REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: A235/2018

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE 31/07/2020 DATE

In the matter between:

THABANG MOTHIBA MOLAZA Appellant

and

THE STATE Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 31 July 2020.

JUDGMENT

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[1] In this judgment, the minority judgment of AP Joubert AJ appears first and thereafter, the majority judgment of Ingrid Opperman J with whom M Ismail J concurs.

A.P. JOUBERT AJ

[2] Appellant was charged in the Regional Court, Soweto on charges of kidnapping, assault with the intent to do grievous bodily harm and three charges of rape. The rape charges were brought in terms of section 3 of Act 32 of 2007, read with the provisions of section 51(1) of Act 105 of 1997.

[3] Appellant was convicted on all the charges, except that on the charge of assault with the intent to do grievous bodily harm he was found guilty on the competent verdict of common assault. On the kidnapping conviction the appellant was sentenced to 5 years imprisonment, on the conviction of common assault to 1 year imprisonment and on each of the three convictions for rape, to imprisonment for life.

[4] Appellant has an automatic right to appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977. This appeal is against the convictions and sentences.

[5] This appeal was first heard by my learned brother Van der Linde and me. Counsel were asked to prepare and present further argument on certain issues. Before the further hearing could take place, Judge Van der Linde, sadly, died. The matter was re-allocated to be heard before my learned sister Opperman and myself. Argument was presented afresh in this re-hearing. The same counsel appeared as before and adv. N.J. Horn was asked to present argument on certain issues, *amicus curiae*. We thank counsel for their valuable assistance.

The Facts

[6] All the charges and consequent convictions stem from events that occurred on 25 February 2012.

[7] The complainant testified that on 25 February 2012 the appellant approached her in the company of four of his friends. Appellant told complainant, in front of his friends, that she was his girlfriend. She denied it. Matters took a turn for the worse when appellant forced her to accompany him and his friends to a garage. At the garage she asked a man called Vusi for help and she got into Vusi's car. Appellant, however, pulled the complainant from Vusi's car and took her to his home.

[8] Appellant forced the complainant into his bedroom where he told her to undress. She refused. He then threatened her that all his friends would rape her. He slapped her twice in the face and she sustained an injury to the eye from the assault. He undressed her. Appellant then entered her vagina with his penis. He had non-consensual sex with her three times. The first time he used a condom, but that broke. The second and third time appellant had non-consensual sex with her, without using a condom. Appellant then fell asleep. This gave complainant the opportunity to slip away and escape. Complainant sought help at a Shell garage. The police was called and she was taken to hospital where Dr Raja Maklaran examined her.

[9] Complainant's evidence is corroborated in many aspects by the witnesses called by the state.

[10] Mr Vusi Mokoena corroborated the evidence given by complainant that she was at the garage and that she sought assistance from him. He said that the complainant looked scared. He testified that appellant grabbed complainant by the wrist and pulled her from his vehicle.

[11] Ms Thembisa Mariwa corroborated the evidence of the complainant that she sought help at the Shell garage. She testified that the complainant was very upset and had physical injuries. Complainant told Thembisa that she was raped.

[12] Dr Raja Maklaran examined the complainant the night of the incident. He found that the complainant was upset, had a swollen eye and injuries in and around her vagina. The doctor testified that the injuries are indicative of forceful penetration and not consistent with consensual intercourse.

[13] The evidence of the complainant accords with the probabilities, especially as so much of her evidence is corroborated. Vusi Mokoena corroborated her evidence that she was unwilling to accompany the appellant, that she approached Vusi to assist her to get away and that she got into Vusi's car, but was pulled from the car by the appellant. (Even the appellant testified that the complainant said, "Vusi, please take me home.")

[14] The evidence of Thembisa Mariwa, importantly, corroborates complainant's reactions and her condition when she sought help immediately after she had escaped from the appellant.

[15] The evidence of the doctor corroborates her evidence of an assault (swollen eye) and rape (injuries in and around her vagina, indicative of forceful entry).

[16] The evidence of the complainant and other witnesses paint a picture of events that is consistent and probable.

[17] Appellant testified. He admitted having had sex with the complainant, but said it was consensual. He said that, when they were in his room, she said to him, "baby, let us kiss." He tells a story of congeniality and romance. They listened to a music video, smoked, drank and were enjoying themselves. They were kissing each other, were undressing each other, had sexual intercourse in various ways and said that the complainant initiated oral sex.

[18] In cross-examination he had no credible answer to why Vusi Mokoena testified that complainant looked scared, asked him to take her home and got in his

(Vusi's) vehicle, but was pulled out of the vehicle by appellant, grabbing her by the wrist. Nor could the appellant explain why complainant, when she arrived at the garage and made her first report to Thembisa Mariwa that night, had a swollen left eye. In cross-examination the evidence of Dr Raja Maklaran that the vaginal injuries were consistent with forceful penetration, was put to appellant. He said that it could be ascribed to his big penis. The appellant could give no credible explanation why, should appellant's evidence of the events be true, complainant ran away at the first opportunity, which occurred when appellant fell asleep. Nor could he give a credible explanation why complainant was so upset, why she reported the matter to the police and why she went to a doctor to be medically examined. In short, if appellant's evidence were to be believed, he and the complainant had a wonderful romantic and erotic evening together. If this were to be so, there is no rational explanation why the complainant would lay a false charge against him. No motive to frame him was even suggested to complainant in cross-examination. The irresistible conclusion is that there is no such motive. I reject the version of the appellant of what happened between him and the complainant that evening, as false.

Onus and Proper Approach to the Facts

[19] It is trite that the onus rests on the state to prove beyond a reasonable doubt that the accused committed the crime accused of. Equally trite is the principle that an accused should be acquitted if his or her exculpatory testimony can be reasonably possibly true.

[20] It has long been our law that the trier of fact should not consider the evidence implicating the accused and evidence exculpating the accused in a compartmentalised manner. The court must evaluate the evidence before it in its totality and judge the probabilities in the light of all the evidence; see *R v Difford*

1937 AD 373, S v Van der Meyden 1999(1) SACR 447 (W) and *S v Toubie 2004(1) SACR 530 (W).*

[21] The proper approach of a court was laid down by Malan JA in *R v Mlambo 1957(4) SA 727 (A)*, especially at 738 A - C:

> "In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.
>
> An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

[22] This approach was approved by Olivier JA in *Phallo and Others 1999 (2) SACR 558 (SCA)* at 562g to 563e.

[23] Applying this test to the facts of the case I am satisfied beyond a reasonable doubt that the complainant was kidnapped, assaulted and raped by the appellant. I am also satisfied that the exculpatory version of the appellant cannot be reasonably possibly true.

Case Law on Multiple Sexual Acts

[24] The facts that arise in this matter are not uncommon in rape cases. Several sexual acts, committed without consent, being perpetrated by the same accused with the same complainant, within short intervals and often at the same place. The

question often posed is whether the several acts should account for one or more convictions of rape.

[25] It is, of course, trite that each case must be evaluated and judged on its own facts. Nonetheless, examples in case law are of assistance to establish the jurisprudential flow of thought and to divine principles therefrom, to the extent applicable.

