

REPORTABLE



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

APPEAL NO: AR 263/24

In the matter between:

MANDLA MZIZI

Appellant

and

THE STATE

Respondent

ORDER

In the result, the following order is made:

- (a) The point *in limine* of duplication of charges is upheld. Appellant should have been charged with one count of rape the provisions of section 51(1) of Act 105 of 1997 being applicable as the complainant was raped more than once.
- (b) The appeal against the convictions are upheld and replaced with the following:
- “Appellant is convicted on a count of rape in terms of section 51(1) of Act 105 of 1997 in that he raped the complainant more than once.”
- (c) The appeal against sentence is upheld and replaced with:
- Appellant is sentenced to life imprisonment.
- (d) The Appellant is in terms of section 103 read with section 10 and 41 of Act 60 of 2000 declared unfit to possess a firearm.

JUDGMENT

Handed down on 21 April 2026.

Luthuli AJ (P Bezuidenhout J concurring):

Introduction

- [1] The appellant was charged in the Regional Court, Izingolweni on two counts of rape in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997. The appellant was convicted

on both counts and sentenced to life imprisonment on both counts. The sentence is effectively one of life imprisonment. This appeal is against both the convictions and sentences.

[2] The appellant has an automatic right of appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 against his convictions and sentences.

[3] The convictions and sentences against which the appellant appeals arise from events of 17 September 2021. The State alleged that on the 17th of September 2021 at Mqatsheni location in the regional division of KwaZulu-Natal, the appellant unlawfully and intentionally committed acts of sexual penetration with M[...] M[...] N[...], who at the time was a female person of 34 years of age, without her consent. The State alleged that the provisions of section 51(1) of Act 105 of 1997 are applicable because the complainant was raped by the appellant more than once. The appellant pleaded not guilty to both counts of rape.

[4] The appellant made a statement in terms of Section 115 of the Criminal Procedure Act, 1977, and it reads as follows:

“In the Magistrate’s Court of Izingolweni for the Regional Division of KwaZulu-Natal, in the matter between the State and Mandla Mzizi. I the undersigned confirm that I am the accused in the matter, Mandla Mzizi. I had my rights explained to me against self-incriminating testimony. I plead not guilty to the offence of rape.

I raise a defence of consent. The complainant and I engaged in a sexual consummation with each other on the day in question, being 17 September

2021. I had slept and sexually penetrated her once. Prior to the sexual interaction, I had proposed love to her. I deny having caused her physical harm in any capacity.

I make this plea freely and voluntarily without any form of duress.”

The facts

[5] The complainant testified that it must have been between 21:30 to 22:00 when she went to her grandmother’s house where she found the appellant and her cousins, namely, M[...], T[...] and S[...] indulging in alcoholic beverages. She knew that she had to go home but decided to keep their company because they were all going along the same route to her home ultimately. Whilst in the company of the men, they consumed intoxicating liquor together and she later indicated to the appellant that she was about to leave and asked if they could walk together. Whilst enroute at a crossroad, S[...] who was also in their company had to part ways with the complainant and the appellant to his place of residence. In doing so, S[...] warned the appellant to “take good care of my sister”.

[6] As the complainant and the appellant continued to walk together, the latter suggested that they should go to a BnB, a local tavern to drink some more alcohol, but the complainant refused and said she wanted to go home and sleep. At that moment the appellant grabbed the complainant’s arm and tripped her. Complainant testified that she fell on her back and the appellant ordered her to undress and referred to her as a bitch. She refused to undress. He ordered her to open her legs and she refused that too.

[7] Complainant testified further that the appellant then strangled her until she was powerless and that's when he undressed her whilst strangling her on her neck. He removed the track-suit pants and tights that she was wearing. She screamed but as she did, he would tighten his grip on her neck, and she succumbed. The appellant then unzipped his pants and took out his erect penis and inserted it into her vagina and had sex with her. She would scream but the appellant tightened the strangulation on her neck. The complainant explained that this was very painful.

