

SOUTH AFRICA / JUDGMENT

V.N and Another v S (Appeal) (A21/2025)

[2025] ZAWCHC 265 (23 June 2025)

[2025] ZAWCHC 265**COURT**

Western Cape High Court, Cape Town

BEFORE

Mantame, Pangarker

CASE / FILE NUMBER

A21/2025

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE DIVISION)****Case****number: A21/2025****In the matter between:**

V[...]

N[...]

First Appellant

ANDILE

NDUNGA

Second Appellant

And

THE STATE

Coram:

MANTAME J et PANGARKER J

Hearing date:

30 May 2025

Judgment delivered:	23 June 2025 ORDER a. The appeal against conviction of both appellants on Count 1 succeeds to the following extent and the order of the Court a quo
is substituted as follows:	Accused 1: Guilty – Theft Accused 3: Guilty – Theft b. The second appellant’s appeal against conviction on Count 6 succeeds to the following extent and the order of the Court a quo is
substituted as follows:	Accused 3: Guilty – Housebreaking with intent to rob and robbery c. The first appellant’s appeal against conviction on Counts 2, 4, 5 and 8, is dismissed. The convictions of the first appellant are confirmed. d. The second appellant’s appeal against conviction on Counts 3, 4, 5 and 8, is dismissed. The convictions of the second appellant are confirmed. e. The appeal against sentence of both appellants on Count 1 succeeds to the extent that the sentence of 15 years’ direct imprisonment imposed by the Court a quo in respect of each appellant is set aside and substituted with the
following sentences:	Accused 1: Theft – Six (6) years’ imprisonment Accused 3: Theft – Six (6) years’ imprisonment The above sentences, as substituted, are backdated to 27 June 2024. In terms of section 280(2) of the Criminal Procedure Act 51 of 1977 (CPA), these sentences shall run concurrently with life imprisonment imposed on each appellant on Count 2 (accused 1/first appellant) and Count 3

(accused 3/second appellant).

f.

The second appellant's appeal against sentence on Count 6 succeeds to the extent that the sentence of 15 years' direct imprisonment imposed by the Court a quo is set aside and substituted with

the following sentences:

Accused

3: Housebreaking with intent to rob and robbery – Ten (10) years' imprisonment.

The above sentence, as substituted, is backdated to 27 June 2024, and shall run concurrently with life imprisonment imposed on him on Count 3.

g.

The first appellant's appeal against the sentences imposed by the Court a quo on Counts 2, 4, 5 and 8, is dismissed. The sentences are confirmed.

h.

The second appellant's appeal against the sentences imposed by the Court a quo on Counts 3, 4, 5 and 8, is dismissed. The sentences are confirmed.

JUDGMENT

PANGARKER J (MANTAME J concurring)

The charges and convictions

[1] The first appellant was accused 1 and the second appellant was accused 3 in the Wynberg Regional Court and were charged with the following serious offences:

Both appellants

Count 1 – robbery with aggravated circumstances as intended by section 1 of the Criminal Procedure Act 51 of 1977 (CPA) read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 (CLAA)

Count 4 – compelling or causing children to witness sexual offences as referred to in section 21(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) as amended (child complainant I[...] C[...])

Count 5 – same as Count 4 (child complainant E[...] C[...])

Count 8 – housebreaking with intent to commit a crime unknown to the State

Count 9 – robbery with aggravated circumstances as intended by section 1 of the CPA read with section 51(2) of the CLA A

First appellant only

Count 2 – rape as defined in section 3 and as read with various sections of the SORMA and section 51(1) of the CLAA

Second appellant only

Count 3 - rape as defined in section 3 and as read with various sections of the SORMA and section 51(1) of the CLA A

Count 6 – housebreaking with intent to commit a crime unknown to the State

Count 7 - robbery with aggravated circumstances as intended by section 1 of the CPA read with section 51(2) of the CLAA.

[2] Accused 2, Thembelani Matolengwe (Thembelani), was the appellants' co-accused and convicted of certain counts on the basis of common purpose. The first appellant was convicted on counts 1, 2, 4, 5 and 8, and acquitted on count 9. The second appellant was convicted on counts 1, 3, 4, 5, 6 and 8, and acquitted on counts 7 and 9 respectively. In respect of count 8, the Court a quo found that there was a duplication of charges with count 9 and thus convicted both appellants of the offence of housebreaking with intent to rob and robbery with aggravated circumstances.

[3] As for the rape charges, on counts 2 (first appellant) and 3 (second appellant), each of the appellants was sentenced to life imprisonment in terms of section 51 (1) of the CLAA. On counts 1, 6 and 8, the Regional Court imposed the minimum sentences of 15 years' imprisonment, and all the sentences imposed on the other counts were ordered to run concurrently with the life imprisonment.

[4] The appellants exercise their automatic rights of appeal in respect of the life imprisonment on the rape counts. In respect of the remaining counts and the sentences imposed by the Regional Court in respect thereof, the appeals against convictions and sentence are with leave of the Court a quo.

Trial in the Regional Court

[5] The appellants were legally represented in the Regional Court and the magistrate explained the application of the minimum sentence legislation to them as well as the provisions of section 50(1) of the SORMA, section 120(4) of the Children's Act 8 of 2005 and the applicable competent verdicts. The appellants pleaded not guilty to all the charges and offered no plea explanations. The

State called five witnesses, and the appellants testified in their own defence. As the appellants appeal all their convictions, the evidence in the trial court is summarised below.

B[...] C[...]