[26] Mere and repeated acts of penetration cannot without more be equated with repeated and separate acts of rape. As a general rule, the more closely connected the separate acts of penetration are in terms of time (i.e. the intervals between them) and place, the less likely a court will find that a series of separate rapes has occurred. Where an accused has ejaculated and withdrawn his penis from the victim, but he again penetrates her thereafter, it was inferred that the accused has formed the intent to rape the complainant again, even if the second rape took place soon after the first and at the same place. (See *S v Blaauw 1999 (2) SACR 295 (W)* at 299c-d and 300c-d.)

[27] In *S v Mavundla 2012 (1) SACR 548 (GNP),* after the appellant had locked the door to his house, he told the complainant to take off all her clothes, which she did, because of the knife the appellant was holding. The appellant then ordered the complainant to get onto the bed. He inserted his penis into her vagina and had intercourse with her until he ejaculated. After that the appellant told the complainant to climb off the bed and hold onto it. He then penetrated her from behind and had intercourse with her, again, until he ejaculated. (It is not clear how long this took.) After that the appellant told the complainant to get onto the bed again where the appellant had intercourse with her once more while she was lying on her back. The appellant ejaculated for the third time. (Again it is not clear how long this took.) The

appellant then fell asleep. The complainant woke him and asked for the key, which he gave her. The complainant dressed and went home.

[28] In *Mavundla's* case the court accepted the evidence of the complainant that there was no interruption in the intercourse, the appellant simply shifted the position of the complainant. While ejaculation could determine the end of intercourse, in this case that clearly did not happen. There is no suggestion that the intercourse ended and that the appellant withdrew his penis twice and formed the intention to rape the complainant on two further occasions. The court found that this was one prolonged act of intercourse.

[29] In *S v Tladi 2013 (2) SACR 287 (SCA) 287* the appellant was charged with two counts of rape. He overpowered the complainant in his room. She fell onto a sponge. He unzipped his trousers, removed her panties and had sexual intercourse with her twice, without her consent. He was convicted on both counts and sentenced to life imprisonment. On appeal the court found that only one act of rape had been proved beyond reasonable doubt, on the reasoning at p 291 d to f:

> "There is no evidence from the complainant as to how the appellant raped her for the second time. The complainant's evidence does not suggest that there was an interruption in the sexual intercourse to constitute two separate acts of sexual intercourse and, therefore, two separate acts of rape. The complainant's evidence suggests that the sexual acts were closely linked and amount to a single continuing course of conduct. There is no suggestion in her evidence that there was any appreciable length of time between the acts of rape to constitute two separate offences. This evidence against the appellant is therefore limited and is insufficient to establish his guilt on two separate counts of rape. The trial court should have analysed the state's evidence and should have concluded that only one act of rape had been proved beyond a reasonable doubt."

[30] In *S v Maxabaniso 2015 (2) SACR (ECP) 553* the appellant took the complainant to his home. Upon their arrival he ordered two young boys who were present, to leave. When the complainant realised that he had plans with her, she escaped when she thought that it was opportune to do so. He caught her, took her back into the house, locked the door, undressed her and himself and penetrated her. At some stage he stopped, withdrew from her, informed her that he was not finished with her and left the room to go to the toilet. When he returned from the toilet, he threw the complainant onto a mattress on the floor and penetrated her again. The court found that the magistrate's finding that the appellant raped the complainant twice, was correct. The court reasoned at 55g – h:

> "This was not one continuous course of conduct or, as in one of the rapes in S v Blaauw supra, an interruption in an act of rape to change the position of the victim. Rather, two distinct acts of penetration occurred, in different places in the room, with the first interrupted by the appellant withdrawing from the complainant and leaving the room for a period."

[31] There are other authorities on the issue, but those referred to largely cover the principles laid down and illustrate the courts' approaches to multiple sexual acts. The cases dealing with different kinds of penetration, such as in *S v Seedat 2015 (2) SACR 612 (GP)* and *S v Ncombo 2017 (2) SACR 683 (ECG)*, are not dealt with, for they do not apply to the facts of this matter.

On the Conviction on Three Counts of Rape

[32] The appellant was found guilty on three counts of rape. I am satisfied that appellant raped the complainant. This has already been dealt with. The question is, was appellant, on the evidence, correctly convicted on three counts of rape.

[33] During argument counsel for the state abandoned the third conviction of rape, but maintained that two counts of rape were proved. The state did not disclose why it abandoned the third count of rape, but persisted with the second count. One can only assume that the state considers the distinction between sexual intercourse with a condom and thereafter without a condom to be such that appellant, the second time, formed a fresh intention to rape.

[34] The evidence dictating the outcome of this issue, is quoted in full. Virtually at the outset the complainant gave this evidence, here being lead by the prosecutor:

> "Q: You arrived at the garage, you asked Vusi to help you, what happens after that?
>
> A: I then got into Vusi's car. Vusi went out of his car and … to go see his friend and he then left me inside the motor vehicle then the accused then came, Thabang, he then said I must go out of this vehicle and he then started pulling me out of the motor vehicle. And he then took me to his home, and when we arrived at his home he then said I must go into his bedroom and I then refused going to his bedroom and he then took me into his bedroom and then inside the bedroom he then said I must undress and he then said to me if I am not going to undress, he is going to call all his friends to come and rape me.
>
> Q: Where were his friends at that stage Madam?
>
> A: The friends were sitting in the dining room. He then slapped me with his open hand and then ended up undressing my clothes.
>
> Q: Where did he slap you?
>
> A: On my face.
>
> Q: How many times did he slap you?
>
> A: Twice.
>
> Q: Please proceed.

A: He then started raping me. When he was now raping me for the first time he used a condom then the second time he did not use the condom and when he was now raping me for the third time he was no longer using the condom.

Q: Madam if you say that he raped you, what exactly did he do?
A: He inserted his penis into my vagina, and after he had raped me he then fell asleep and I then managed to escape. I went to the garage and neighbours arrived and I [indistinct]... The girl then helped with phoning the police."

[35] A little later the prosecutor revisited the critical circumstances of the rape:

"Q: Madam you also indicated that the accused raped you three times, how long did this take?
A: I do not remember how long it took but I was at the garage at around about 23:00 [indistinct]. 23 hours Your Worship was when I was at the garage.

Q: You do not recall how long you were with the accused in his bedroom while he was raping you?
A: No I cannot recall.

Q: Madam, when you left the accused's house to go to the garage, where was the friends at that stage?
A: They were sleeping in the dining room.

[36] The evidence established that, at three different instances, appellant inserted his penis into complainant's vagina. This happened without her consent, for in the context of all her evidence I accept that this is what the complainant meant when she testified that the accused "raped" her, although her evidence really amounts to a legal conclusion. All of this happened in the same room. There is no evidence how long the intervals were between such enterings. We do know that appellant used a condom when he entered the complainant for the first time, but on appellant's

version the condom broke in the middle of sexual intercourse. Thereafter he did not use a condom.

[37] There is also no evidence from the complainant whether or not the appellant ejaculated during sexual intercourse. Although multiple acts of rape can occur without any ejaculation at all, the significance of evidence on when and how often ejaculation occurred during sexual intercourse for establishing whether more than one conviction of rape is justified, has long been recognized in our law; see *S v Blaauw*, supra, referred to in para [26] above.