[8] The complainant further stated that she tried to fight the appellant off by pushing him with her knees and managed to escape and ran, but she only took a few steps, and the appellant tripped her, and she fell on her knees. The appellant managed to pin her down and ordered her to bend over and then took out his penis, inserted it into her anus, and performed anal sex on her. On this occasion too, the appellant was strangling the complainant. According to the complainant, he also promised to kill her if she ever told anybody about what had happened. The complainant stated that she told the appellant that she would not tell anyone and asked for her clothes back. According to the complainant, the appellant got off her, and she managed to get up and ran away naked from the bottom half. The appellant pursued her with her clothes on hand.

[9] The complainant testified further that as she ran she met one L[...] S[...] who asked her what happened. She informed L[...] S[...] that "Mandla is raping me",

and she ran past L[...] S[...] until she got to the gate at her aunt's place where she was initially headed and shouted until her cousins V[...] K[...] and B[...] P[...] K[...] came out and asked her what happened. She told them that "Mandla was raping me". At this stage the complainant was still half-naked. Mandla made a statement but did not testify as he was seriously ill at the time of the trial. The complainant's cousins took her inside K[...] V[...] K[...]’s house and the appellant followed them, claiming that the complainant was lying, and that in fact, he found her in the bushes. The appellant offered her a bottle of Vodka but she snatched the bottle from him and hit him on the head. The bottle broke when it fell to the ground, and that's when the appellant fled. The complainant's cousins are also related to the appellant and that is how complainant and appellant know each other.

[10] When the appellant arrived at V[...]’s house, he had complainant's clothes with him. V[...] enquired from the complainant what her intentions were? The complainant indicated that she wanted the police involved, and the police were called and they arrived. According to the complainant, the police took her to the doctor at Thuthuzela, in Port Shepstone where she gave her history and was examined. The doctor observed injuries in her neck, vagina and anus. The complainant's history was taken. She had not bathed. That was the evidence of the complainant.

[11] The complainant was cross-examined at length but stuck to her version. When it was put to her that the appellant would say he is her boyfriend, complainant laughed the suggestion off, saying "*it is only in his mind*". The complainant

also brought to the attention of the trial court that the appellant sent his family members to complainant's family to apologize and "*he even said he committed this, he was very, very drunk*". The complainant's evidence was also that the appellant did not finish the sexual act the first time around, that's why he did it for the second time.

[12] The State called V[...] K[...] K[...], who is related to both the complainant and the appellant and knows the two of them from when they were children. She described how on the night in question she had been suffering from a flu. She suddenly heard the cries of a person or somebody yelling outside. She came out at almost the same time as B[...] to see what was happening, and she saw L[...] S[...] at the gate and then immediately saw the complainant, M[...] N[...], half-naked from her bottom half. She testified that the complainant told her that "Mandla raped me". Her evidence was also that the complainant was crying hysterically. She took the complainant to the house and covered her with a blanket. The complainant told her what had happened.

[13] When V[...] testified, she gave evidence that the appellant came into the house with complainant's clothes and a bottle of Vodka in his hands. According to V[...], the appellant denied raping the complainant and offered the latter the bottle of vodka and said "*here, drink*". V[...] corroborated complainant's version that the latter took the bottle of vodka and hit the appellant on the head, and the bottle broke when it fell to the ground. She further testified that she could see that the complainant had been drinking but was not a person who was under the influence of alcohol, whereas the appellant also appeared to have

been drinking but evidently under the influence of alcohol. V[...] was likewise cross-examined at length by the appellant's legal representative, and she gave evidence that the complainant told her that the appellant raped her but did not specify as to the number of times. She was cross-examined in matters of culture and cultural taboos and the relationship between the appellant the complainant but V[...] could not give answers to that.

[14] The State then called Dr Zinhle Abigail Ndamase ("Dr Ndamase") to the stand. She is a qualified and registered medical doctor of many years of experience, employed by the Port Shepstone regional hospital and stationed at Thuthuzela Health Care Centre in Port Shepstone. She holds, among others, a diploma in Clinical Forensic Medicine from the Colleges of Medicine of South Africa, 2019, over and above her MBChB degree. She is responsible for completing the J88. Dr Ndamase confirmed the history of the complainant as received from the latter. She confirmed that the complainant informed her that she had been raped by the appellant, a person known to her. The complainant had informed her that she (complainant) had been penetrated by the appellant vaginally and anally.