- [6] Ms C[...] is the complainant in respect of counts 1 to 3. During 2021, she was living with her husband and two minor children, aged 3 and 6 respectively in a one-roomed shack in the informal settlement, Marikana. On 25 May 2021, at approximately 20h00, she was at home with her children while her husband was working nightshift duty. She heard a knock at the door and heard a familiar voice of accused 2, Thembelani, call out for her. She enquired as to what he wanted, but he did not respond.
- [7] Another male voice, unknown to her, stated the following:
- “Open the door. This is a shack. If I want to, I can open it.”[1]*
- [8] Ms C[...] went to the door and opened it. She testified that the first appellant, known as Vovo, and the second appellant, known to her as Blacks, along with an unknown short male, entered the shack. They removed two cell phones and sneakers from the cupboard, and food from the refrigerator. At the time the men entered the complainant’s shack, the children were on the bed. The complainant explained that she did not scream because Thembelani, who was outside the shack, was with the appellants and she was in shock.
- [9] After they removed the items, the men departed from Ms C[...]’s premises and proceeded to her next-door neighbour, Ms Yoliswa Payi. Ms C[...] heard them kick at the door to Ms Payi’s shack and she waited until they left before she decided to leave her shack. Ms C[...] and Ms Payi later met up and discussed the incidents but due to the lateness of the hour, they did not report the incidents to the police. Ms C[...] returned to her shack and the children and fell asleep. I refer to these events, which relate to count 1, as the first incident.
- [10] Shortly after midnight, Ms C[...] heard a knock at her shack door again. She did not open and asked the person(s) at the door, what they wanted. An unknown male voice demanded that she must open the door, or they would kill her if she refused. At that, she again asked what they wanted. The response from the male(s) at her door was to ask her whether they should open the door themselves or was she going to open it? She then replied that she would open the door. At the time, she did not have her cell phone.
- [11] Ms C[...] switched on the light in the shack and opened the door and with that, the appellants entered. The first appellant instructed her to switch off the light and she refused, and the second appellant then switched off the light. She testified that her children were on her bed and crying.
- [12] The second appellant pushed Ms C[...] towards the bed, and she fell backward onto the bed. He then lifted her dress, moved her panty aside, took out his penis which he inserted in her and raped her vaginally. During the rape, the first appellant stood at the door and used something to provide light in the shack.

[13] After the second appellant was done, he moved to the door and the first appellant moved towards the complainant and took out his penis, inserted it into her vagina and raped her on the bed. The rape occurred in the presence of her children. Thereafter, the second appellant put water in a large tub and the first appellant ordered Ms C[...] to wash herself and she complied. She testified

that the first appellant threatened her that should she inform anyone of the rapes, they would kill her and her family. This is referred to as the second incident.

[14] The appellants then left the shack and Ms C[...] switched on the light. They had left the door open, and she went to her neighbour Portia, whereafter Ms Payi arrived. Ms C [...], who was crying and traumatised at the time, reported the rapes to her neighbours and called her husband from Portia's phone. She testified that she reported the rapes to her husband and identified the perpetrators to him. One of her neighbours spoke to her husband, who arrived with his manager, and they transported her to the police station where she made a statement. She also underwent a medical examination which included an HIV test later on after the rape incident.

[15] Ms C[...] explained that she felt scared at the time of the incidents and even during the trial. She was offered counselling but was not ready at that stage to receive help but indicated during her testimony that she would like to receive counselling. Her children had also not received counselling, and she did not know how their witnessing of the rapes had affected them. She explained that testifying at the trial, took her back to the time and occurrence of the incidents.

[16] Ms C[...] confirmed that the items removed from her shack were never recovered and that she had not given anyone permission to take them. Insofar as how she knew the appellants, she stated that they lived in the area for a year prior to the incidents occurring and she saw them in the community.

[17] She had never spoken to the appellants prior to the incidents and explained that she had heard them being called Vovo and Blacks by community members. Vovo (first appellant) lived opposite her and Blacks (second appellant) lived further up the road. It was put to her that the appellants deny ever being on the scene at her shack, deny the rapes and had no knowledge of the two incidents.

[18] The complainant was steadfast in her version of events which occurred at 20h00 in her shack and that the appellants returned later to rape her. Insofar as the lighting in the room during the second incident, she testified that approximately two minutes had passed from the time she switched on the light to the time she was ordered to switch off the light. Furthermore, the streetlight illuminated the shack during both incidents and the appellants had also not changed their clothes from entering the shack during the first incident to the later commission of the rapes, nor had they covered their faces or identities.

Yoliswa Payi

- [19] Ms Payi is the second complainant and counts 6 to 9 relate to her. She confirmed living in Marikana and that her shack was close to Ms C[...]’s. The shacks were so close that you could easily hear sounds and movement from a next door neighbour’s shack.
- [20] She did not recall the date nor month, but explained that one evening in 2021, at about 20h00, she heard knocking on Ms C[...]’s door and male persons asking for a phone and other items; the men then left Ms C[...]’s house and came to her shack. In relation to Ms Payi, this is the first incident.
- [21] Thembelani and the second appellant whom she referred to as Black Power, shoved or kick the door to her shack, causing it to open and they thus entered. The second appellant asked for her Samsung phone, which she gave to him, and they then left her shack. She explained that she was in shock. Her shack was illuminated by the inside light and the very bright streetlight. She testified that the second appellant lived in the area.
- [22] Ms Payi described the second incident as follows: early the next morning, her door was shoved open again, and the two appellants entered her shack. At the times, she was with her husband. The appellants demanded cell phones and an exchange with her husband ensued, as he refused to hand over the cell phone. The first appellant threatened to shoot her and her husband if they did not give him money.
- [23] The first appellant became increasingly angry and continued with the threats. At that stage, the first appellant had taken the cell phone, food, coins and a jacket, and the second appellant also took a jacket and food. Her husband’s phone was valued at R2500 and one of the jackets also belonged to him. The second appellant convinced the first that they should leave because Ms Payi did not have money, and they then left Ms Payi’s shack.
- [24] Ms Payi testified that she then heard the appellants knocking on Ms C[...]’s door, demanding that she opens and threatening to shoot if she refused to comply. Ms C[...] opened the door, and at that time, the first appellant called out to her (Ms Payi) demanding that she goes to sleep[2]. She testified that all went quiet until she heard sounds emanating from Ms C[...]’s shack which sounded like someone having sexual intercourse. Not long thereafter she heard Ms C[...] knocking on a neighbour’s door requesting them to open. Ms Payi left her shack and went to the neighbour, where she found a distraught Ms C[...], who reported to them that the appellants had raped her. She confirmed that Ms C[...] called her husband to report the rapes, and he arrived to take her to the police station.
- [25] She returned to her shack and later Thembelani returned with her cell phone regretful and shocked when informed that his co-accused, the appellants, returned to Ms C[...] and raped her. Ms Payi concluded her testimony by stating that the incidents made her fearful of men, she became distant with her husband, and they relocated subsequently. She was open to receiving counselling or therapy.

