



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MAKHANDA]**

CASE NO. CA&R154/2025

In the matter between:

TSEPISO NGUNUZA

Appellant

And

THE STATE

Respondent

JUDGMENT

JOLWANA J

[1] This appeal concerns the oft-controversial issue of whether or not a complainant's sexual intercourse with an accused person was with or without her or his consent. Appellant was arraigned on two counts of rape for contravening various provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act), read with sections 268 and 270 of the Criminal Procedure Act 51 of 1977 (the CPA), further read with sections 51(1), 51(2), Part 1, Parts 2 and 3 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, (the Minimum Sentences Act). It was alleged that on 16 April 2024 at or near Gqeberha the

appellant unlawfully and intentionally committed an act of sexual penetration with the complainant by inserting his genital organs and/or his fingers into or beyond the complainant's genital organs without her consent. It was further alleged that on the same date and place the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant by inserting his genital organs into the complainant's mouth without her consent.

[2] Appellant who was legally represented throughout his criminal trial pleaded not guilty to the charges explaining that the sexual intercourse with the complainant's complainant was with her consent. He was, however, convicted on one count of rape but was acquitted on the second count. He was thereupon sentenced to 15 years imprisonment. He appeals against both conviction and sentence with the leave of this Court granted on petition to the Judge President subsequent to the refusal of his application for leave to appeal by the trial court.

[3] The facts in this matter are largely uncontroversial, the only issues being whether the complainant consented to vaginal sexual intercourse with the appellant. The state relied largely on the evidence of the complainant and her friend, the so called first report witness. Formal admissions in terms of section 220 of the CPA¹ were agreed to and entered into the record. In those admissions, appellant admitted that he placed his penis and his fingers into the complainant's vagina and that he placed his penis into the complainant's mouth.

[4] The first witness for the state was a forensic nurse who completed the medico-legal report on 17 April 2024. She testified that complainant's injuries were tears on

¹ Section 220 of the CPA provides that: An accused or his or her legal representative or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact.

the perineum, the posterior fourchette and on the vestibule. She pointed out that such tears were possible even if sexual intercourse was consensual. This means therefore that such injuries are a neutral factor to the issue of whether or not the sexual intercourse was with the complainant's consent.

[5] The evidence of the complainant was that she first met the appellant on 14 April 2024 for the very first time in a vehicle driven by a woman who had come to fetch her so as to take her to that woman's house. On 16 April 2024 she was at that woman's house as she had been asked to look after that woman's one year old baby. She was alone with the baby in the house that evening when the appellant arrived. That woman had intimated to her that appellant would come to the house just to check on the baby and her. When she opened the door for him, she noticed that the baby was excited to see him. When she was feeding the baby, and she was struggling to do so, he offered to help feed the baby. They ended up sitting together on a sofa as he helped her in feeding the baby.

[6] At some point she took the baby to another room to put him in bed. She was still in that room when she overheard appellant speaking on the phone with someone she assumed was his sister telling her that he would not be coming back home that evening. She asked him about that, and he said that the baby's mother usually allowed him to sleep in her house. She felt a bit uneasy about this turn of events, but she decided that she would raise it with the baby's mother the following day. She and the appellant had a conversation on the sofa and at some stage she put her head on the pillow facing the side opposite to the appellant. He then invited her to lie on his lap, and she put the pillow on his lap and lay on his lap as they continued with their conversation.

[7] While they were talking, he kissed her and she told him that he was moving far too quickly and sat up on the sofa. He said that he was sorry and they continued with their conversation. At some stage she wanted to sleep, so she went to turn off the lights in the house. He followed her to the spare room, and she sat on the bed in that room. He closed the door and turned off the lights. Because it was dark she could not see him, but she could hear that he was undressing himself. He came to be with him on the bed and tried to touch and caress her. She told him to put his clothes back on. At that stage he was only wearing his boxer shorts having removed his other items of clothing. She thought of an excuse to leave that room as she felt uneasy. She told him that she needed to go and check if the baby was still fine and sleeping. However, he would not let her leave the room and told her to relax.