[38] Section 3 of Act 32 of 2007 defines rape in these terms:

> "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."

[39] The state relies on *Kaitamaki v The Queen [1984] 2 All ER 435*, particularly on the finding at p437: "*Sexual intercourse is a continuing act which only ends with withdrawal.*"

[40] From this the state argues that the mere penetration is sufficient to constitute the act of rape and, as the act of rape comes to an end when the penis is withdrawn from the vagina, it follows that three rapes occurred because there were three penetrations. Hence, so the state argues, the appellant was correctly convicted on three counts of rape, "*albeit that the three acts happened within a short space of time*"; quoting from the heads of argument of counsel for the state.

[41] The state presented no evidence whether the acts took place within a short space of time or, if so, how short the space of time was. In the absence of such evidence, the three acts of penetration could have happened at such short intervals that it virtually amounted to one drawn out act of rape. The approach followed by *S v*

Thadi, supra, quoted in para [29] above, to my mind, finds application in the present matter.

[42] In the debate whether one or more acts of rape had been proved by the prosecution, counsel for the state was confronted by the paucity of evidence of the prosecution's case on whether the appellant had formed more than one intention to rape. Counsel for the state sought assistance in the evidence given by the appellant, who testified of several acts of consensual sex with the complainant that night, including oral sex initiated by the complainant. In this manner the state, so the argument for the prosecution goes, has overcome this difficulty in its own case. The question is whether the argument for the state is sound. The evidence of the appellant on which the state relies, is quoted in full:

> "I said to her girlfriend, let me show you my bedroom, she wanted to know where is your bedroom, first door on your left there in the passage. She led me Your Worship to my bedroom, there as we were going to my bedroom, she opened the door, she even Your Worship complimented me, your bedroom is very nice. I ask her to kiss her, she agreed. At that time Your Worship, the door was closed but not locked. Whilst kissing, that is when the complainant asked me that where is the condoms? I [indistinct] Your Worship from the box which I normally keep those condoms. I asked the complainant that which flavour do you choose from these different condoms, she chose Your Worship the flavour of Trust condom. We enjoyed ourselves. Your Worship as we kissing each other, undressing each other, that is when went there Your Worship. We had sexual intercourse Your Worship, we started to have sex. Whilst in the middle of sexual intercourse, Your Worship that is when I felt that the condom has bust again. Your Worship I then told her Your Worship. I told her, the complainant that problem that I am having is this one of the busting of the condom. That is when she said, you know what, I do not want to fall pregnant. I said do not worry my girlfriend, in the morning I am going to give the amount of R50, you are going to buy for yourself tablets which are called, morning after. That is when she said no problem, if that is the situation. To my ... then Your Worship I went to visit the loo. Your Worship when I was from the loo that is when asked

me for warm water. I opened the door, screamed to Tsakane, I then requested Tsakane to boil water Your Worship with the kettle. Tsakane did so, I then fetched that boiling water, Your Worship I was relaxing on top of the bed with the complainant, I ask her of this style that she likes when sexual intercourse is taking place, then she said 'I also enjoy when a man is on top of me', she also wanted to find out from me that the style that you like, which one? I enjoy the one when a girl, or a lady is on her knees, as I will be coming behind her, I enjoy that style. That is when she said Your Worship, you, the accused, you talk too much, you also like things. I ask her, what do you mean? I then ... that is when she said Your Worship, I can lick ...lick your penis and that will make you crazy if I can start doing that to you. Your Worship I then said to the complainant, I do not just believe, I only believe in actions. That is when she started Your Worship to touch my body, up to the lower part Your Worship, even touching my penis, she ended licking my penis, I enjoyed Your Worship, it. Then I said Your Worship, I said to her, because I enjoyed, let me make you also enjoy it, if you can be on your knees. She bended as I requested and [indistinct] Your Worship, that is when we work each other, we enjoyed Your Worship. Your Worship condom was not used because we agreed of these morning pills. We [indistinct] from there that is when we [indistinct]. Whilst we [indistinct] I fell asleep. After felling [sic] asleep Your Worship, I only woke up at around 23;30. When I woke up Your Worship, she was missing next to me."

[43] It is well settled law that the prosecution can find corroboration in the evidence of the accused. In the present matter the issue is whether the state can find corroboration in the appellant's evidence on the sexual acts he performed with the complainant, to prove more than one act of rape. I turn to consider this argument.

[44] Although evidence presented during a trial may well be considered in compartmentalised segments, to weigh its veracity and evidential weight, it remains the duty of the trier of fact to consider the full conspectus of the body of evidence presented (in its totality) prior to making a finding. The court's finding must always account for all the facts presented into evidence.

[45] In *S v Van Der Meyden, 1999(1) SACR 447 (W) at 449j to 450b*, Nugent J (as he then was) puts it thus:

> "S v Munyai 1986 (4) SA 712 (V) at 715G, to which we were also referred by counsel, should accordingly, in my view, be approached with some circumspection. At 715G Van der Spuy AJ interpreted the abovementioned passage from Kubeka's case as follows:
>
> 'In other words, even if the State case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false.'
>
> It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is 'completely acceptable and unshaken'. The passage seems to suggest that the evidence is to be separated into compartments, and the 'defence case' examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence. Although the dictum of Van der Spuy AJ was cited without comment in S v Jaffer 1988 (2) SA 84 (C), it is apparent from the reasoning in that case that the Court did not weigh the 'defence case' in isolation. It was only by accepting that the prosecution witness might have been mistaken (see especially at 89J-90B) that the Court was able to conclude that the accused's evidence might be true.
>
> I am not sure that elaboration upon a well-established test is necessarily helpful. On the contrary, it might at times contribute to confusion by diverting the focus of the test. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account

for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

[46] Navsa JA cites the aforegoing dictum with approval in *S v Trainor 2003 (1) SACR 35 (SCA)* at paragraph [8] and elaborates on this principle in paragraph [9] of the judgment:

"[9] A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong."

[47] In *S v S [2012] ZASCA 85* the Supreme Court of Appeal held:

"A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. The correct approach is set out in the following passage from Mosephi and Others v R LAC (1980 – 1984) 57 at 59F – H: The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach

> is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."

[48] It is trite that when a witness (and that, of course, includes an accused in a criminal trial) is untruthful in one aspect of his or her evidence, it does not mean that his or her evidence should be rejected out of hand and in totality; see *S v Oosthuizen 1982 (3) SA 571 (T) at 576A – B* and many subsequent decisions approving of this principle. The court can therefor still rely on portions of such witness' evidence which it finds sufficiently reliable, measured against the threshold,in this case, of proof beyond a reasonable doubt. The process of reasoning which is appropriate to the application of the test of proof in any particular case will depend on the nature of the evidence which the court has before it. Where a court makes a credibility finding and rejects a witness' version (here, the accused's) as unreliable on particular facts, such as, in the present matter, whether the sexual acts were consensual or not, or what the nature of such sexual acts were, or how far apart in time the sexual acts occurred, that part of the witnesses' evidence should be considered as unreliable and no weight should be attached to it. Once the court finds the accused's version as to how, when, how often and in what manner the sexual acts occurred to be unreliable and such evidence is irreconcilable with that of the state witness (here the complainant), the court should, in my view, not place reliance on that portion of the accused's version for purposes of establishing proof of a separate *actus reus* or *mens rea* of the accused to commit a second crime.