[26] The cross-examination of Ms Payi was brief and ineffectual. As with Ms C[...]’s cross examination, a bare denial that the appellants were at her shack was put to Ms Payi, but she was steadfast in her version of the events, that the appellants entered her shack on two occasions: in the first incident, Thembelani and the second appellant were involved, and in the second incident,

both appellants were involved.

[27] Ms Payi explained that she had asked Ms C[...] about the sounds she had heard coming from the latter’s shack and was informed by Ms C[...] that the sounds stemmed from her while she was being raped. Ms Payi was firm that the second appellant was known to her and in the community as Black Power. She had identified him from a photo identification album presented to her by the police.

P[...] N[...]

[28] Mr N[...] was married to Ms C[...] at the time of the incidents which are described above. He confirmed that Ms C[...] called him while he was at work and reported to him that Thembelani had knocked on her door, that the appellants had entered their shack and taken items from them.

[29] Ms C[...] reported to him that the appellants raped her and instructed her to bath. He borrowed a vehicle, came home and took her to the police station. Mr N[...] confirmed that the appellants did not live far from their home, that Vovo and V[...], the first appellant, was the same person and that the shack was well-lit.

Hubert Noble

[30] Mr Noble was the investigating officer in the Philippi East matter and testified that the first appellant and Thembelani were arrested prior to the third appellant’s arrest.

Dr Mati Laurie Matanda

[31] The State called Dr Matanda, a medical doctor of 20 years’ experience at the time of her testimony, employed at Thuthuzela, Heideveld. Her duties included medical examinations of victims of sexual abuse and the collection of DNA evidence.

[32] She was not the medical practitioner who conducted the examination of Ms C[...], nor the author of the J88[3]. The medical examination was conducted by Dr Ahmed Haffejee who was on extended sick leave. Dr Matanda had familiarised herself with the content of the J88 completed by her colleague and was called to testify about the information recorded in the report and answer any questions which required clarity or an explanation.

- [33] According to the observations recorded in the J88, the gynaecological examination performed on Ms C[...] indicated a 3mm fresh tear on the fossa navicularis, part of the vestibule in the vagina. Dr Hafejee found the hymen configuration to be carunculated, which according to him, meant that it had multiple clefts and bumps[4]. Dr Hafejee also noted a whitish discharge in the complainant's cervix and vagina.
- [34] Dr Matanda clarified that usually "carunculated" refers to a remnant of the hymen left behind or broken. In her view, she could not speak of "clefts and bumps" on the hymen when the hymen was broken or only remnants were left behind. She explained that the clefts and bumps referred to by her colleague were the pieces or remnants of the hymen which were visible at the time of Ms C[...]’s medical examination.
- [35] Dr Hafejee’s conclusion of the gynaecological examination was that the findings were compatible with an alleged sexual assault or forced penetration of the vagina by a penis or object. Dr Matanda testified that a forceful penetration could be one of the causes of a fresh tear, when the patient/victim was resisting.
- [36] In cross-examination, the appellants’ legal representative queried whether Dr Hafejee had contradicted himself with reference to his observation that the hymen was carunculated and that there were clefts and bumps. The witness explained that with a carunculated hymen, the hymen membrane is destroyed and what is left behind are "pieces here and there," which appear as small bumps as Dr Hafejee had recorded[5]. On the Court’s questions, the witness expressed that the multiple clefts and bumps were a pre-existing condition and that it was likely that the hymen was destroyed during childbirth[6].
- [37] The forensic biology report[7] indicated that not enough male DNA was obtained from DNA swabs taken from Ms C[...].

The appellants’ versions

- [38] The first appellant denied any knowledge of the incidents alleged by the State and as testified by the two complainants. He could not recall his whereabouts on the evening and early morning when the robberies, house-breaking and rapes occurred. He was arrested at a neighbour’s house. Under cross-examination, the first appellant admitted that he is referred to as Vovo. He knew Thembelani but they were not friends and denied knowing the second appellant at all.
- [39] The second appellant denied that he was known as Blacks or Black Power. He stated that his nickname was Adja which was a shortened version of Andile. He confirmed that he lived in the area. He testified that he would see the first appellant occasionally and he denied all the allegations related to the offences and testified that the complainants were unknown to him.

Judgments on convictions and sentence

[40] In her judgment on conviction, the Regional Magistrate found that the identities of the appellants were established and that the

complainants corroborated each other in this respect. The further main findings were that: the complainants corroborated each other

with regard to the home invasion and robbery; the medical evidence supported Ms C[...]’s version of forced vaginal penetration; in respect of Ms Payi, on both occasions, the appellants’ intentions were to break into her house and to rob her with

aggravating circumstances; and accused 2 acted in common purpose with the appellants when he threatened Ms C[...] to open the shack door. The Regional Magistrate found a duplication of charges in respect of the housebreaking and aggravated robbery charges[8].

[41] The further findings were that the threats uttered and the manner in which the appellants entered the shack caused Ms C[...] to submit to the request by the men as she feared being harmed by them. Furthermore, it was found that both appellants had raped Ms

C[...] in the presence of both of her children, allowing or causing them to witness such sexual offences.

[42] In respect of sentencing, the Regional Magistrate found that there existed no substantial and compelling factors and that life imprisonment was justified for each appellant in respect of the rapes.

