



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

**Not Reportable
Case No: A97/2026**

In the matter between:

SIPHENATHI PENDU

Appellant

and

THE STATE

Respondent

Coram: SMITH, AJ et (RALARALA, J concurring)
Heard on: 18 August 2026
Delivered on: 26 August 2026

Summary: Appeal against conviction and sentence- *Appellant convicted of attempted murder and housebreaking with the intent to rape and rape-Whether the court a quo erred in failing to apply the cautionary rule applicable to a single witness-Whether the court a quo failed to correctly consider the personal circumstances of the appellant before imposing life imprisonment*

ORDER

1. The conviction on count 1 is set aside.
2. The conviction and sentence on count 2 is confirmed.

JUDGMENT

SMITH, AJ

Introduction

[1] The appellant was convicted in the Regional Court Parow on 29 October 2024 of the following:

- i) Attempted Murder
- ii) Housebreaking with the intent to Rape and contravening section 3 of the Criminal Law Amendment Act (Sexual Offenses and Related Matters), Act 32 of 2007, Rape.

[2] On 24 March 2025 the appellant was sentenced by the Regional Court Magistrate as follows:

- i) 5 years imprisonment in respect of count one
- ii) Life imprisonment as contemplated in section 51 (1) Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the CLA A') in respect of count 2

[3] The Regional Court Magistrate ordered in terms of section 280 (2) of the Criminal Procedure Act 51 of 1977 ('the CPA') that the sentences imposed on count 1 run concurrently with the sentence of life imprisonment.

[4] On 15 September 2025 leave to appeal the conviction and sentence in respect of Count 1 was granted on petition by the High Court, Cape Town.

[5] This court is also seized with the appellant's automatic right of appeal in respect of Count 2.¹

Summary of the evidence

[6] On the evening of 22 August 2021 the complainant, her friend, and the accused returned to her home in Langa after an evening and a day of socializing with friends at different places. The accused and the complainant were not known to each other until he joined their company on 21 August 2021. Due to a lack of sleep and the consumption of alcohol the complainant wanted to sleep. Her friend, Ms Tikipeni ('T') and the accused left her premises. T waited for her to lock the burglar gate with a bolt mechanism and the front door of the house before she left.

[7] While she was sleeping on her bed, the complainant heard a knock on the front door. She ignored it and fell asleep again. When she became awake again, an unknown person was on top of her body, strangling her. The unknown person asked her why she did not answer the door when he knocked. He beat her with his fists and hit her in the face with a firearm. Due to the force of the blow, she bled from her chin and both her ears. The unknown person then switched on the light. She identified the person as the appellant.

[8] The appellant ordered her to clean the blood from the floor and to remove her top garment she was wearing as it was bloodstained. She then heard a knock at the door. Someone called her name. She was instructed by the appellant to be silent and she obliged. He switched the light off again. The person knocking at the door was the complainant's ex-boyfriend, who left the premises when there was no response from inside the house.

[9] The appellant instructed her to remove her clothes and get into bed. He removed his clothes and had sexual intercourse with her. The complainant was still bleeding from her face and ears. She did not give him any permission to have sexual

¹ First proviso to Section 309(1)(a) Act 51 of 1977

intercourse with her. Throughout the incident the appellant told her that he loved her and wanted to be in a relationship with her.

[10] The only access to the complainant's home was via a window that was not secured by burglar bars. The curtain in front of the window was drawn closed.

[11] After the appellant had sexual intercourse with her, he fell asleep. The complainant made her escape through the front door. She was naked and bleeding. She ran to her friend T's house. She told her friend that the accused had raped her. She was given a gown to cover herself. The police were informed and the complainant was taken to hospital for a medical examination and treatment. The complainant discharged herself from hospital the same day, after she received medical attention.

[12] The police arrested the appellant inside the home of the complainant.

[13] The appellant confirms that he socialized with the complainant and her friends from 21 August until 22 August 2021. During this time the complainant was flirtatious. On the evening of 22 August 2021, the complainant's friend T left her home while he remained inside. The complainant was lying on a couch. She locked the front door and went to the bedroom. He followed her. She jumped up and rushed towards the window. The appellant reached out to her, but she released herself from his grip and fell to the floor. He saw that she bled from her chin. He tried to comfort her. They then started kissing and had consensual sexual intercourse.

[14] The appellant fell asleep. He woke up when the police arrested him. He denies breaking into the house of the complainant, assaulting and raping her.

Grounds of appeal

Conviction

[15] The grounds of appeal are summarized as follows:

- (i) The Regional Court Magistrate did not apply sufficient weight to the cautionary rule pertaining to a single witness.
- (ii) The nature of the complainant's injuries does not amount to life threatening injuries, and does not support a finding of attempted murder, but one of assault with the intent to do grievous bodily harm.