[8] They started having a conversation during which she ended up opening up to him about a previous experience in which her friend tried to sexually assault her about a year previously. He seemed empathetic to her about it, and she allowed him to hug her. After some time of talking about that experience, he then put his hands in her pyjama pants. She told him not to touch her and told him that she had not shaved. He proceeded to do it anyway saying that he had not shaved either. He took her hand and put it in his pants, but she removed her hand. He put his hand in her pyjama pants again and then proceeded to penetrate her with his fingers. He then came on top of her and sat on her abdominal area. He told her to remove her top not sounding nice about it as he asked her to do that. She just complied and removed her top. He then caressed her breasts and kissed them while she just lay there feeling uncomfortable. He pulled her pants down and also removed his boxers and proceeded to penetrate her with his penis. She tried to move away and to resist but he had bent her over and penetrated her.

[9] She told him that it was painful and that it hurt to which he said that he was not going to stop until he ejaculated. Thereafter he put her on top of himself and told her to do sex acts on him which she was reluctant to do but he assisted her in doing them which did not last long. He told her to perform oral sex on him to which she told him she did not know how to do it. He then said that he would teach her. He proceeded to force her head to his penis as a result of which she performed oral sex on him. After that she lied to him saying that the baby was crying. She put on her clothes and headed to where the baby was sleeping. He followed her to the baby's room and found her lying next to the baby and tried to finger her while she was with the baby. She told him that he should not do that in front of the baby and so he stopped for a while. He then tried to touch her again, but she removed his hand from touching her. Eventually they slept but she was awake the whole time as she could not sleep. The next day she woke up and he tried to talk to her, but she did not speak to him that much as she was confused about everything that had happened. She was busy getting the baby ready for school when the baby's mother called her and asked her if everything was okay because she could sense that she was not okay. However, she told her that everything was fine and did not tell her anything because the appellant was still there. While she was still on that call with the baby's mother appellant had told her not to tell her that he was there.

[10] The transport for the baby came to fetch the baby to take him to school. She then went to the other room at which stage the appellant had already left. She stayed in that room and called her friend Manyano and told him what had happened. She had first sent him a WhatsApp message and asked him if it was rape when one let something happen that they did not want to happen. Manyano said yes, it was rape and asked her what was going on. She did not answer him as a result he

called her. Manyano came by as he did not stay far and she then explained to him what happened. She went to report the incident to the police that same morning of the incident. Police took her to Dora Nginga Hospital where she was examined by a forensic nurse.

[11] The complainant explained that she went to the spare room to show appellant where he was going to sleep and in doing so, she was trying to be hospitable to him. The reason she sat on the bed was because the appellant said he wanted them to talk. She sat on top of the bed and not under the bedding. When he switched off the lights and she heard him undressing, she knew that he was going to assault her. She tried to stand up and leave the room. That is when he told her to relax and just sit on the bed. She explained that the reason she told appellant about the previous occasion in which her friend tried to sexually assault her was because she thought that would make him stop what he was going to do to her. She had even told him that she is a Christian and that she did not believe in sex before marriage while they were sitting on a sofa. She testified that she never consented to him inserting his fingers in her vagina even though when he asked her if it was okay she did not say anything. When he told her to remove her top with a demanding tone of voice, she became afraid even though he did not threaten her beyond the change in his tone of voice. She never wanted him to touch her breasts even though she did allow him to do it. She never said that it was okay for him to do it. At that stage she thought the encounter would end with the touching of the breasts.

[12] When appellant penetrated her with his penis, he did not use a condom. She did not consent to him penetrating her and even telling him that she did not want to have a child was her way of trying to stop him. She did not just only want him not to penetrate her without a condom, she did not want him to penetrate her at all. She

just raised the issue of not wanting a child as an excuse, but he proceeded to penetrate her anyway. However, she never said that she did not want to be penetrated. When she was in pain and hurting because of the penetration, she told him to stop but he did not stop, saying that he would only stop after he would have ejaculated. When appellant put her on top of himself, she did not want him to do that and in fact she resisted by trying to get off but he held her down on top of himself. He proceeded to have oral sex with her which she did not want to do even saying she did not know how to do it and backed away but he said he would teach her. She testified that when the incident occurred, she was 21 years old and was a student at Nelson Mandela University. As a result of the incident, she stopped going to church and she had nightmares, she would be angry with her parents, had become more reserved and self-aware even though she was a bubbly person before the incident and she does not trust men.