Grounds of appeal

[43] In respect of conviction, the grounds of appeal are that the Court a quo erred in finding that the State had proved the appellants’ guilt beyond reasonable doubt; that the witnesses were honest and reliable and that the only reasonable inference from the facts was that the appellants committed the offences.

[44] In the appellants’ written submissions, for the first time, they raise the issue of duplication of charges in respect of counts 4 and 5 and counts 6 and 8. The submission is that these counts arise out of the same incidents.

[45] With regard to the appeal against sentence, the appellants’ grounds of appeal are that the interests of the community and seriousness of the offences were over-emphasised at the expense of their personal circumstances, and that the element of mercy was not considered during sentencing. The further ground is that life imprisonment would hinder rehabilitation and that the sentences imposed are startlingly inappropriate and induced a sense of shock.

Issues in the appeal

[46] Having considered the record of proceedings, the findings of the Court a quo, the grounds of appeal and the parties’ submissions, the issues in the appeal are as follows:

[46.1] Whether the State proved robbery with aggravated circumstances on count 1;

[46.2] Whether the Regional Court's finding of housebreaking with intent to rob and robbery with aggravated circumstances on count 6 was correct;

[46.3] The rape convictions on counts 2 and 3;

[46.4] Whether counts 4 and 5 should have been one charge and whether the elements of the offences were satisfied;

[46.5] In respect of the appeals against sentence, whether the Regional Court erred in not finding substantial and compelling factors to deviate from the prescribed minimum sentences, and the remaining grounds of appeal.

Interference on appeal

[47] In *S v Monyane and Others* [2006] ZASCA 113 at paragraph [15], the Supreme Court of Appeal stated that: "[15] This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (*S v Francis* 1991 (1) SACR 198 (A) at 204e). "

Count 1: Robbery with aggravating circumstances

[48] During the appeal, I enquired from both counsel whether the State had succeeded in proving robbery with aggravating circumstances in respect of the first incident at Ms C[...]’s shack at 20h00 and whether the Regional Magistrate was correct when

she convicted the appellants of robbery with aggravating circumstances, as charged.

[49] The Regional Magistrate found that one of the men, after accused 2 had called out to the complainant while at the door, said that she must open the door, that it is a shack and if he wanted to, he could open the door. She further found that the threat uttered

from outside the door and the manner in which the appellants entered, caused Ms C[...] to submit to the request out of fear of being harmed by them and that they ransacked her shack. It must be remembered that Ms C[...] opened the door of her shack after the words were uttered from outside and the appellants and an unknown man entered and removed her property.

- [50] Both counsel submitted in response that the facts found to be proved did not support a finding that the State proved robbery with aggravating circumstances. Instead, counsel for the respondent was of the view that the offence committed by the appellants was robbery and that the State had not proved any aggravating circumstance within the definition of section 1(1) of the Criminal Procedure Act (CPA). The discussion regarding robbery and its elements which follows below, also applies to count 6, which I consider hereafter.
- [51] Snyman identifies the elements of robbery as follows: theft of property “by unlawfully and intentionally using violence to take the property from somebody else, or threats of violence to induce the possessor of the property to submit to the taking of the property”[9]. There must be a causal link between the violence and the taking of the property, in other words, the theft of the property. The theft element is not problematic in respect of count 1.
- [52] Turning to the violence element in the crime of robbery, it is so that the crime may be committed or completed if there is use or application of force directed at the complainant, or threats of violence directed at the complainant. In *Moloto v S*[10], Rumpff JA discussed the elements of robbery with specific reference to threats of violence. The Appellate Division in *Moloto* held that there must be the intention to render the victim defenceless, albeit temporarily defenceless, by eliminating the complainant’s resistance so that she submits to the robber so as not to defend her property or she acquiesces in the fact that the robber steals her property[11]. In such scenario the threat of violence must lead to the complainant’s acquiescence or submission to the theft of her property.
- [53] In respect of the threat of violence implicit in the crime of robbery, the following further factors should be considered: (a) the threat should be of such a nature that it would lead to conviction of the crime of assault; (b) whether the complainant’s will is overcome or she acquiesces due to the threat of violence must be determined subjectively, and not according to the reasonable person test[12], and (c) the threat of violence may be expressed or implied.
- [54] The subjective test referred to requires a determination of whether, in the complainant’s mind, she felt threatened in that she believed that the threats would be carried out by the robber(s)[13]. Applying the above elements and test to the facts related to the first incident at Ms C[...]’s shack, I accept that by stating to her from outside the shack that she must open the door and that if he (the speaker) wants to, he can open the door, a verbal threat was conveyed to her.
- [55] The evidence which the Regional Magistrate accepted was that after the utterance, Ms C[...] opened the door of her shack, the men entered, went to the cupboard and bed, removed certain items, and then left. Neither of the appellants (nor the unknown male) verbally or by their conduct prior to or during the action, threatened Ms C[...] with grievous bodily harm from the moment of entry into the shack to the time of their exit.