[49] The accused testified that he and the complainant enjoyed multiple acts of consensual intercourse. If appellant's evidence is accepted, he has committed no

rape at all. But this evidence of the accused has been rejected as false. The state, in my view, cannot rely on this evidence of the accused to prove multiple acts of rape. The evidence of the complainant falls short of such proof.

[50] In my opinion, the state proved one act of rape, but not two or three. In consequence the convictions and sentences on counts 4 and 5 should be set aside.

On the Conviction of Assault

[51] The court a quo found the Appellant guilty on a charge of assault.

[52] Snyman in his Criminal Law, 6th edition, defines assault as any unlawful and intentional act or omission:

> "(a) which results in another person's bodily integrity being directly or indirectly impaired, or
> (b) which inspires a belief in another person that such impairment of his/her integrity is immediately to take place."

[53] Complainant's testimony that appellant struck her was corroborated by evidence given by Dr Maklaran and Ms Mariwa. The assault was proved. The question that remains to be answered is whether the conviction on the assault charge amounts to a duplication of convictions.

[54] Several tests have been formulated over the years to answer this question. One such test is the "*single intent*" test. The test determines that where a person commits two acts, each of which could be separately labelled as criminal, but does so with a single intent, and both acts are necessary to carry out that intent, then that person may be convicted of only one offence because the two acts constitute one continuous criminal action.

[55] The single intent test is particularly applicable where the accused has carried out a number of unlawful acts. Thus, where an accused commits a whole series of

acts, each one of which, standing alone, could be a separate offence, but they constitute continuous conduct carried out with a single intent, such conduct would constitute a single offence.

[56] The assault was perpetrated to induce or force the complainant to undress, all part and parcel of appellant's design and intent to have sexual intercourse with the complainant, without her consent. The two unlawful criminal acts constitute a continuous act. The conviction on the charge of assault in my view amounts to a duplication of convictions. The charge of assault is subsumed in the charges of rape. It should be said that adv. Carla Britz, who appeared for the State, correctly and properly made this concession already in her heads of argument.

[57] The conviction and sentence on the charge of assault should in my opinion be set aside and substituted with a verdict of not guilty.

On the Conviction of Kidnapping

[58] Kidnapping consist in lawfully and intentionally depriving a person of his or her freedom of movement; see Snyman, Criminal Law. 6th edition, p471.

[59] The state proved that the appellant deprived the complainant of her freedom of movement. He dragged her from Vusi Mokoena's vehicle and, against her will, pulled her from there to the house where he raped her. He confined her to his room by inducing fear in her that she would otherwise be raped by his friends who were in the house.

[60] It follows that the appellant was correctly found guilty on the charge of kidnapping.

On Sentence

[61] Two convictions stand, the conviction of kidnapping (count 1) and the conviction of rape (count 3).

[62] Appellant is a first offender. There is in my view no reason to interfere with the statutory minimum sentence of 5 years imprisonment for kidnapping as prescribed by the Criminal Law Amendment Act 105 of 1997 ('the Act"), see section 51(2)(c).

[63] The appellant was sentenced to life imprisonment on every conviction of rape. As the 2nd and 3rd convictions have been set aside, this court is at liberty to consider sentence afresh on the one conviction for rape that has been upheld.

[64] The approach to sentencing where the legislature has imposed a minimum sentence requires a court to be conscious of the fact that such a sentence should ordinarily be imposed. The residual discretion of the Courts to impose lesser sentences for those offences was reserved in recognition of the easily foreseeable injustices that may result. (See *S v Malgas 2001 (1) SACR 469 (SCA)* at para [8].)

[65] The legislature did not intend for the courts to exclude from consideration any or all of the factors traditionally and rightfully taken into account when sentencing offenders by incorporating the words "substantial and compelling". But the ultimate cumulative impact of the traditional factors must be such as to justify a departure. (See *S v Malgas*, supra, para [9].)

[66] The following passages in Malgas bear repetition:

> "The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence." (See para [22].)

> "While speaking of injustice, it is necessary to add that the imposition of the prescribed sentences need not amount to a shocking injustice ('n skokkende onreg' as it has been put in some of the cases in the High Court) before a departure is justified. That it would be an injustice is enough. One does not calibrate injustices in a court of law and take note only of those which are shocking." (See para [23]).
>
> "What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure." (See para [25].)

[67] The statutory minimum sentence for a first offender for rape is 10 years imprisonment, see section 51(1)(a) of the Act, as amended. On all the facts of this matter, including the personal circumstances of the appellant, the gravity of the offence and the interests of society, and having regard to the proper approach a court should adopt as stated in the authorities referred to, I find no substantial and compelling circumstances that warrant departure from the statutory minimum sentence of 10 years imprisonment.

[68] I propose that the following order be made:

68.1. The conviction of the court a quo on count 1 that the appellant is guilty of kidnapping and sentenced to 5 years imprisonment, is confirmed.

68.2. The conviction of the court a quo of rape on count 3, is confirmed. The sentence of imprisonment for life is set aside and substituted with a sentence of 10 years imprisonment.

68.3. The convictions and sentences on counts 2, 4 and 5 are set aside.

68.4. It is ordered that the sentences be served concurrently.

68.5. The accused is declared to be unfit to possess a firearm.

68.6. The prison authorities should be alerted immediately of this judgment, particularly as the appellant seems to have been incarcerated since his arrest on 26 February 2012, some 8 years and 5 months ago.

INGRID OPPERMAN J

[69] I have had the benefit of reading the judgment of my brother AP Joubert AJ (*'the first judgment'*). For the reasons advanced herein, I am unable to agree with him on his findings in respect of counts 3, 4 and 5. I agree with him on his findings in respect of count 1 (kidnapping) and count 2 (assault common).

[70] The convictions and sentences as found and imposed in the Regional Court, Soweto and as summarised in paragraph [3] of the first judgment are correct save that the summary omits to record that the magistrate had ordered the sentences to run concurrently[1] and had declared the appellant unfit to possess a firearm as contemplated in terms of section 103 of Act 60 of 2000.

[71] The issues that fall for consideration (and on which I differ from the first judgment) include how many acts of rape the evidence establishes and how many counts of rape the evidence should support.

[72] The Criminal Law Amendment Act, 105 of 1997, as amended (*'the 1997 Act'*), applies to the matter. It refers to the statutory definition of rape as contained in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as amended (*'SORMA'*).

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[1] The magistrate need of course not have done this expressly as any determinate sentence of incarceration is, in any event, to be served concurrently with a life sentence – see sec 39(2)(a)(i) of the Correctional Services Act No 111 of 1998 as amended (*'the Correctional Services Act'*).

[73] The prescribed minimum sentence for an offence referred to in Part I of Schedule 2 is imprisonment for life. The offence described there is rape as contemplated in section 3 of SORMA when committed in circumstances where the victim is raped more than once[2].