Sentence

[16] The Regional Magistrate did not afford sufficient weight to the personal circumstances of the appellant, which are sufficiently substantial and compelling for the court to deviate from the minimum sentence.

[17] The court *a quo* did not properly evaluate all the factors or attach sufficient weight to the rehabilitation of the appellant.

[18] Defense counsel conceded that:

- i) the evidence of the complainant's friend (first report witness) T, and her ex-boyfriend, Mxolise Masepe, gives credence to the evidence of the complainant;
- ii) the appellant's explanation of how the complainant was injured is not supported by the medical evidence;
- iii) the appellant was a poor witness²
- iv) the court *a quo* considered all factors in respect of sentence (but failed to attach sufficient weight to the personal circumstances of the appellant).

Conviction

[19] The court *a quo* evaluated the evidence of the complainant, T and Masepe and, despite minor discrepancies, correctly found their evidence to be trustworthy

² Appellant's Heads of argument p.8 par 16 and 19

and reliable. The caution applied to the evidence of the complainant is overcome by other evidence that corroborates and gives credence to her version of the incident.

[20] The evidence of the appellant, that the complainant sustained the injuries by falling on the floor and thereafter freely consented to sexual intercourse, was in my view a poor attempt to exonerate himself. The court *a quo* correctly found that the appellant's account of events undermined his credibility as it was marked by inconsistencies, contradictions and was not adequately addressed during the trial³.

[21] However, the evidence does not support the conviction on attempted murder in respect of count 1. The appellant broke into the house of the complainant with the intention to rape, not with the intention to kill. Although grievous bodily injuries were inflicted upon the complainant, there is no evidence that the appellant ever verbalized any intention to kill. On the contrary, there was talk of a romantic interest and marriage. The complainant discharged herself from hospital within hours after her admission, before any CT or MRI scan could be done to determine if she suffered any injury to the brain that could have explained her loss of consciousness. There is no medical evidence that the complainant suffered any life-threatening injuries.

[22] Evidence must be approached holistically by taking proper account of the inherent strengths and weaknesses, probabilities and improbabilities on both sides.⁴ After having done so, the court can determine if the State has proven the allegations in the indictment or charge sheet beyond reasonable doubt. The Regional Magistrate correctly found that the respondent had proven beyond reasonable doubt that the appellant broke into the home of the complainant with the intent to rape, assaulted and raped her. The evidence against the appellant is overwhelming.

[23] The respondent in this instance proved beyond reasonable doubt the following:

³ Transcript of court proceeding GHS (2) 54/2023 p 537 lines 3 to 6

⁴ S v Chabalala 2003(1) SACR 134(SCA)

S v Van Aswegen 2001(2) SACR 97(SCA)

- i) The appellant broke into and entered the house of the complainant with the intention to rape her.
- ii) The appellant inflicted grievous bodily harm to the face and body of the complainant whilst wielding a firearm.
- iii) The appellant had sexual intercourse with the complainant without her consent.
- iv) The appellant assaulted the complainant with the intention to inflict grievous bodily harm, forcing the complainant into submission to enable him to have sexual intercourse with her without any resistance.
- v) The rape involved the infliction of grievous bodily harm and therefore section 51(1) Part 1 of Schedule 2 of the CLAA, was invoked.

[24] The Regional Magistrate found that the rape involved the infliction of grievous bodily harm and sentenced the appellant to life imprisonment on that charge. The Magistrate also found the appellant guilty on count 1, attempted murder, for the same conduct (assault on the complainant). The finding is tantamount to a duplication of convictions, as the same facts are relied upon to convict the appellant on count one and finding that the rape, in count two, involved an assault with the intent to cause grievous bodily harm (thereby invoking the application of section 51(1) of the CLAA ⁵). Accordingly the conviction on count 1 stands to be set aside.

[25] The National Prosecuting Authority should be more attentive to the drafting of charge sheets or indictments. Understandably, the facts that may be proven are not always predictable at the start of a trial. Before judgment there is a duty on a prosecutor to argue the matter and indicate if they have proven rape involving the infliction of grievous bodily harm, (which is one charge) or assault with the intent to inflict grievous bodily harm and rape as two separate charges. In the latter instance section 51(1) Part 1 of Schedule 2 will not be invoked on the charge of rape.