- [56] The question arises whether, as the Regional Court found, the verbal threat to open the door caused Ms C[...] to submit to the taking of her items out of fear of being harmed? In order to answer the question, I have regard to Ms C[...]’s testimony that when she went to open the door, the appellants and the unknown male simply entered, said nothing to her, took her property and left the shack. Significantly, she also explained that she was in shock but did not scream because Thembelani, whom she knew was present outside the door, and because the men did not approach her.
- [57] This testimony informs my view that the threat to open the door, which was made before the appellants and unknown male entered and then proceeded to divest Ms C[...] of her property, cannot be equated with a threat of physical harm or violence to hand over her property or to acquiesce in its removal or taking[14]. Ms C[...] complied in opening the door. At that stage, the threat to open the door (should Ms C[...] not comply with the instruction or demand) was, in my view, at best a threat to damage Ms C[...]’s door/property and not a threat of physical violence or physical harm directed at her.
- [58] To add, in order for such verbal threat to have been elevated to a threat of physical violence directed at her, something more was expected or required. For example, had Ms C[...] perhaps refused to open the door after the threat was issued, the situation would or could have escalated to a threat of physical violence and/or the door could have been forced or kicked open, or a further verbal threat of physical violence may have followed. None of these actions occurred during the first incident.
- [59] Having regard to the elements of robbery and the factors to be considered when determining whether a threat of violence exists, the verbal threat in this scenario must have been one of immediate violence and directed at Ms C[...]. However, as can be seen from the facts presented by the State and accepted by the Court a quo, they do not support a finding of an immediate threat of violence directed at the complainant[15].
- [60] Insofar as the Regional Magistrate’s finding that the verbal threat to open the door and the manner of entry caused Ms C[...] to submit to the request out of fear of being harmed, I must emphasise that the acquiescence to the removal of her property must be as a result of the threat of physical violence or harm directed at her[16]. On the facts related to count 1, Ms C[...] opened the door, did not scream nor do anything as accused 2 whom she was familiar with was outside the door; she was not approached, nor physically threatened and the men proceeded directly to remove items from her house and then leave.
- [61] Furthermore, there was also not an implied threat of physical violence and/or grievous bodily harm directed at Ms C[...]. To elaborate, there was no verbal or physical interaction in the shack or as the appellants left the shack after taking the items, to cause me to conclude that a threat of grievous bodily harm was issued or directed at Ms C[...] at that stage. In view of the above findings, I do not agree that the State proved that the threat issued to open the door amounted to a threat of violence, directly or impliedly, and that such threat plus the taking of the items constituted the crime of robbery.

- [62] Accordingly, the Regional Magistrate's finding that Ms C[...] opened the door because of a fear of being harmed and acquiesced, was incorrect and so too her finding that the State had proved aggravating circumstances in that a threat to inflict grievous bodily harm was made towards her. In view of my finding that the State did not prove robbery, there is no need to discuss the aggravating circumstances as there can be no crime of robbery with aggravating circumstances if robbery was not proved.
- [63] Having regard to the facts related to the first incident, I am satisfied that the State indeed proved the crime of theft of the items listed in Count 1, and accordingly, succeeded in proving that the appellants committed the offence of theft, which is a competent verdict on a charge of robbery. Accordingly, interference in the Court a quo's finding on Count 1 is warranted, with the result that the appeal against the convictions on Count 1 succeeds to an extent that the conviction on robbery with aggravated circumstances will be set aside and be replaced with a conviction of theft in respect of both appellants.
- [64] As a matter of completeness, I point out that the aggravating circumstance described in the charge sheet on Count 1 was that the appellants threatened to kill the complainant. While it is academic in view of the above finding of theft, the Regional Magistrate convicted the appellants on Count 1 as charged[17], which was also incorrect as there was simply no evidence of a threat to kill Ms C[...].

Count 6 and Count 8

- [65] Count 6 relates to the second appellant only and the first incident at Ms Payi's shack. The Regional Magistrate found that the housebreaking was committed with the intention to rob and convicted the second appellant and accused 2 of housebreaking with intent to rob and robbery with aggravated circumstances.
- [66] In the appeal, the appellant sought to argue that there was a duplication of charges in respect of Counts 6 and 8 as they arose out of the same incident. This is simply incorrect. The action in Count 6, which occurred at 20h00 at Ms Payi's shack was completed, and the second appellant and accused 2 Thembelani, left the shack.
- [67] Some four hours later, both appellants returned to her shack, and committed a different action, to which Count 8 refers. Thus, it cannot successfully be argued that the two actions arose from one incident or that there was a duplication of charges. They were independent and unrelated.

Count 6: Housebreaking with intent to commit a crime unknown to the State

- [68] The evidence in respect of this incident established the crime of housebreaking in that the State proved that the second appellant and Thembelani shoved or kicked the door to the shack, caused the door to open, hence allowing them access to the shack. Thus, the trial Court's finding on housebreaking was correct. The Regional Magistrate found that the State had proved the crime of robbery with aggravating circumstances.

- [69] The evidence presented by the State was that the second appellant and Thembelani entered Ms Payi's shack. They asked for her Samsung cell phone and she, startled and shocked, handed her phone to them. Her version was that the second appellant took the phone from her[18]. The men then left the shack with the phone in their possession. The State did not call Ms Payi's husband as a witness, and while there was no reason to doubt her credibility and version of the incident, there is no evidence that the second appellant and Thembelani adopted a threatening demeanour, that they verbally or physically threatened her while in the shack or threatened to commit violence toward her if she did not hand over the cell phone. The picture painted during her testimony is that there was no force used to take the phone.
- [70] Similarly, to Count 1, I am of the view that questions arise as to whether all the elements of robbery were present in this incident. The above discussion of the definition and elements of robbery above when considering Count 1, refers.
- [71] It is important to note that in view of the facts and execution of the offence in this first incident at Ms Payi's shack, when considering robbery, one is dealing with threats of violence and not the actual application of physical violence to the complainant. I accept that there is no evidence indicating that the second appellant and Thembelani used violence in order to obtain Ms Payi's cell phone.
- [72] In my view, the act of shoving or kicking the shack's door, to the extent that it constituted an act of force causing the door to open, relates to the housebreaking offence and not to robbery, as the action was completed and it preceded the taking of the cell phone. The evidence is that the only words spoken during the incident, after they gained entry, came from the second appellant who asked Ms Payi for her cell phone. She did not testify nor elaborate on the specific words spoken, and she also did not testify that the appellant and Thembelani used threatening language and/or uttered any words or phrases amounting to a verbal threat to her.
- [73] Furthermore, no evidence was led as to the positioning of the men during the incident or whether they attempted to physically impose themselves upon her and/or took up a threatening stance near her. Thus, the only evidence was that a request was made for the cell phone, and she then handed it over, and it was taken from her by the second appellant. In respect of the latter action, she also did not testify that the cell phone was forcefully grabbed from her hand.
- [74] This leads me to ask whether the request for the cell phone may be considered to be an implied threat of violence? In this regard, I consider the discussion in *S v MacDonald*[19], where it was held that an assault on a bystander in a shop amounted to an implied threat of violence of the intended victim of the robbery. While the facts in that case are similar only to the extent that men entered premises and made a request for an item which did not belong to them, the discussion regarding an implied threat of violence is insightful.