Considerations for determining separate acts of rape

[74] The question that Borchers J sought to clarify in *S v Blaauw*[3] (sitting as a court of first instance in respect of sentencing) was when does an act of rape start and when does it end? On the facts in that case there were three individual acts of penetration at more or less the same place and soon after each other.[4] She concluded as follows:

> "Ejaculation is not an element of rape, **though it would seem to me that if the rapist had indeed 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, it would be reasonable to infer that the rapist had formed **a new intent** to have intercourse for the second time."[5]
>
> 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.

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2 Sexual penetration is defined in section 1 of SORMA as follows: " 'sexual penetration' includes any act which causes penetration to any extent whatsoever by- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or (c) the genital organs of an animal, into or beyond the mouth of another person,..."

3 1999 (2) SACR 295 (W) at 299C

4 Ibid at 299B

5 Ibid at 299C-D

> "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 again, even if the second rape takes place soon after the first and at the same place.**"[6] (emphasis provided)

[75] Although the test laid down in *Blaauw* to determine whether a victim was raped more than once relates to the common law crime of rape, such test has been approved by the Supreme Court of Appeal in respect of statutory rape as defined in section 3 of the Sexual Offences Act.[7] The test has been applied consistently to matters involving the statutory definition of rape.

[76] In *Maxabaniso*[8] the appellant first had intercourse with the complainant on a bed in his room. It was unclear whether he had ejaculated, but he withdrew his penis and went to the bathroom. Upon the appellant's return, he threw the complainant onto a mattress on the floor and raped her again. The court held that the appellant had indeed raped the complainant twice for purposes of the 1997 Act.

[77] In *Ncombo*[9] the Court concluded that two penetrations formed part of one continuous course of conduct consisting of the insertion of the appellant's fingers and, upon withdrawal thereof, the almost immediate insertion of his penis into the vagina of the complainant. It was held that the evidence did not suggest that there was an interruption in the appellant's conduct between the time that he withdrew his

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6 Ibid at 300A-D

7 In *S v Tladi* 2013 (2) SACR 287 (SCA) at 290H to 291C

8 *S v Maxabaniso*, 2015 (2) SACR 553 (ECP)

9 *S v Ncombo*, 2017 (2) SACR 683 (ECG) at 688B-C

fingers and the insertion of his penis, sufficient to constitute two separate acts of rape.

[78] In *Tladi*[10] the Supreme Court of Appeal found on the facts there in question that there was no evidence from the complainant as to how the appellant had raped the complainant for a second time. The evidence did not suggest that there was an interruption in the sexual intercourse to constitute two acts of rape. An important distinguishing feature from this case was that the appellant had, during his evidence, admitted to one act of sexual intercourse only. The court rejected the defence of consensual sexual intercourse relating to this single admitted act.

[79] In *Willemse*[11] the appellant first raped the victim vaginally. He then turned her on her side and raped her anally. There was little or no evidence as to the time that each of these acts took, 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 his victim 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.

[80] The difficulty in the case under consideration is not the quality of the complainant's evidence but rather the sufficiency thereof. The complainant testified that she had been raped 3 times. The facts underpinning these conclusions were, however, not placed on record with sufficient particularity. She was not lead on those events adequately. The complainant was never questioned about the interlude or time period between each act of rape. The issue surrounding this time period was not canvassed by the prosecution or the magistrate.

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[10] Note 7 supra at 291D

[11] *S v Willemse*, 2011 (2) SACR 531 (ECG) at para 8, 16 and 18

[81] The calibre of the case presentation for the prosecution was unacceptable for a case of this seriousness. A prosecutor cannot present a case by just pouring out a jumble of conclusions of law. The crime of rape consists of various elements. The victim cannot simply testify that she was raped. The facts underpinning that assertion should be placed on record. Victims of rape, as a class of vulnerable people in our society, ought to have a reasonable expectation that their cases are taken seriously enough to be presented properly and tried at a standard that the guilty do not wriggle free because of un-insightful and superficial attention to the elements of the crime by those who are responsible to protect them. This court has previously drawn attention to the unacceptable manner in which the evidence of complainants in rape matters is presented but it would seem as though the reprimands have fallen on deaf ears.[12] In addition, this insufficiency (lack of detailed attention to the evidence in the presentation of the facts of the matter) has involved enormous judicial attention and the constitution of a three judge court which would not have been necessary if the detailed facts had been clearly and chronologically presented by the prosecutor leading the complainant to present the trial court with a detailed picture of what had happened. Perhaps the time has come to report the transgressors.

Can the State's case be supplemented with facts from Appellant's testimony when his defence has been rejected?

[82] In the first judgment, attention is drawn to the principle applied in amongst other decisions that of *Oosthuizen.*[13] In *Oosthuizen* Nicholas J analysed the probative value of contradictions in regard to the credibility of a witness. He expressly found that: '*There is no reason in logic why the mere fact of a*

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[12] *S v Sebofi*, 2015 (2) SACR 179 (GJ)

[13] *S v Oosthuizen*, 1982 (3) SA 571 (T) at 576A - B

contradiction, or of several contradictions, necessarily leads to the rejection of the whole of the evidence of a witness'[14]. Although opining that there is a '*kernel of truth in the maxim falsus in uno, falsus in omnibus'* [15] he concluded that the maxim is unreliable and illogical. Relying on Wigmore[16] and *R v Gumede,*[17] he confirmed the principle that a person who tells a single lie is not necessarily lying throughout his testimony nor is there a strong probability that he is lying, the probability is to the contrary, he concluded.

[83] The present case is distinguishable from *Oosthuizen* because in *Oosthuizen,* the accused did not give evidence in his own defence. The case also did not concern the issue of whether the version advanced by the appellant can be used to supplement the state's case when his defence has been rejected.

[84] The first judgment suggests that where a court makes a credibility finding and rejects a witness' version as unreliable, it has the effect of the evidence being disqualified from further consideration and no evidential weight can be attached to such witness' evidence. I disagree.

[85] Southwood AJA (as he then was) summarised the approach to the adjudication of evidence in *Sithole v S*[18], as follows:

> "[8] The State bears the onus of establishing the guilt of an accused beyond reasonable doubt and he is entitled to be acquitted if there is a reasonable doubt that he might be innocent. The onus has to be discharged upon a consideration of all the evidence. **A court does not look at the evidence implicating the accused in isolation** to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. The correct approach is set out in the following

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14 *Oosthuizen* (supra) at 576A

15 supra at 576H – 577A

16 *Evidence* vol III chap 35 ('Specific Error (Contradiction)') and chap 36 ('Self-contradiction')

17 1949 (3) SA 749 (A) at 756

18 [2011] ZASCA 85

passage from *Mosephi and others v R* LAC (1980 – 1984) 57 at 59 F-H:

'The question for determination is whether, in the light of **all the evidence** adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, **one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof.** Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees'.