[15] Dr Ndamase testified that she examined the complainant and found abrasive marks on the latter's neck that could have been caused by either a rope or hands. The examination also revealed fresh injuries in the vagina and perineum. Upon examination of the anal area, Dr Ndamase found bleeding during the examination. Her evidence in summary was that the history of the complainant was corroborated by the outcome of the clinical examination, i.e.

abrasions and lacerations caused by blunt force, and same was consistent with a person who has been vaginally and anally penetrated without consent.

[16] Under cross-examination, Dr Ndamase expressed limited opinion on matters that fell outside her expertise. The State closed its case.

[17] The appellant testified in his defence. His evidence was that the sexual encounter he had with the complainant was prearranged. He stated that when they met outside the complainant's grandmother's house things moved quickly and he proposed love to complainant, and she agreed. According to the appellant, they took a walk and did not tell the others. Whilst enroute, she was giving him signs and they decided to have sex right there on the side of the road. According to the appellant, when they finished having sex, he told her *"Now listen, I have to go home to get the money"*. According to the appellant that is when complainant started to change. She started screaming and crying. He testified that she thought he was playing her, and that, according to the appellant, is why she ran in public half naked and reported to L[...] S[...] and her family (also his family) that the appellant was raping her.

[18] The appellant further testified that he went to their family, namely V[...] and P[...] K[...], because he had nothing to hide. He had an alcoholic drink with him which he offered to the complainant. He was hit with the bottle of alcohol on the head by the complainant. He testified further that he went home because his aunt told him to do so. He stated that the complainant did this because she got caught and she wanted to keep it a secret because of the age difference

between them. The appellant was 23 years of age and complainant was 34 years of age at the relevant time. He cited a further reason for complainant's reason for wanting to keep the affair a secret as being that it is a taboo that they get involved sexually because they are related. He insisted that he did not rape the complainant, it was in fact consensual.

[19] Under cross-examination, the appellant introduced a different version, and it was that complainant reacted in the manner she did because she thought "*she was being played*". Not that she got caught. Further, on the anal penetration, in re-examination he was asked "Tell me, when there was this anal penetration, did you know about it?", and his answer was yes.

The point *in limine*

[20] The appellant raised a point *in limine* that there was a duplication of the charges in that the appellant should have been convicted of one count of rape and not two counts. The appellant relied on *S v Radebe*¹ where the court stated:

*"The rule against a duplication of conviction is a rule primarily aimed at fairness. Its main aim and purpose is to avoid prejudice to an accused in the form of double jeopardy, that is, being convicted and punished twice for the same offence when in fact he or she has only committed one offence."*²

¹ 2006 (2) SACR 604 (O).

² Id at para 5. See also *S v Bam* 2020 (SACR 584 (WCC) at [31].

[21] The appellant submitted that the court *a quo* misdirected itself when it convicted the appellant with two counts of rape, pursuant to a finding that on each count the complainant was raped more than once. The appellant contends that the complainant testified that the appellant raped her twice on one occasion and not on two occasions. He placed her on her back and inserted his penis into her vagina and when she got up and tried to run, he tripped her and raped her in her anus.

[22] The appellant also relied on *S v Blaauw*³ in support of his contention that only one act of rape will be committed where the sexual acts of an accused are closely linked to a single continuing act of sexual conduct. The appellant submitted that in the event this court finds that it was one count of rape constituting one continuous act, then the rape will fall under the provisions of section 51(2)(b) of Act 105 of 1997 which attracts a minimum sentence of 10 years imprisonment and would not fall under the provisions of section 51(1) of Part 1 of Schedule 2 of Act 105 of 1997.