[75] To illustrate, Ms Payi testified as follows:

“I cannot describe, Your Worship, how I felt when all – when this is happening - when they were asking for the phone. The only thing that went through my mind that I must just give the phone. The only time when I felt something, it was when the whole ordeal was done and when they had left, then I realised that I could have gotten hurt.” [20]

[76] From the above testimony, it is clear that at the time of the incident, in Ms Payi’s mind, she had no choice but to hand over her cell phone to the second appellant and accused 2. Therefore, it can only be inferred that the request for the cell phone was calculated to create in her mind a fear that she would be hurt should she refuse or decline to hand over the phone, and she believed that she would be hurt were she to refuse to comply.

[77] In such circumstance, I am of the view that the request for the cell phone was an implied threat of violence directed at her. Stated differently, the result of such request for the cell phone, having regard to all the evidence presented in respect of Count 6, leads to an inescapable finding that the second appellant impliedly threatened Ms Payi with violence with the purpose of inducing her to submit to his taking and removal of her cell phone[21].

[78] Ms Payi understood the implied threat within the request for the cell phone as the second appellant intended: that should she fail to hand over the cell phone, she would be assaulted or hurt. The result of the implied threat of violence was that Ms Payi acquiesced to the removal of the cell phone from her possession[22]. The conclusion is therefore that the elements of the crime of robbery were all proved, and that the Regional Magistrate was correct to have found that the intention of the second appellant and Thembelani, in breaking into the shack, was to rob Ms Payi.

[79] According to the charge sheet, the aggravating circumstance was that the second appellant and accused 2 threatened Ms Payi “to desist from resisting”[23]. In her judgment, the Regional Magistrate correctly found a duplication of charges in respect of the housebreaking charges and the aggravated robbery charges.

[80] The difficulty I have with the judgment in relation to Count 6, is that the finding of aggravated circumstances is bundled together with the second incident related to Count 8, when the appellants (without Thembelani) returned to Ms Payi’s shack. I have had regard to the judgment in more detail and note that the Regional Magistrate concludes that the evidence in the matter is clear that the appellants’ intentions were to break in and enter Ms Payi’s premises with the intention to rob and robbery with aggravating circumstances[24].

[81] The Regional Magistrate’s finding is that the evidence proved that the circumstances of the robberies fell within the definition of robbery with aggravating circumstances and that the appellants uttered threats, and in so doing caused fear to the complainants,

thus causing them to submit to the taking of their property[25]. I certainly gain the impression that she included all the instances of robbery with aggravating circumstances related to both

complainants in reaching such conclusion. In my view, it is not advisable to have discussed the offences in a collective fashion particularly as separate actions occurred at different times.

[82] Staying with Count 6, I disagree with the Regional Magistrate's finding that aggravated circumstances were present in the robbery committed toward Ms Payi at 20h00. My discussion and findings above regarding an implied threat of violence and the subjective test applied to conclude that Ms Payi acquiesced to the request for her cell phone because she feared that she would be hurt should she refuse or resist, refer.

[83] Robbery with aggravating circumstances is not a separate crime with different or further requirements as with robbery. In *Minister of Justice and Constitutional Development v Masingili*, the Constitutional Court stated as follows regarding robbery with aggravated circumstances[26]:

"[33] Robbery with aggravating circumstances is a form of robbery with more serious consequences for sentencing. This distinctive form of robbery is not to be confused with a completely different offence, as

courts seem to have done in different contexts. The respondents rely heavily on the fact that the Supreme Court of Appeal in *Legoa* found that the existence of aggravating circumstances should be established at conviction stage. This, however, does not mean that armed robbery is a separate crime. The concern in *Legoa* was that aggravating circumstances should be proven before conviction to ensure fairness when the sentence is considered. It would be unfair suddenly to confront a convicted person with an enhanced penal jurisdiction at the sentencing stage, if the state did not give sufficient notice of this possibility. This is consonant with the constitutional principle of the rule of law, which requires clarity and notice to an accused so that he or she can address the state's case comprehensively. In this sense it differs from other circumstances that could aggravate sentence, like previous convictions, which for obvious reasons may only be proven after conviction, when sentencing is considered.

[34] In spite of the practice of treating armed robbery as what sometimes appears to be a separate crime, it is not. It is robbery. Robbery is the theft of property by unlawfully and intentionally using violence or threats of violence to take the property from someone else. The elements of robbery are the theft of property; through violence or threats of violence; unlawfulness; and intent. The definitional elements of armed robbery are no different. The aggravating circumstances are relevant for sentencing. Intent regarding the circumstances is not required for conviction, exactly because an accused will be convicted of robbery, given that armed robbery is merely a form of robbery.

(footnotes omitted)

[84] As seen from the above dicta, aggravating circumstances determine the sentence to be imposed, and the presence or absence of aggravating circumstances is decided from the objective facts[27]. From the objective facts in Count 6, we can exclude that grievous bodily harm was inflicted on Ms Payi, or that a firearm or other dangerous weapon was wielded, as mentioned in section 1 of the CPA. I have already found that the request for the cell phone,

given the acquiescence which followed, constituted an implied threat of violence directed at Ms Payi, but in my view, more would be required to constitute a threat to inflict grievous bodily harm, as defined in section 1(b)(iii) of the CPA.

[85] Section 1(1) of the CPA defines aggravating circumstances to robbery in the following manner:

“(1) In this Act, unless the context otherwise indicates – ‘aggravating circumstances’, in relation to-

(a) ...