In weighing the evidence of a single State witness a court is required to consider its merits and demerits, decide whether it is trustworthy and whether, despite any shortcomings in the evidence, it is satisfied that the truth had been told. It must state its reasons for preferring the evidence of the State witness to that of the accused so that they can be considered in the light of the record. In applying the onus the court must also, where the accused's version is said to be improbable, only convict where it can pertinently find that the accused's version is so improbable that it cannot be reasonably possibly true." (emphasis provided)

[86] The first judgment argues that if the appellant's evidence is accepted, he has committed no rape at all. It suggests that the evidence presented by the state and of the appellant are mutually destructive on the point of how many acts of sexual intercourse occurred.

[87] Therein lies the rub: 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.

[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: When the appellant entered the witness box, duly assisted by his legal representative, he knew he was facing 3 counts of rape, 1 of kidnapping and 1 of assault with the intention to do grievous bodily harm. The complainant had, by then, testified, that he had raped her 3 times. From her evidence one knows that the ordeal commenced at the garage at about 18h00[19] and ended at about 23h00 when she managed to escape. She told the court that the first time the appellant had raped her, he had used a condom but the second and third times not. From these facts it is clear that the appellant had had intercourse with the complainant using a condom, that there was an interruption, that the condom had been removed, that they had sexual intercourse again and that this had occurred between 18h00 and 23h00.

[89] After cross-examination of the complainant, it was common cause as between the appellant and the state, that there had been at least two sexual encounters, one with a condom and one without. What was put to the complainant was that there was a lapse of between 20 to 25 minutes between these two acts. This interruption was confirmed under oath when the appellant testified. He stated that they had sexual intercourse without a condom, that he had gone to the bathroom, had asked his friends to boil water for the complainant to drink and then had had intercourse again without a condom.

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[19] Paginated p 46 of the record: '*At what time during the day did the accused approach you on the street? I do not remember the exact time, it could be maybe 18:00*'

[90] Had the appellant been charged with two acts of rape which had occurred on two separate days, had claimed both acts were consensual and the version in respect of both days had been rejected, there would have been no difficulty in concluding that on the evidence as a whole, two separate acts of rape had occurred despite the complainant not testifying to the time delay between the two acts. In this case the appellant's counsel had cross-examined the complainant about two acts of rape, had put a time period of 25 minutes to the complainant separating the two acts, the appellant had testified about two acts and had proffered exculpatory versions in respect of both acts, which versions were rejected. It should follow that the admissions of the two sexual acts should stand as evidence against the appellant.

[91] On the authority of *Willemse's*[20] case, the appellant raped the complainant in a different manner the second time. The use of the condom at least shielded her from sexually transmitted diseases and an unwanted pregnancy. When she was raped for the second time without a condom the appellant exposed her to every bit of devastation that his act of raping her could possibly cause, seemingly now without concern. It matters not that the first incident may have happened in close proximity in time to the second. 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.

[92] On the authority of *Maxabaniso's*[21] case, the interruption between the first and second incidents, when the appellant went to the bathroom (regardless of whether he ejaculated or not) was sufficient to conclude that two distinct acts of penetration

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[20] Note 11 supra

[21] Note 8 supra

occurred and therefore two rapes. The same reasoning leads to the same result in this case.

[93] It is important to remember that in *Tladi*[22] the appellant had, during his evidence, admitted to **one** act of sexual intercourse only. The court had rejected the defence of consensual sexual intercourse relating to this **single** admitted act.

[94] The first judgment accepts that the prosecution can find corroboration in the evidence of the appellant. It has long been accepted that admissions made extra-curially can be considered, provided the whole of the statement is put before the court.[23] A court is entitled too, to reject exculpatory portions of the statement while accepting those parts which incriminate the accused.[24] Section 219A of the Criminal Procedure Act 51 of 1977 authorises the receipt of admissions as evidence provided such admissions are constitutionally compliant, relevant and made voluntarily. By parity of reasoning and perhaps even more so where the admissions are made under oath and in open court, when a court, as I do, finds that the admissions of the two acts were made under constitutionally compliant circumstances, the admissions are relevant and they were made voluntarily, this evidence can be accepted.

[95] The scenario which presents itself is the following: The complainant testified in the court *a quo* that she had been raped 3 times ie that she had had sexual intercourse 3 times. The appellant testified and admitted that he had had sexual intercourse with her, at least twice. The logic of concluding that the complainant had only had sexual intercourse once when it is common cause as between the state and the appellant that the complainant and the appellant had had sexual intercourse

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[22] Note 7 supra

[23] See *Rex v Valachia*, 1945 AD 826 at 837 per Greenberg JA with whom Schreiner, JA and Davis AJA concurred.

[24] *S v Khoza*, 1982 (3) SA 1019 at 1039 per Corbett JA

twice, escapes me. All that has been rejected are the defences of consent in respect of each act of rape ie the exculpatory portions of the appellant's evidence.

[96] The same cannot be said of the third count of rape. There is no indication in the evidence how the third penetration was separated from the second. There is no evidence that enabled the trial court to determine whether they were two distinct acts or part of a continued course of conduct. The appellant testified that he had penetrated the complainant orally but he was not charged with this and the complainant did not admit this. There accordingly exists no common cause facts in respect of the third count. These deficiencies illustrate the need for prosecutors to carefully and diligently consider the charges in cases such as the present and to lead clear evidence in respect of each alleged act of rape. The evidence was plainly inadequate in this regard and did not establish a third, distinct act of rape. The state advocate properly conceded this during argument in this appeal.

One or two counts of rape?

[97] In these circumstances it must be considered whether the appellant ought to have been charged with one count of rape or two.

[98] *Mahlase,*[25] set the proverbial cat amongst the pigeons in respect of the pre-requisites for the minimum sentencing provisions to be triggered. It held that for the rape to fall within the provisions of paragraph (a)(i) of Part 1 of Schedule 2 of the 1997 Act, a **co-perpetrator** had to have been 1) before the trial court and 2) had to have been convicted (*'the Mahlase dictum'*).

[99] The implication of this finding (the ratio) on the current facts is the following: The **number of counts** of rape the appellant is convicted of, will dictate the sentence he receives **not the facts** underpinning the conviction/s. What needs to be

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[25] *Mahlase v S,* [2013] ZASCA 191 (29 November 2013).

explored therefore, is whether *Mahlase* is binding on this court and if not, whether *Mahlase* is a correct statement of the legal position or distinguishable in law (clearly it is on the facts as this case does not concern co-perpetrators).

[100] Pickering J in *Cock*[26] highlighted the illogical situation which arises from the application of *Mahlase* ie that a trial court, having found beyond reasonable doubt that the complainant was raped more than once by two men and having convicted the accused accordingly, it must for purposes of the 1997 Act disregard that finding and proceed to sentence the accused on the basis that it was not in fact proven that she was raped more than once.

[101] In *Khanye,*[27] a full bench of this Division, dealing with facts similar to *Mahlase*, it was held that although *Mahlase* binds it, *Legoa*[28], also a Supreme Court of Appeal decision, was equally binding and Carelse J concluded '*I have no doubt that had Legoa been considered it may have resulted in a different finding.*' She summarised the position as follows:

> 'It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the legislature does not create a new type of offence. Thus, 'robbery with aggravating circumstances' is not a new offence. The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present.'[29]

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[26] *Cock v S, Manuel v S*, 2015 (2) SACR 115 (ECG)

[27] *Khanye v S*, [2017] ZAGPJHC 320 (13 March 2017)

[28] *S v Legoa*, 2003 (1) SACR 13 (SCA)

[29] para [18]

[102] *Ndlovu*[30] found that the reasoning in *Khanye* is flawed in that it begs the question of what constitutes proof for purposes of the 1997 Act, is accordingly clearly wrong and considered itself bound to *Mahlase*. I disagree with such finding. I conclude that *Khanye*, on this point, was correctly decided and also consider myself bound to *Legoa*.