[13] The complainant's evidence under cross-examination was largely dominated by the assertion that she did not say no, do not do that to the appellant or failing to stand up and walk out of that room. Mainly because of this, it was then suggested that she was not raped, that her reasons for saying that she was raped was her guilt conscience for having compromised her values as a Christian. It was put to the complainant that the appellant's version would be that she agreed to each and every one of those sexual acts and that she never told him to stop. Furthermore, it was put to her that he never threatened her. She confirmed that he never threatened her or forced her to have sexual intercourse with him. She explained that she did not agree to those sexual acts. She did not know that he was going to come and take advantage of her. She had a problem with him kissing her which was why she told him he was moving too fast. Her excuses and her body language should have been

enough for him to see that she was uncomfortable. He should have known because even while they were sitting on the couch, she had told him that as a Christian there are certain things she would not be doing, not just with him but not with anybody. She asserted that he knew what her values are. When she heard him removing his clothes she tried to get up and as she was getting up, he told her to calm down and relax.

[14] The next state witness was Manyano, a friend of the complainant. His evidence was that on 17 April 2024 he received a WhatsApp message from the complainant. That message, as recorded in a statement he made to the police was as follows:

“She asked me, what do I think about the situation whereby someone insisting doing something whereby a person will tell the insisting person no, and because of the fear for the person you end up doing it.”

Manyano testified that he later went to the house in which the complainant was. When he got there, he could see that the complainant was not alright and she could not even control her tears. The complainant told him what happened. After their conversation he accompanied her to report the incident to the police.

[15] After the state closed its case appellant's attorney made an application for the appellant to be discharged in terms of section 174 of the CPA. The court *a quo* delivered a judgment refusing the appellant's application to be discharged. The appellant's attorney thereafter indicated to the court that her instructions were to close the appellant's case without testifying or tendering any evidence. I will come back to this issue later in this judgment.

[16] The court *a quo* later delivered a judgment in which it found that the appellant made the complainant comfortable by telling her to relax. It further found that

complainant could not be blamed for thinking that the sexual acts would not go beyond kissing and cuddling. The appellant gained the trust of the complainant after assisting her when she was struggling in feeding the baby and he invited her to put her head on his lap. It further found that she was honest to say that she was a nice person. The court found that appellant was aware of the complainant's belief in abstinence before marriage and that during the vaginal sexual intercourse she told him to stop, and he refused to stop and continued to have sexual intercourse with her.

[17] The court concluded that appellant did not present any evidence in rebuttal especially of him being aware of the complainant's religious values and how he understood her body language and her telling him to stop when he was penetrating her. It further found her evidence to have been consistent with what she told the nurse who examined her as well as with the questions she had asked Manyano. It also found that Manyano's response that what had happened to her was rape was not him making any suggestions to her. In the final analysis, it concluded that the complainant was an honest and reliable witness who told the truth and further concluded that it had no reason not to accept such evidence especially as there was no countervailing evidence. It concluded that the facts were indicative of the complainant not having consented to vaginal penetration. It further concluded that even if it could be said that there was consent at some stage, complainant's verbal expressions and body language showed the withdrawal of such consent and that the appellant being aware of the withdrawal of such consent, nevertheless persisted with his act of vaginally penetrating the complainant.

[18] The appellant's case on appeal was anchored on two main submissions. First, it was submitted that the state did not prove that the intercourse between the appellant

and the complainant was without complainant's consent. The appellant's alternative submission was that even if it were accepted that the complainant did not consent to sexual intercourse, the state did not prove the appellant's *mens rea* to justify his conviction. It was further submitted that appellant had no evidential burden to testify because of the reasonable doubt besetting the case of the state.

[19] The state contended that it was apparent from the evidence of the complainant that she never consented to sexual intercourse and that the appellant had *mens rea* to rape her. Appellant forcefully pushed her head towards his penis and told her to perform *fellatio* on him. She told him she did not know how to perform *fellatio*, and he told her that he would teach her. She then proceeded to perform *fellatio* on him. She displayed her disapproval by telling him that she did not know how to perform *fellatio* while backing away. She lied to the appellant saying that the child was crying in order to escape. She put her clothes back on and went to the room in which the child was sleeping and lay next to the child. The appellant followed her to that room in which she was now sleeping with the child and tried to finger her again. She told him not to do that in front of the child. He stopped and tried to finger her again but she removed his hand and he then stopped and fell asleep. She, however, could not fall asleep.