[23] The respondent premises its opposition to the point *in limine* firstly on the definition of rape as “any act of sexual penetration with a complainant without her consent”. The respondent then submits that in this matter two separate acts of sexual penetration with the complainant without her consent occurred. The first act was committed and completed before the appellant was interrupted by the complainant when she managed to push him off and ran away. The appellant ran after the complainant, tripped her and raped her in

³ 1999 (2) SACR 295 (W); see also *S v Tladi* 2013 (2) SACR 287 (SCA) at 12.

her anus. When he raped her in her anus, it was the second incident. These constituted two distinct offences. The respondent further argues that the conduct of the appellant was not one continuous act as he was interrupted. When the appellant came after the complainant, tripped and penetrated her for the second time, he had formed a second separate intent to rape her again, so submitted the respondent.

[24] The question turns on the manner in which the State framed the charges, and in addressing the question, I borrow copiously from the majority decision in *Molaza v S*⁴, where Opperman J said the following:

“In my view the question of what constitutes proof for the purposes of the 1997 Act was answered authoritatively in *Legoa*: Each and every fact sought to be relied upon to trigger the enhanced sentencing jurisdiction provided for in the 1997 Act must be proved beyond a reasonable doubt, along with all the other elements of the offence. Cameron AJ (as he then was) relied on *Moloto* in which robbery with aggravating circumstances was considered. There the court found that robbery had remained the core offence but facts proving aggravating circumstances afforded the trial court a discretion to impose the death penalty. The point is put to bed by Cameron JA at paragraphs 24 and 25 as follows:

“These principles were illuminatingly applied in regard to the 1997 statute’s minimum sentencing provisions in *S v Nziyane* [reported at [2000] 2 All SA 391 (T) – Ed]. There the scheduled offence was possession of a semi-automatic weapon, which for a first offender similarly carries a minimum 15 year sentence. The charge sheet averred possession of a Norinco pistol and specified that this was a semi-automatic weapon. However, in its verdict the trial court, though observing that it was common cause that a Norinco pistol was in

⁴ [2020] 4 All SA 167 (GJ)

general a semi-automatic weapon, failed to make a specific finding to this effect. Only after the conviction was entered did the State lead expert evidence establishing that the pistol the accused possessed was in fact a semi-automatic. The Court correctly laid emphasis on the 1997 Act's requirement that the accused must be convicted of the scheduled offence. The minimum sentencing provisions therefore did not apply. Although the Legislature had not created new offences, it had to appear at conviction that elements in question were present. Botha J observed (I translate):

'The words in my opinion convey the meaning that *the facts* that must be present to make the minimum sentence compulsory must be established at conviction in the sense that *they must be included in the facts on which the conviction is based*. (609d)

Botha J concluded that the nature of the weapon was *res judicata* after conviction. Where the accused pleads not guilty, the State's allegation in the charge sheet puts the matter in issue at the trial, so that after verdict the State can no longer lead evidence on the issue (610b – d) *These conclusions seem to me clearly right.*⁵

[25] Opperman J continued to observe as follows:

"In my view, two counts of rape are not required to trigger the operation of the minimum sentencing regime as suggested by the *Mahlase dictum*. What is required, are two acts of rape. This is so as Part 1 of Schedule 2 in relevant parts reads, and commences with the word "rape" in the singular as follows:

"Rape

(a) when committed –

⁵ *Molaza v S* at para 103

- (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice...
- (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
- (iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions” (emphasis added)

To suggest, as *Mahlase* does that there has to be conviction on a second count before the minimum legislation is triggered is flawedbecause such a meaning would render (a)(i) meaningless. The situation contemplated by *Mahlase* in (a)(i) is already catered for in (a)(iii) which envisages more than one count, not necessarily more than one victim. The description of rape as contained in (a)(i) contemplates more than one rape in a single encounter as envisaged in *Blaauw*. The purpose of this description is to accommodate a situation where the accused committed more than one rape, but not in a single encounter. If this distinction is not made, the inclusion of a single accused who rapes a victim more than once in (a)(i) would be rendered meaningless, for such an accused would always fall under (a)(iii), which contemplates multiple counts.”⁶

[26] Then Opperman J concluded as follows, importantly:

“The difference is perhaps academic, because the result will be the same: life imprisonment. But conceptually there is a difference. Item (a)(i) envisages a single count and item (a)(iii) envisages multiple counts.”⁷

[27] Opperman J further referenced *S v Maxabaniso*⁸, a case which concerned the offence of rape as defined in section 3 of Act 2007. There the accused was

⁶ See *Molaza* at paras 104 – 105.

