedroom presents itself. The appellant's presence at the scene is proved beyond a reasonable doubt.

[25] The J88 findings provide consistency with the complainant's version. The absence of fresh genital injuries is medically consistent with the penetration of a sleeping adult victim who offers no physical resistance. The

⁴ *R v Blom* 1939 AD 188 at 202–203 per Watermeyer JA; *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449h–450a; *S v Reddy* 1996 (2) SACR 1 (A) at 8e–f.

medical conclusion that such absence does not exclude penetration is a professional opinion that the trial court was entitled to accept.

[26] As regards count 1, housebreaking with intent to rape is established if it is proved that the accused broke into and entered the premises with the intent to commit a rape. The evidence of entry through the window, a point of entry identified by the complainant and corroborated by the sketch plan and photographs, satisfies the breaking-and-entering requirement. The subsequent commission of the rape establishes the intent. The conviction on count 1 is accordingly in order.

[27] The grounds of appeal do not disclose any basis upon which this Court can interfere with the convictions. The appeal against conviction on both counts must fail.

Conclusion

[28] The appeal against conviction on both counts is dismissed.

Order

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

1. Condonation for the late prosecution of the appeal is granted.
2. The appeal against conviction on count 1 (housebreaking with intent to rape) is dismissed.
3. The appeal against conviction on count 2 (rape) is dismissed.

A H PETERSEN
ACTING DEPUTY JUDGE PRESIDENT
NORTH WEST DIVISION, MAHIKENG

I agree.

R D HENDRICKS
JUDGE PRESIDENT

NORTH WEST DIVISION, MAHIKENG

Appearances

For the appellant: Mr E Setumo
Instructed by: Legal Aid South Africa
Mahikeng

For the respondent: No appearance