[20] In the morning she was withdrawn and did not speak with the appellant because she was confused because of what had happened. When the child's mother phoned her as she was preparing the child for school, the appellant asked her not to tell her he was still there. After the appellant left, she sent a text message to her friend Manyano asking him if it was rape when she allowed someone to do something to her which she did not consent to and her friend said that it was rape. That friend

came over to the house, and she reported the rape to him and ultimately a rape case was opened with the police that very morning.

[21] It is common ground that sexual intercourse did take place between the appellant and the complainant. This case turns on whether or not, on the evidence before the court *a quo*, such sexual intercourse took place with the complainant's consent. Not surprisingly, this issue tends to be more difficult especially in situations in which there is a relationship or familiarity between a complainant and the alleged assailant. The issue of consent is central in most rape cases. Its centrality flows directly from the Sexual Offences Act² which, in section 3 defines rape as follows:

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

[22] Put simply, any sexual penetration of one person by another without the other person's consent is rape. Sexual penetration is defined in the Sexual Offences Act as including “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.”

[23] The complainant's evidence, considered as a whole, together with her actions after the incident are inconsistent with her having willingly engaged in sexual intercourse with the appellant. Complainant's evidence struck me as that of someone who did not harbour any anger against the appellant to the point of lying for

² 32 of 2007.

purposes of ensuring the conviction of the appellant. On the contrary, it appears that she was determined to and did give as correct recollection of events as possible while giving the benefit of doubt in some instances to the appellant. She openly gave aspects of her evidence which were clearly to the benefit of the appellant in her effort of being candid with the court and even conceding that in some instances she did not express an unequivocal no and gave excuses instead of saying no to what appellant was doing. This is exactly what led to the acquittal of the appellant on the second count of rape relating to oral sex. This is to her credit as an honest and credible witness. What was clear throughout though was that she did not expect the appellant to ignore her various intimations and ways of saying no to him which were by no means unclear indications of discomfort about what was taking place and her attempts to move away and leave the room at some stages of their encounter. All these considered together which she took at various times and stages were not headed by the appellant.

[24] There is nothing in the complainant's evidence to suggest that she consented to sexual intercourse. At best for the appellant, she did not run away from the house in which she was just with the appellant and nobody else except the one year old baby. She also did not scream or try to reach for her phone to phone somebody. The idea that the complainant should be faulted for not unequivocally saying no to all what was done to her is wrong for many reasons. It is the kind of the unfortunately not so uncommon mindset of expecting victims of sexual assault to all respond in the same way to acts of sexual violence. That is the expectation that a victim should vocally say no, or scream or try to fight back, the expectation that all victims must verbalise their refusal or disapproval and do so in the same way. The absence of a vocalised objection to sexual intercourse on the part of a complainant, it tends to be argued,

point to or entitles the assailant to assume consent. Consent to sexual intercourse cannot be assumed, it is either there or it is not there.

[25] In this case, no basis whatsoever was laid for any contention that there was implied consent much less express consent. This would have required the appellant to testify and candidly give to the court an explanation of his own understanding of what the complainant did or did not do that would have led him to assume that there was consent, express or implied. I may mention that it was never put to the complainant that for whatever reason or for whatever she allegedly did, the appellant understood her to be consenting. It was never put to her that the complainant said or did anything herself as an alleged active participant to the sexual intercourse. Instead, her alleged active participation seemed to be founded on no more than her submissiveness to what were all unrelenting acts or actions of the appellant that took over a period of time. It was never even alleged that the complainant's consent was ever sought or obtained and expressly or tacitly granted for any of the things that were done to her. It was never suggested that she did anything on the basis of which it could reasonably be said that appellant was led to believe rightly or wrongly that she consented to sexual intercourse.

[26] Consent in the context of sexual intercourse where a complainant and the alleged rapist know each other and there was no violence or threats thereof unfortunately is often misunderstood in the legal discourse. In my exposition of consent, I can do no better than refer to the judgment of Erasmus AJA in *SM*³ in which the Supreme Court of Appeal expressed itself as follows:

“The law requires further that consent be active, and therefore mere submission is not sufficient. In *R v Swiggelaar*, Murray AJA commented as follows:

³ S v SM 2013 (2) SACR 111 (SCA) 120 d-g.