⁷ *Id* para 106.

charged with one count of rape, but the charge sheet drew the accused's attention to the provisions of section 51 of the 1997 Act. When the charge was put to the accused, the prosecutor indicated that the State would seek a sentence of life imprisonment due to the fact that the complainant was raped more than once. Plasket J (as he then was), distinguished the matter from a case where the two rapes are separated by a significant period of time of, say a week or a few months. He held that, where a person is accused of raping the victim more than once in a single encounter, the correct way to charge the accused is with a single count of rape. The following passage in the *Maxabaniso* judgment is instructive:

“[25] In my view the Legislature envisaged an accused being charged with one count of rape if, in the course of his encounter with his victim, he penetrates her more than once. The repeated penetration of the victim is what aggravates the perpetration of the rape and renders him liable for life imprisonment in respect of his entire course of conduct: it is in other words, multiple acts of penetration that attract the life sentence.”

[28] Pertinently, Opperman J then concludes as follows in *Molaza*:

“[117] Does this conclusion imply that the three charges of rape in the present case were impermissible? Practically, it does not matter whether an accused person is charged with one count or three. In either event, the charge should contain reference to section 51(1) of the 1997 Act and item (a)(i) of Part I of Schedule 2 so as to inform the accused of “all the elements of the form of the schedule offence that the State intends to prove; and warn the accused of the punishment he or she faces if convicted.”

[29] On the authority of *Molaza*, with which I agree, whether the accused faces two or more counts of rape does not matter, provided he is charged with raping his victim twice in the same sexual encounter and reference must be made in each charge that the State would be seeking life imprisonment as contemplated in section 51(1)(a)(i) in the event of conviction. It is common cause in this matter that the accused was charged with two counts of rape in contravention of section 3, read with section 1, 56, 56A, 57, 59, 60 and 68 of Act 2007 and further read with section 51 of Act 105 of 1997 in respect of both counts. The following is relevant in respect of both counts of rape as appears from the charges:

“The provisions of Section 51(1) of Act 105 of 1997 are applicable by virtue of the fact that the rape was committed in circumstances where the victim was raped more than once by the accused or by his co-perpetrator or accomplice. As such, the minimum sentence of life imprisonment is prescribed.”

[30] An accused person who faces a charge of rape where his victim was penetrated more than once in a single sexual encounter must be charged with one count of rape and not two, so as to avoid unnecessary confusion and the difficulties concerning sentencing. But in the end, the result is the same, life imprisonment.

[31] In the circumstances therefore the point *in limine* must succeed. Appellant should only have been charged with one count of rape in terms of section 51(1) of Act 105 of 1997 in that the complainant was raped more than once.

On conviction

[32] The complainant maintained throughout the trial that the appellant raped her twice, and the appellant raised a defence of consent. The appellant submitted that the evidence regarding the actual incident of rape consists of evidence of a single witness, the complainant and that such evidence ought to be treated with caution.

[33] The court *a quo* determined the question before it to be whether the sexual encounter between the complainant and the appellant was consensual? The court *a quo* sought guidance from *S v Chabalala*⁹ where the Supreme Court of Appeal referred to its earlier decision in *S v Van Aswegen* and stated as follows:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused, against all those which are indicative of his innocence. Taking proper account of inner strengths and weaknesses, probabilities and improbabilities on both sides, and having done so, decide whether the balance weighs so heavily in favour of the State, as to exclude any reasonable doubt about the accused’s guilt.”

⁹ 2003 SACR 134 (SCA)

[34] The court *a quo* considered that the complainant's version is corroborated by the appellant himself, save for the question of consent and the injuries on her neck. There was vaginal penetration, and there was anal penetration. This is common cause. The question is whether or not penetration on both occasions was by consent.