[103] 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 JA (as he then was) relied on *Moloto*[31] in which robbery with aggravating circumstances was considered. There the court had 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*. 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 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 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

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30 *Ndlovu v S*, 2019 (2) SACR 484 (KZP)

31 *S v Moloto*, 1982 (1) SA 844 (A) 850 C-D per Rumpff CJ

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**.' (609*d*)

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 this issue (610*b-d*). **These conclusions seem to me clearly right**.' (emphasis provided)

[104] 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 -
(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'

[105] To suggest, as *Mahlase* does that there has to be a conviction on a second count before the minimum legislation is triggered is flawed not only for the reasons advanced by Pickering J, Carelse J and many others, but also because 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.

[106] 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.

[107] Quite recently in *Ndlovu (Jhb),*[32] a full bench of this division (referred to hereinafter as *Ndlovu (Jhb)* to distinguish it from *Ndlovu*[33] referred to hereinbefore), Fisher J held that the recent findings in the Constitutional Court in *Tshabalala*[34], serves to overrule the *Mahlase* dictum and that it is accordingly no longer binding. In *Tshabalala* the Constitutional Court held that the doctrine of common purpose applied to the common law crime of rape. Fisher J found that: *'It was apparently assumed by the SCA in Mahlase that this anomalous state of affairs could only be cured by having the multiple rapists tried together. The instrumentality argument lies at the heart of the Mahlase dictum…..'*[35] I am not persuaded that a lower court can avoid the consequences of being bound by the Supreme Court of Appeal by importing an assumption, the legal basis of which has now been found to be set aside by the Constitutional Court. I would have thought that it would be for the

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[32] *Ndlovu v S*, A5/2013 (9 March 2020)

[33] Note 29 supra

[34] *Tshabalala v S; Ntuli v S* [2019] ZACC 48 (11 December 2019)

[35] Paragraph [52]

Supreme Court of Appeal only to correct its error if that is what it concludes it made. Also, the facts in *Mahlase* did not deal with common purpose as the complainant had been raped by different men, co-perpetrators. The incident occurred on 6 June 1998. The 1997 Act had commenced on 1 May 1998 (one month after the incident) and Part 1 of Schedule 2 relating to rape, ie section (a)(ii), read exactly as it does today[36] and thus expressly made provision for a finding in respect of common purpose even in respect of the common law crime of rape. That being so, the instrumentality argument could not have been at the heart of the *Mahlase* dictum. Had it been, section (a)(ii) of Part 1 of Schedule 2 was available to the court. Be that as it may, I hold the view that a lower court is bound by a higher court and accordingly conclude that the only way around *Mahlase* for a lower court, is the route identified by Carelse J in *Khanye*. I agree though with the view expressed by Fisher J that an express pronouncement by either the Supreme Court of Appeal or the Constitutional Court on this issue is required but understand that legislation is afoot to address the difficulty.

[108] Quite recently in *Mthombeni*[37], a full bench of Natal concluded that the appellant in *Mahlase* had been charged and convicted of a form of rape committed by more than one person in a common purpose scenario provided for in item (a)(ii) in the description of rape in Part I of Schedule 2 of the Act and that the conclusions in paragraph 9 of *Mahlase* are accordingly restricted to item (a)(ii). As already indicated, I hold the view that the facts of *Mahlase* support the application of item (a)(i) ie a co-perpetrator situation and not a common-purpose situation contemplated in (a)(ii) but if I am wrong on this, then it follows that I am not bound by *Mahlase* as the case under consideration involves a rape provided for in item a(i) and not item a(ii).

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[36] Paragraph [104] hereof

[37] *Mthombeni v S*, [2020] JOL 47622 (KZP) (8 July 2020)

Can one have regard to the 1997 Act in order to determine how to charge and how to convict?

[109] Both *Legoa* and *Khanye* make the point that the 1997 Act does not create new offences. That being so, the question which falls for consideration is whether one can look at the 1997 Act in order to decide how to formulate the charge sheet ie how many counts of rape to include in the charge sheet and how to deal with the convictions.

[110] In my view this is perfectly permissible so as to avoid the conundrum one can get into, so well summarised by Plasket J in *Maxabaniso*: "*it avoids potential difficulties ... namely whether ... each count attracts a potential life sentence, or whether the first rape attracts a 10-year minimum sentence while the second attracts life, or whether both counts have to be taken together for purposes of sentence.*"[38]

[111] In my view, it is crucial to have regard to what the legislature intended the offender should be punished for and to arrange the counts in such a manner so as to ensure a balance between these two stages of the trial ie conviction and sentence.

[112] Moreover, this would be in line with the clear direction given by the Constitutional Court in *Tshabalala*[39] where the following was held:

> '[63] This scourge has reached alarming proportions in our country. Joint efforts by the courts, society and law enforcement agencies are required to curb this pandemic. This Court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that **the South African Judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender- based violence** in order to safeguard the constitutional values of equality, human dignity and safety and security. ..' (emphasis provided)

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[38] Ibid at para [24]

[39] Ibid at para [107]

How then to charge and how to convict?

[113] In *Blaauw*[40] the accused was charged with one count of rape. When the victim was asked how a single act of rape took approximately two hours, she provided details which compelled the judge to conclude that she was describing at least "*two separate acts of sexual intercourse and, hence, two separate acts of rape.*"[41]

[114] It was contended in *Blaauw* that, because the accused was only charged with a single count of rape, it would be unfair to invoke the provisions of the 1997 Act. Borchers J concluded otherwise on the basis that the 1997 Act did not create new statutory crimes of rape, for instance "*rape where the victim is raped more than once*". All that the Legislature had done was to define circumstances which it regarded as aggravating and which, if present, would attract higher sentences than in the past.[42]In the result, Borchers J concluded that it was competent to find, on the facts, that the victim was raped more than once, even where the accused was charged with only one count, and to sentence the accused as provided for in the 1997 Act[43]. The finding does not serve as authority that an accused person *must* only be charged with one count in the circumstances that prevailed there.

[115] In *Seedat*[44] the accused was charged with one count of rape. On appeal the Court held that the evidence established that the victim was penetrated vaginally and anally. The court concluded that the accused had committed two separate acts of rape. But, since the accused was charged with and pleaded to one count of rape in the form of vaginal penetration and the State did not seek to amend the charge sheet, the Court left the matter there. In *Seedat* it was held that the accused "*should*

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40 Note 3 supra

41 Ibid 300E-F

42 Ibid at 300J to 301D

43 The Court found substantial and compelling circumstances were present that warranted departure from the prescribed sentence.