'The authorities are clear upon the point that though the consent of a woman may be gathered from her conduct, apart from her words, it is fallacious to take the absence of resistance as *per se* proof of consent. Submission by itself is no grant of consent, and if a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless.'

While it follows that consent would encompass submission, the converse is not always true. One has to have regard to the totality of facts in order to determine whether acquiescence to certain sexual conduct also constitutes consent."

[27] It should be emphasised that even to the extent that it could, be said that the evidence of the complainant was unclear on certain aspects, it was never cogently challenged. Furthermore, appellant made an informed choice after being given an opportunity to make the decision, as his attorney placed on record, not to give his own version to explain himself candidly to the court. This is more so as someone who, no doubt, should have been surprised by the rape charges being laid against him by the complainant the very morning of the incident, if he believed he did not rape the complainant. There is no evidence of him having sought to explain himself to the complainant, the complainant's friend for whom the complainant was looking after the baby and who knew both of them. His own version of events to date, remains buried in his belly despite his allegation that the sexual intercourse was with complainant's consent. Surprisingly he elected not to back that up with any evidence whatsoever. I say regrettably because the court *a quo* was denied an opportunity to weigh any evidence he could have given evidence, consider his credibility as a witness and indeed make an assessment of the entirety of the factual matrix.

[28] This has to be juxtaposed amongst other evidence with the evidence of the complainant that when the baby's mother phoned that morning, she could tell that she was not okay. The appellant, for some reason which he never sought to explain nor did he challenge that evidence, indicated to the complainant who was talking over the phone with the baby's mother that she should not tell her that he was still there. That evidence was also not challenged. The complainant sending a text to his friend, Manyano seeking another person's understanding of what had happened to her in circumstances in which she was clearly blaming herself for allowing certain things to happen thinking that they would not escalate to non-consensual sexual intercourse. The complainant ultimately laying rape charges against the appellant the very morning after the incident but in its entirety. All of this evidence considered together with the rest of the complainant's evidence, not as individual compartmentalised pieces of evidence, is consistent with the complainant having been raped by the appellant who knew full well that he did not have complainant's consent.

[29] The contention that appellant lacked *mens rea* is stillborn. It is stillborn because for it to have any chance of making any sense on the facts of this case, it would still have necessitated the appellant to give evidence that would negate *mens rea* in light of the clear, honest and credible evidence of the complainant pointing to the contrary. The basis for the contention that appellant lacked *mens rea* is thrown into the arena with no factual foundation. It seeks to suggest, without any basis, that the appellant must have understood the complainant to be consenting without him laying the basis of that understanding. *Mens rea* is the state of the mind of the appellant when he acted as he did. This required him to explain that which was in his mind which could have negated an intention to engage in non-consensual sexual

intercourse with the complainant. This is important because in its very nature, for consent to be a sustainable defence, it must have been given consciously and voluntarily, either expressly or tacitly. This begs the question, absent evidence from the appellant, what is it that the complainant did which would have led the appellant to believe that she was giving her express consent or that she tacitly consented to engage in sexual intercourse with him. The appellant presented no facts or evidence before the court *a quo* which allegedly led him to believe that he was entitled to engage in sexual intercourse with the complainant at all and to continue doing so even when the complainant told him that he was hurting her.

[30] Z⁴, which was decided more than six decades ago, laid a very firm jurisprudential foundation for a proper understanding of consent to sexual intercourse and *mens rea*. The court stated this legal position which still obtains to date as follows:

“Rape is a crime in which intention is an element; there must be an intention to have unlawful carnal connection with a woman without her consent. That intention must be proved as an essential element in the Crown case. If the accused believed that the woman had consented, the guilty intent or *mens rea* is lacking. The onus is on the Crown to prove that the accused had the necessary *mens rea* and therefore the Crown must prove that the accused knew that the woman had not consented. Submission, of course, is not consent. That the accused had that knowledge may be proved in many ways and proof that the accused was aware of the possibility of non-consent and was reckless whether the woman consented or not will suffice, but the necessary *mens rea*, like the other elements in the crime must be proved beyond all reasonable doubt.”

[31] At worst for the state, on the evidence of the complainant, whose credibility was not cogently assailed even when she was cross-examined quite rectlessly, intention at least in the form of *dolus eventualis* was established beyond reasonable doubt.