Conviction count 2 and Sentence

⁵ Act 105 Of 1997 Part 1 of Schedule 2

[26] Housebreaking with the intent to commit a crime is a substantive offence. *“It is not however, sufficient that x should intend on unlawful breaking and entering. There must also be an intention thereby to commit a crime, common law or statutory. This offence is usually theft, but it may be rape, assault, malicious injury to property, trespass or any other offence.”*⁶

[27] According to *Snyman*⁷ it is uncertain if housebreaking with the intent to commit a crime and the crime itself (contained within the charge of housebreaking) is a single crime or two crimes. They are treated as a single crime for the purposes of sentence. *Snyman* suggests that the better view is that two crimes have been committed.

[28] The charge of housebreaking with the intent to rape should be separated from the charge of contravening section 3 of the CLAA, Act 32 of 2007, for the following reasons:

- (i) For the purpose of sentence, the charge of housebreaking with the intent to rape and rape is treated as one crime. There is a distinction to be made between the aforesaid charge and one of housebreaking with the intent to steal and theft. Theft is a non-violent, minor crime compared to rape. Depending on the type of items stolen and the value thereof, the minimum sentence legislation is not usually applicable to theft. Rape is a serious offence sanctioned by long term or life imprisonment. Rape should not play second fiddle to a count of housebreaking.
- ii) In this instance life imprisonment is applicable to the charge of rape. It leaves no room to punish the offender on the charge of housebreaking with the intent to rape.
- iii) Housebreaking with the intent to commit any crime, involving the use of a firearm is sanctioned with a minimum sentence of 5 years

⁶ Principles of Criminal Law, Burchell J, 3rd Edition p.863

⁷ Criminal Law *Snyman*, C.R 6th Edition p.544

imprisonment for a first offender.⁸ The use of a firearm was not discussed or properly ventilated in this matter and this minimum sentence was not applied. If it did find application, two distinguishable minimum sentences would have been applicable to a single charge. Life imprisonment is applicable to the latter part of the charge(rape) and it, once again, leaves no room to sentence the offender on the housebreaking charge.

- iv) Section 51(1) of the CLAA, Act 105 Of 1997, does not mention housebreaking with the intent to rape and rape as an offence invoking life imprisonment. Applying section 51(1) to only the latter part of the charge with the involvement of grievous bodily harm is a contrived way of applying that section.
- v) Housebreaking with the intent to commit a statutory or common law crime is of itself a substantive charge. It needs no other charge to support it.
- vi) It serves the interest of justice to do so.

[29] It is unfortunate that the appellant had been charged with housebreaking with the intent to rape and contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 Of 2007(rape) as a single charge while it contains two offences. Separating the charges and convicting and sentencing separately now, will be to the disadvantage of the appellant. It is just to proceed on the charge of housebreaking with the intent to rape and rape of which the appellant was charged and convicted of in the Regional Court. The conviction on count 2 stands to be confirmed.

Aggravating and mitigating factors

[30] The court *a quo* adequately considered all aggravating and mitigating factors before imposing a sentence of life imprisonment on count two. The aggravating factors surpass the mitigating factors present in the personal circumstances of the

⁸ Section 51(2) Part IV of Schedule 2 of the CLAA, 105 of 1997

appellant. The appellant is not a first offender: in 2016, he was sentenced to eight years imprisonment for possession of a firearm and ammunition. His criminal record that was presented to the Regional Court reveals a previous conviction where he served a sentence before his release. However, there is no indication whether he was released on parole or not. Subsequent to his release from prison in respect of that matter, he committed the present offenses. He used a firearm during the housebreaking and to assault the complainant. This repeated conduct demonstrates a lack of insight into the seriousness of his actions and contempt for the criminal justice system. It weighs against his prospects of rehabilitation.

[31] During the commission of the offence an intervention took place when the complainant's ex-boyfriend knocked at the door and called out to her. The appellant should have come to his senses then and reflected on his conduct, but instead he threatened the complainant and proceeded to rape her.

[32] The physical and psychological trauma that the complainant suffered at the hands of the appellant is devastating. Her victim impact report clearly shows that, years after the incident occurred, she is still haunted by it.

[33] The Regional Magistrate correctly found that there are no substantial and compelling factors present that justify a lesser sentence than life imprisonment.

ORDER

[34] After careful consideration of the record of the proceedings in the Regional Court and the written and oral submissions of counsel for the appellant and the respondent, I find no misdirection on the part of the Regional Court in respect of the conviction and sentence in respect of count 2. I propose the following order:

- i) The conviction on count 1 is set aside.

- ii) The conviction and sentence on count 2 is confirmed.

S. I. SMITH, AJ
Acting Judge of the High Court

I agree, and it is so ordered.

N.E RALARALA
Judge of the High Court

APPEARANCES

For the Appellant:	Ms I. Levendal
Instructed by:	Legal Aid South Africa
For the Respondent:	Adv J.Ryneveld

Instructed by: Directorate of Public Prosecutions, Western Cape