44 *S v Seedat*, 2015 (2) SA 611 (GP) at para [29] and [30]

have been convicted of repeat rape in terms of section 51(1) of [the 1997 Act]".[45] It is correct that the Court in *Seedat* could not interfere by convicting the accused on a charge other than the one set out in the charge sheet. The State did not appeal the conviction. It is incorrect that the accused should have been charged with "*repeat rape*". No such crime exists. The 1997 Act only describes aggravating circumstances that will warrant a higher sentence, namely the repeated commission of an existing, defined offence. The court could have sentenced the accused on the two separate acts as those distinct separate acts triggered the provisions of the 1997 Act.

[116] *Maxabaniso*[46] concerned the offence of rape as defined in section 3 of SORMA. The accused was 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.[47] 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.[48] 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

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45 Ibid

46 Note 8 hereof

47 Ibid at para [12] and [13]

48 Ibid at para [21] & [22]

entire course of conduct: it is, in other words, multiple acts of penetration that attract the life sentence..."

[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 of rape 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 scheduled offence*"[49] that the State intends to prove; and warn the accused of the punishment he or she faces if convicted.

[118] What does matter is that, in circumstances such as the present, the appellant should be convicted on one count of rape only. The legislature had multiple convictions in mind elsewhere (in item (a)(iii)).

[119] It was permissible to charge the appellant with three counts of rape. Section 83 of the Criminal Procedure Act 51 of 1977 provides as follows:

> "**83 Charge where it is doubtful what offence was committed**
> If by reason of uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused with the commission of all or any of such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offences."

[120] The section authorises the inclusion in the charge sheet of all the charges that could possibly be supported by the facts, even if they overlap to such an extent that convictions on all or on some of the counts would amount to a duplication of convictions. An accused may thus not object, at the beginning of the trial, to the

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[49] *Legoa* supra at para [18]

charge sheet on the basis that it contains a duplication of charges. Such duplication will occur where more than one charge is supported by the same culpable fact. In short, it is the court's duty to guard against a duplication of convictions and not the prosecutor's duty to refrain from the duplication of charges.[50]

[121] The difficulties foreshadowed by Plasket J in *Maxabaniso*[51] arose in this case not from multiple charges of rape, but from multiple convictions.

[122] The appellant ought to have been convicted on one count of rape and sentenced as provided for in the 1997 Act on a finding that two acts of rape had been committed.

Summary of principles

[123] Where a person is accused of raping the victim more than once in a single encounter, the preferred way to charge the accused is with a single count of rape with clear indications in the charge sheet that reliance will be placed on item (a)(i) of Part 1 of Schedule 2 of the 1997 Act being that separate acts of rape will be sought to be proved.

[124] Where a person is accused of raping the victim more than once and the two acts are separated by a significant period of time, perhaps a week or few months, separate counts are preferable.

[125] It is permissible to convict an accused person on more than one count of rape where the facts support separate acts of rape. The preferred way would be to convict of 1 count with a finding of the separate acts should the acts have occurred in a single encounter.

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[50] *S v Whitehead and Others* 2008 (1) SACR 431 (SCA) at para 33

[51] Note 8 supra

[126] The **number of counts** of rape of which an accused is convicted, does not dictate whether the 1997 Act is triggered. The **facts** underpinning the conviction/s do.

[127] Bound by both *Legoa* and *Mahlase*, it is permissible to follow either although the preferred route is *Legoa* as justified by *Khanye.*

Sentence

[128] I agree with the confirmation of the sentence in respect of the kidnapping charge (count 1) as contained in the first judgment.

[129] In considering the substantial and compelling circumstances found to have existed and the test to be applied by this court, the following: In *S v PB*[52] at para [20] Bosielo JA formulated the approach by a court on appeal against a sentence imposed in terms of the 1997 Act as follows:

> "[20] What then 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."

[130] In other words, as Rogers J held in *S v GK*[53] whether or not there exists substantial and compelling circumstances, is not a discretionary issue but rather a

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[52] *S v PB,* 2013 (2) SACR 533 (SCA)

[53] 2013 (2) SACR 505 (WCC)

value judgment which judgment a court of appeal is obliged to bring to bear on the facts presented in the court *a quo*.

[131] *S v Vilakazi*[54], Nugent JA said at 562G : " *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*".

[132] In *S v Nkomo*[55], Lewis JA at 201e-f held as follows:

> "But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing - mitigating factors - that lessen an accused's moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of these need be exceptional."

[133] I turn now then to the central issue and consider all the circumstances available to the court *a quo* to assess whether the facts which were considered are substantial and compelling or not, or, put differently, whether it would be unjust to impose the minimum sentences.

[134] The court *a quo* considered the following facts:

134.1. The appellant is 23 years of age, unmarried and has grade 10 education.

134.2. The appellant has two children, but he does not support them financially.

134.3. The appellant has no previous convictions.

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[54] 2009 (1) SACR 552 (SCA)

[55] 2007 (2) SACR 198 (SCA)

134.4. According to the probation officer the appellant has not accepted responsibility for his actions and shows no remorse. This constitutes a negative indicator in the context of possible rehabilitation.

134.5. The probation officer recommended direct imprisonment.

134.6. The victim impact report reveals that the complainant struggles to cope emotionally. She was crying at the time of the social worker's consultation with her. She did not communicate easily and has become socially withdrawn.

134.7. Rape is a serious crime. Reference was made to authorities that summarise the devastating effect of the crime on its victims.

134.8. In this case, the offence was accompanied by violence on the part of the appellant.

[135] Making a value judgment, I am unable to conclude, in the context of this case that the magistrate ought to have found the existence of substantial and compelling circumstances.

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

[137] Here I am 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.

[138] I accordingly make the following order:

138.1. The appeal against the conviction on count 1 (kidnapping) is dismissed.

138.2. The appeal against the convictions on count 2 (assault), count 3 (rape), count 4 (rape), count 5 (rape) and the sentences imposed in respect of such counts is upheld. The order of the court *a quo* is replaced with the following:

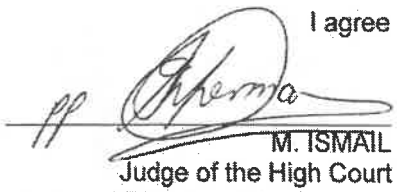
'The accused is convicted of one count of rape with a finding that two acts of rape, as contemplated in item (a)(i) of Part I of Schedule 2 were committed. The accused is sentenced to life imprisonment.'

138.3. The declaration that the appellant is unfit to possess a firearm remains enforce.

138.4. The Director of Public Prosecutions ('*DPP*') is to draw the content of this judgment to the attention of the prosecutor who led the evidence of the complainant and the DPP is to enable proper training to prosecutors generally to prevent a repeat of the situation which arose in this matter.

I. OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

I agree



M. ISMAIL
Judge of the High Court
Gauteng Local Division, Johannesburg

A. P. JOUBERT
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the Appellant: Y.J Britz
Legal Aid South Africa
Counsel for the DPP: C.E. Britz
Counsel for the *Amicus*: N.J. Horn
Date of final hearing – 3rd Judge appointed – 10 July 2020
Appellant and DPP agreed matter to be determined on papers by 3rd Judge
Date of Judgment: 31 July 2020