(b) Robbery or attempted robbery, means-

i. The wielding of a fire-arm or any other dangerous weapon;

ii. The infliction of grievous bodily harm; or

iii. A threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.”

[86] In the circumstances of Count 6, an implied threat to inflict grievous bodily harm must be capable of establishment from the objective facts, and it cannot be concluded that a request that Ms Payi hands over her cell phone implies an immediate threat to inflict upon her grievous bodily harm. As an example, had the second appellant or Thembelani or both, on request for the cell phone also uttered, for example, “or else you will see”, or words along those lines, then it may follow that a threat to inflict grievous bodily harm was established.

[87] As held in *Nakumba v S*[28], a recent Full Bench decision of this Division, with reference to robbery, a threat constitutes an aggravating circumstance only if such threat relates to the infliction of grievous bodily harm. In this matter, Ms Payi was simply not questioned about the men’s demeanour, their stance nor anything further and in any event, her testimony was that the cell phone was requested and handed over.

[88] In conclusion on this aspect, I am accordingly not convinced that there was sufficient evidence placed before the Regional Magistrate to cause her to conclude that the second appellant and accused 2 threatened to inflict grievous bodily harm upon the complainant. The acquiescence to the request for the cell phone and its immediate taking from her possession, convinces me that the offence committed was robbery and that the conviction of the second appellant on housebreaking with the intention to rob and robbery with aggravating circumstances, was thus wrong[29].

[89] Accordingly, the second appellant’s appeal against the conviction on Count 6 will be upheld to the extent that it will be substituted with a conviction of housebreaking with the intention to rob and robbery. Such finding would thus also affect the sentence imposed on the second appellant in respect of count 6.

Count 8: Housebreaking with intent to commit a crime unknown to the State

- [90] In respect of the second housebreaking incident at Ms Payi's premises several hours after the first, which involve both appellants, there is no issue with the Regional Magistrate's finding and conviction of the appellants on the charge of housebreaking with the intention to rob and robbery with aggravating circumstances. The State proved the breaking and entering, and the threats to shoot and kill Ms Payi constituted a clear threat to inflict grievous bodily harm.
- [91] The objective evidence also indicated that the appellants took her jackets and food, unlawfully so, in the execution of one action. I am thus satisfied that the conviction of both appellants on count 8 leaves no room for interference on appeal. Accordingly, the appellants' appeal against conviction on Count 8 falls to be dismissed.
- [92] In my view, the Regional Magistrate was also correct, given the facts prevalent in the incidents at Ms Payi's shack, that counts 7 and 9 were a duplicate of the charges on counts 6 and 8.[30]

Counts 2 and 3: Rape

- [93] Count 2 applies to the first appellant and Count 3 to the second appellant. They were charged with contravening section 3 read with various sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA) read with section 51(1) of CLAA because it was alleged that the rapes were committed in circumstances where the victim was raped more than once whether by the accused or a co-perpetrator or accomplice.
- [94] On appeal, it was argued that the State relied on common purpose when it charged the appellants with rape as read with section 51(1) of the CLAA, and that there were two counts of rape arising out of one incident. Firstly, in spite of clearly showing emotion once during her testimony when recalling her ordeal, Ms C[...] was clear and firm during her testimony regarding the incident in the early hours of 26 May 2021. The appellants had threatened to kill her if she did not open the door.
- [95] The Regional Magistrate's findings regarding Ms C[...] reliability of her evidence and the identity of the two males and sequence of events are unassailable. Ms C[...]’s report of the rapes to her neighbour immediately after the appellants left her shack is corroborated by Ms Payi who heard her knocking on the other neighbour's door, and Mr N[...], who was telephonically informed by the victim that she had been raped by the appellants. As a single witness to the rape, Ms C[...]’s version was not attacked and was barely questioned but for a bare denial by the appellants that they were not present and have no knowledge of the incidents. She was reliable, consistent and her evidence was correctly accepted.

[96] The criticism directed at the Regional Magistrate that she failed to evaluate the medical and oral testimony correctly, is without merit. I say this as I am of the view that the Regional Magistrate's evaluation and assessment of the evidence presented in support of the rape counts, was correct. The appellants' submission that she erred when she found that the medical evidence

corroborated the victim's version that she was raped is also unconvincing.

[97] Dr Matanda, in my view, did not contradict Dr Hafejee's findings on the material respects. If anything, she differed from Dr Hafejee that one could speak of clefts and bumps when the medical examination showed a carunculated hymen, meaning remnants of a hymen. She then equated the clefts and bumps to being the remnants of the hymen membrane, and what was left were pieces which appeared as small clefts and bumps. Thus, to submit that Dr Matanda contradicted Dr Hafejee's findings in material respects, is an incorrect assessment and consideration of the medical evidence in the matter.

[98] On the important conclusion that a 3mm tear to the vestibule was a fresh tear and indicative of forced vaginal penetration, Dr Matanda agreed with her colleague. The appellants have argued that the witness stated that forceful penetration could be one of the causes. This is correct but to the extent that they wish to imply that the fresh tear was not caused by them raping the victim, or that she was raped by other persons, is opportunistic to say the least when I consider the evidence holistically.

[99] The victim maintained that she knew the appellants in passing and that they lived close-by and the latter fact was not seriously attacked in cross examination. Furthermore, she explained that they were the same men who earlier, at 20h00 during the first incident, came into her shack and took her items. At midnight, on their second visit to her shack, they wore the same clothes, there was sufficient light to identify them, and she knew the appellants by their nicknames, Vovo and Blacks.

[100] In my view, the Regional Magistrate correctly found Ms C[...]’s version regarding the reporting of the rapes and events after the rapes, was corroborated by Ms Payi and Mr N[...]. Thus, the men who demanded entry to Ms C[...]’s shack, were the same men who hours earlier, stole from her. Ms C[...]’s evidence that she was pushed onto the bed by the second appellant, who forcefully raped her while the first appellant stood watching at the door was also properly accepted, and similarly her description of the second rape by the fist appellant.