[35] The court *a quo* considered the evidence of the complainant, V[...] K[...] K[...] whom it found to be a neutral witness who is also known to both the complainant and Appellant, as well as the evidence of Dr Ndamase. The court *a quo* found the evidence of the complainant to be clear and credible in every material respect. To the extent that there was an inconsistency in complainant's statement concerning the absence of an allegation of anal penetration, the court attributed same to poor translation and that such defect is nevertheless cured by the evidence of the appellant himself who admitted to penetrating the complainant anally. The court *a quo* further found that there is corroboration in the evidence of the complainant with V[...] K[...] K [...], and corroboration with the doctor. The court found that where corroboration was needed and expected, it was presented in the State's case.

[36] As regards the evidence of the appellant the court *a quo* found that the appellant failed to explain the injuries on complainant's neck. The court also found that the appellant engaged in a recent fabrication or fabricated evidence as he went along and that the evidence of the appellant when seen in the light of the State's case, was not credible, and therefore not reasonably possibly true and accordingly rejected.

[37] The court *a quo* found that on a conspectus of the evidence of the complainant and the doctor, there were two penetrations in two orifices. The evidence was vaginal penetration and the appellant confirmed the anal penetration. There was a start and there was a stop when she fought him off. There was also a start and stop after he tripped her and penetrated her in her anus. These, the court *a quo* regarded as two separate acts.

[38] In *S v Blaauw*, a case which involved three individual acts of penetration at more or less the same place and soon after each other, Borchers J stated as follows:

“Ejaculation is not an element of rape, though it would seem to me that if the rapist had ejaculated, withdrawn from the victim and then shortly thereafter again penetrated her, he would on the second occasion be guilty of raping her for the second time. Not only is there a second act of penetration, but it would be reasonable to infer that the rapist had formed a new intent to have intercourse for the second time.”¹⁰

and

“*Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape.* A rapist who in the course of raping his victim withdraws his penis, positions the victim’s body differently and then again penetrates her, will not, in my view, have committed rape twice.”

“Each case must be determined on its own facts. As a general rule *the more closely connected the separate acts* of penetration are in terms of time (ie the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. *But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her*

¹⁰ See *S v Blaauw* supra fn 3 at 299C.

again, even if the second rape takes place soon after the first and at the same place."¹¹ (emphasis added)

[39] In *S v Willemse*¹², the appellant first raped the complainant vaginally. He then turned her on her side and raped her anally. There was little to no evidence as to the time that each of these acts took place, or as to the overall time taken to commit both acts. The Court concluded that each act must have involved a distinct thought process during which the appellant decided to rape the complainant in a different manner to that which he had initially done. By doing so the appellant formed a completely separate intent to rape the victim in a different manner, even though it may have occurred reasonably close in time to the initial act.

[40] in the present matter, evidence of vaginal penetration was tendered by complainant and corroborated by the appellant. Evidence of anal penetration though not contained in complainant's statement was corroborated by the appellant. A question arises: whether the State can supplement its case with facts from the appellant's testimony when his defence has been rejected? The court in *Molaza* dealt with the same question as follows:

"[87]....All of the appellant's evidence has not been rejected. Only that which has a bearing on his defence, being one of consensual sexual intercourse. The appellant's version was not rejected in *toto*. A finding on the lack of consent, is not the same as a finding of a lack of intercourse.

¹¹ Id, at 300A – D.

¹² 2011 (2) SACR 531 (ECG) at paras [8], [16] and [18].

[88] Had the appellant not testified at all or had his defence been a denial of the *actus reus*, a conviction on more than one count of rape might have been unsustainable by virtue of the paucity of facts. However, he did testify and the fact that the exculpatory portions of his evidence have been rejected does not, in my view, lead to the rejection of the incriminatory portions thereof.”

[41] The corroborative evidence of V[...] K[...] K[...] to the effect that the complainant arrived at the former’s home half-naked and reported spontaneously that “*Mandla was raping me*” and that of Dr Ndamase on the brut force on the neck, vagina and anal area of the complainant, efforts by the appellant and his family to apologize to the complainant viewed against appellant’s failure to explain the injuries on complainant’s neck, vagina and anus. In addition, the appellant’s failure to explain why would complainant run half-naked in the middle of the night if the sexual encounter was consensual as well as appellant’s vacillation on the reasons he contends the complainant reacted the way she did, being first that it was because she got caught as she wanted to keep the affair a secret, but later the reason changed to “she thought I was playing her”.