⁴ R v Z 1960 (1) 739 at 745 D-F

The evidence of the complainant actually proved a sequence of events that established a well-planned and relentlessly pursued stratagem of having sexual intercourse with the complainant, without violence or threats thereof. This was designed to get the complainant into submission to what she clearly did not want to do, engaging in sexual intercourse with the appellant. The complainant's refusal or reluctance to engage in sexual intercourse was clearly communicated to the appellant a short while before the unlawful vaginal penetration by the appellant a number of times and in various ways. Complainant gave him three reasons. First, that she did not believe in sex before marriage. The appellant ignored the complainant's clearly communicated plans for her life as a young woman in this regard. Second, complainant told appellant that she is a religious person, a Christian who did not want to engage in sexual intercourse with someone she was not married to contrary to her personal Christian conviction. Third, she told the appellant when he inserted his hands under her pyjama pants that she would not like to be touched there as she was not shaved. This was also ignored by the appellant who went on to penetrate her vagina with his fingers against her will. It was also the appellant who, without the complainant having done anything, climbed on top of her and inserted his penis in her vagina. The complainant protested that it was painful. True to his intention, appellant was undeterred and did nothing to alleviate the complainant's pain, choosing instead, to continue with his actions telling the complainant that he would not stop until he would have ejaculated. He indeed did exactly that, ignored the complainant's protestation that he was hurting her and continued with his unlawful actions. None of this evidence was gainsaid. These were all actions of a direct intention to engage in sexual intercourse with the

complainant without her consent which was neither sought nor obtained either expressly or tacitly.

[32] The legal position as articulated in *Z*⁵ was recently confirmed in *Coko*⁶ in which Petse DP and Mabindla–Boqwana JA, unwriting jointly, a unanimous judgment of the Supreme Court of Appeal said:

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

The evidence of the complainant, with all the necessary caution applied as a single witness, established the guilt of the appellant beyond reasonable doubt and he was therefore correctly convicted. The appellant’s appeal against conviction must therefore fail.

[33] Something more needs to be said about the choice of the appellant to testify and challenge the complainant’s evidence. That decision, while it is an exercise of a constitutional right to silence, great care needs to be taken in exercising it as an accused person may first him or herself in an invidious position with no point of return should the court conclude that the complainant’s evidence established the guilt of the accused beyond reasonable doubt. In *Boesak*⁷ the Constitutional Court

⁵ Note 5 supra.

⁶ Director of Public Prosecution, Eastern Cape, Makhanda v Coko 2024 (2) SACR 113 (SCA) para 62.

⁷ S v Boesak 2001 (1) SA 912 (CC); 2001 (1) SACR 1 (CC)

expressed the principles and considerations involved in that choice better than I would ever do. It said:

“[24] The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman and Another v Attorney-General, Transvaal*, when he said the following:

‘Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution’s case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.’”

[34] This brings me to the appellant’s appeal against his sentence of 15 years imprisonment. Bearing in mind the seriousness, the prevalence and the damaging effect rape has on its victims and the fear engulfing society due to the fact that it shows no signs of abating, I consider it appropriate to start with the words of our former Chief Justice, Mohamed CJ when he, in my view, explained with the

eloquence only he could have done, what rape is and what it does to its victims. In *Chapman*⁸, almost 30 years ago he said:

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The appellant showed no respect for their rights. He prowled the streets and shopping malls and in short period of one week he raped three young women, who were unknown to him. He deceptively pretended to care for them by giving them lifts and then proceeded to rape them callously and brutally, after threatening them with a knife. At no stage did he show the slightest remorse. The courts are under a duty to send a clear message to other potential rapist and to the community: We are determined to protect the equality, dignity and freedom of all women and we shall show no mercy to those who seek to invade those rights.”

[35] The undisputed evidence of the complainant was that after she opened up to the appellant telling him about a friend of hers who nearly sexually assaulted her, the appellant offered her a hug. That was clearly pretentious of him as he went ahead and did exactly what logic dictate appellant should have avoided and the complainant hoped to avoid when she told him about her previous encounter with a friend. Instead, it appears that the hug was offered as a ruse to lull her into a false belief that she was in safe hands. He thereafter had sexually intercourse with her with no compunction whatsoever about what he had just been told by the complainant about her previous near sexual assault. While the appellant may not have used violence or threats of violence as the assailant did in *Chapman*, the

⁸ S v Chapman 1997 (3) SA 34 (SCA).

difference between them is the manner in which the appellant acted to achieve the same result, having sexual intercourse with the complainant without her consent.