[42] As a result of all of the above I am unable to assail the factual and credibility findings of the court *a quo*. The evidence demonstrates an unequivocal lack of consent to the two incidents of sexual intercourse between the Appellant and the complainant in a single encounter. The appeal on conviction is therefore dismissed.

On sentence

[43] In considering the substantial and compelling circumstances found to have existed and the test to be applied by an appeal court, the following: In *S v PB*¹³ Bosielo JA formulated the approach by a Court on appeal against sentence imposed in terms of the 1997 Act as follows:

“[20] What is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court’s exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not.”

[44] In *S v Vilakazi*, Nugent JA said “*it is enough for the sentence to be departed from that it would be unjust to impose it.*” To determine whether or not it would be unjust to impose the sentence the Court is entitled to consider factors traditionally taken into account in sentencing and referred to as mitigating factors.

[45] I turn to deal with the question whether it would be unjust to impose the minimum sentence imposed by the 1997 Act. The court *a quo* considered the following facts:

¹³ *S v PB*, 2013 (2) SACR 533 (SCA)

- (i) the appellant was 24 years old at the time with no previous convictions or pending cases;
- (ii) the appellant was employed prior to his arrest, albeit in casual circumstances;
- (iii) the appellant is a father to a minor child of six year of age at the time. The minor child is under the care of appellant's mother, because the biological mother of the child is an orphan;
- (iv) the appellant supported the minor child when he was working. The minor child does not receive a child care grant because he does not have a birth certificate. He confirmed that his mother and sisters are the primary caregivers of the minor child, and he was not;
- (v) the appellant stated that he was remorseful and that his actions would not have been the same had he not been drinking. He conceded under cross-examination that he was feeling sorry for himself;
- (vi) he sought to offer his apologies to the complainant but maintained that there was no rape;
- (vii) he has remained in custody since his arrest;
- (viii) the offence charged is very serious;
- (ix) the accused is remorseless;
- (x) the offence has had a devastating effect on complainant's family life in that her eldest daughter no longer respects her because of what she went through;

- (xi) complainant has developed serious trust issue such that she testified that she does not trust any man, including her own father whom she clarified, has done nothing wrong to her;

[46] Having considered all of the factors which the court *a quo* had regard to in sentencing the appellant, and in the exercise of my judgment I am unable to find that the court *a quo* ought to have found the existence of substantial and compelling circumstances justifying a departure from the minimum sentences imposed by Act 105 of 1997.

[47] The appellant falls to be sentenced to life imprisonment in terms of section 51(1) of Act 105 of 1997 read with item (a)(i) of Part 1 of Schedule 2 thereto for having been convicted of rape with a finding that two acts of rape as contemplated in Part 1 of Schedule 2 were committed unless substantial and compelling circumstances are found to exist.

[48] This court is called upon to sentence afresh. For all the reasons referred to herein I am unable to conclude that substantial and compelling circumstances are present which would warrant a deviation from imprisonment for life.

In the result, the following order is made:

(a) The point *in limine* of duplication of charges is upheld. Appellant should have been charged with one count of rape the provisions of section 51(1) of Act 105 of 1997 being applicable as the complainant was raped more than once.

(b) The appeal against the convictions are upheld and replaced with the following:

“Appellant is convicted on a count of rape in terms of section 51(1) of Act 105 of 1997 in that he raped the complainant more than once.”

(c) The appeal against sentence is upheld and replaced with:

Appellant is sentenced to life imprisonment.

(d) The Appellant is in terms of section 103 read with section 10 and 41 of Act 60 of 2000 declared unfit to possess a firearm.

S.M LUTHULI

ACTING JUDGE OF THE HIGH COURT

I agree.

P BEZUIDENHOUT J

JUDGE OF THE HIGH COURT

Heard on : **23 January 2026**

Delivered on : **8 May 2026**

For the appellant:

Z Fareed instructed by Legal Aid South Africa

For the respondent:

G.E Xulu instructed by National Prosecuting Authority