[36] Cases of these types of rapes are not uncommon in our courts and one often wonders how many victims of these types of sexual assaults do not report their terrible experiences for fear that they might not be believed and would be subjected to further humiliation in which their experiences and their feelings invalidated, and being accused of feeling guilty for succumbing to their sexual nature as was done to the complainant. They are usually asked why they did not say no as if keeping quiet is the equivalent of consent. This kind of attitude cannot and should not be countenanced. Victims of rape are entitled to respond to the traumatic circumstances they find themselves in true to who they are as human beings first and as women in particular. They cannot and should not be expected to follow a prescribed script of running away or screaming or verbally shouting no, failing which they will be accused of lying about the what they went through.

[37] Even in mitigation of sentence, appellant elected not to testify, even if just to express his regret about having unintentionally sexually violated the complainant as it was claimed on his behalf. His personal circumstances on which it was argued on appeal that the sentence imposed by the trial court was not one which a reasonable court would have imposed, that it was disproportionate and therefore interference with it was justified were the following. He was 22 years old with a grade 12 level of education. He was unemployed, unmarried with no children. He came from a stable family background with no history of criminal or problematic behaviour and that he has no previous convictions. All of this was submitted to make a case for a deviation from the prescribed minimum sentence of 15 years imprisonment. In the appellant's heads of argument, nothing was said about the pain and trauma that

appellant went through as was the case when submissions were made before the trial court. Instead, a lot was said about the complainant not having sustained any major physical injuries.

[38] The submission about the absence of physical injuries is fundamentally flawed. It is fundamentally flawed for two reasons mainly. First, it assumes that because a victim of rape did not sustain physical injuries, no harm was done to her or him. In this case it was the complainant's evidence that subsequent to the incident she stopped going to church. She would have nightmares and would just be angry with her parents. She became more reserved and more self-aware and does not trust men anymore. The depth of the trauma leading to these manifestations may never be known but the consequences can never be denied. Surely it cannot be suggested that a rape victim who has no physical injuries did not suffer any unknown psychological effects subsequent to the horrifying experience of being violated by being raped. Secondly, it is fundamentally flawed because it ignores the fact that the legislature, in its wisdom, enacted that there are certain factors which it determined that they shall not constitute substantial and compelling circumstances justifying a departure from a prescribed minimum sentence and therefore the imposition of a lesser sentence.

[39] Section 51(3) (aA) of the Criminal Law Amendment Act⁹ reads:

“When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history,
- (ii) an apparent lack of physical injury to the complainant,

⁹ Criminal Law Amendment Act 105 of 1997.

- (iii) an accused person's cultural or religious belief about rape; or
- (iv) any relationship between the accused person and the complainant prior to the offence being committed.)”

It cannot therefore be correctly submitted that the court sentencing the appellant should also have, while it may be relevant, taken into consideration the fact that the complainant had had no physical injuries on the face of the legislature's injunction that that shall not be a consideration as a substantial and compelling circumstance for deviation from a prescribed minimum sentence.

[40] There is no basis for this Court to, on appeal, interfere with the discretion of the lower court on the facts of this case. It correctly found that the appellant failed to establish substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of 15 years imprisonment. In *Bogaards*¹⁰ the Constitutional Court restated the legal position at it relates to interference with the discretion of the sentencing court as follows:

“Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.”

[41] In the written submissions of the appellant the factors enumerated in *Bogaards* were listed with no attempt at engaging with them or showing that they were present or applied. This is hardly surprising because none of them is present or applicable. No real basis was shown for this Court to, on appeal, interfere with the sentencing discretion of the court a quo. Therefore, the appellant's appeal against his sentence of 15 years imprisonment must fail.

¹⁰ S v Bogaards 2013 (1) SACR 1 (CC) at page 14 d-e.

[42] In the result, the following order is issued.

1. The appeal against conviction is dismissed.
2. The appeal against sentence is dismissed.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

I agree:

N. NTLAMA-MAKHANYA

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the appellant : D.P. Geldenhuys

Instructed by : Legal Aid South Africa

Makhanda

Counsel for the respondent: H. Mondliwa

Instructed by : Director of Public Prosecutions

Makhanda

Date heard : 25 February 2026

Date delivered : 17 June 2026