[101] There is no doubt that each appellant raped the complainant once. To add, the gynaecological examination was conducted within hours of the rapes occurring in the early hours of 26 May 2021 and the doctor's recordal of a 3mm fresh tear to the vestibule was unchallenged. The proximity of time of the gynaecological examination to the rapes reinforces my view that the tear to the victim's fossa navicularis was indeed caused by the appellants' forceful penetrations of the complainant's vagina. The facts accepted by the Regional Magistrate were consistent with her finding that the appellants raped Ms C[...].

- [102] It was submitted that the DNA report, Exhibit D, did not support the State's case of rape. The finding of the forensic analyst in her section 212 statement was that not enough male DNA was obtained from the vaginal swabs taken from Ms C[...]. In my view, the finding does not damage the State's case due to the strength of Ms C[...]'s version, along with the medical evidence in the J88, Dr Matanda's confirmation of Dr Haffejee's finding of forceful vaginal penetration and the corroborating version of Ms Payi and Mr N[...] that Ms C[...] reported the rapes to them and was distraught and emotional at the time. Ultimately, the Regional Magistrate was correct not to have placed much weight on Exhibit D's finding as it neither supports, nor was it detrimental to, the strength of the State's case on counts 2 and 3.
- [103] The further argument on appeal is that the State elected to charge the appellants with rape as read with section 51(1) of the CLAA, in two separate counts arising out of the same incident. The plea proceedings indicate that the Regional Magistrate queried the State prosecutor who clarified that the complainant was raped by two accused, at the same time[31].
- [104] Section 51(1) read with Part 1 of Schedule 2 of the CLAA triggers life imprisonment as the mandatory sentence for rape when committed in circumstances where the accused acted in the furtherance of a common purpose or conspiracy and the evidence at trial proves that the victim was raped by more than one person who acted in the furtherance or execution of a common purpose or conspiracy to rape the victim, irrespective of whether or not any other person who so acted in the execution or furtherance of a common purpose or conspiracy has been convicted of or charged with or is standing trial in respect of the offence in question[32].
- [105] The facts were that the appellants entered the shack together after threatening the complainant. The first appellant was present while the second appellant raped Ms C[...], standing and watching at the door and providing a source of light while the second appellant sexually penetrated Ms C[...] without her consent. As correctly found, when the second appellant completed the act, the
- first appellant took his turn and also proceeded to rape her. At this stage, the second appellant stood and watched his co-accused rape the complainant.
- [106] These appellants acted in concert with one another, with the intention and purpose that each would take their turn to rape Ms C[...] while the other stood by and watched, and in doing so, each appellant achieved the purpose to execute the rape of Ms C[...] [33]. She was therefore raped more than once, in two actions by two accused.
- [107] In the circumstances, the Regional Magistrate committed no error in her findings and section 51(1) accordingly applies to each appellant. Thus, I find that no misdirection nor error occurred in respect of the conviction of rape read with section 51(1) of the CLAA and Part 1 of Schedule 2 of that Act. The appeal against conviction on counts 2 (first appellant) and 3 (second appellant) shall be dismissed.

Counts 4 and 5: Compelling or causing children to witness sexual offences

[108] The evidence which the Regional Magistrate accepted was that Ms C[...]’s two minor children, aged 6 and 3 respectively, were on the bed in the shack, crying, when she was raped by each appellant. Her version about the presence of the crying children on the bed during the commission of the rapes, was never challenged.

[109] It was presented as a ground of appeal, that counts 4 and 5 arose out of one incident and represent a splitting of charges. Section 83 of the CPA states as follows:

“83 Charge where it is doubtful what offence was committed

If by reason of any 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 may be charged 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."

[110] Section 83 allows the State, as the prosecuting authority, a discretion to put as many charges as possible as may be justified by the facts, either as main or alternative charges[34]. In *S v Dlamini*[35], Majiedt JA made the following caution about section 83 and the duplication of convictions:

*“[55] A brief consideration of the principles regarding duplication of convictions is apposite. Section 83 of the Criminal Procedure Act 51 of 1977 enables the State to draft charges as widely as it may deem necessary, to the extent that it may technically amount to a duplication of charges. That the law permits. But what is not permitted is duplication of convictions in order to safeguard an accused against being convicted twice in the same case for the same offence. As stated by Cachalia JA, where the application of the two tests to determine whether there has been a duplication of convictions yields no clear result, a court is called upon to apply its common sense, wisdom, experience and sense of fairness to reach a decision.[36] As demonstrated above, on the evidence and in applying the two tests, three separate offences were committed. To hold otherwise would be to distort a fundamental legal principle, leading to anomalous results. As Wessels JA said in *S v Grobler en ‘n ander*:[37]*

‘The test or combination of tests to be applied are those which are on a common-sense view best calculated to achieve the object of the rule.’

The rule is primarily aimed at fairness. This, however, embodies fairness to both the accused and the State. Harms DP put it thus in the context of the Constitution’s fair trial provisions in s 35:

‘Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the State’.
[38]

The rule cannot be applied where it would lead to manifest unfairness to the State, as would be the case, in my view, were Cachalia JA's views to be upheld. To borrow again from Wessels JA in *S v Grobler en 'n ander*:^[39]

‘The main purpose and social function of criminal proceedings are to establish the guilt of an accused person in respect of criminal conduct so that he may be punished according to law for that conduct.’

The practice of the DPP, referred to by Cachalia JA in para 26, is ill conceived as s 83 of the Act specifically permits a broader approach to be followed in the formulation of charges. But once evidence is heard a court should be mindful of the rules regarding the duplication of convictions. The manner in which charges had been formulated in the present matter constitutes the proper approach.”

[111] It is important to note from the above dicta in *S v Dlamini*, and authorities such as *S v Grobler en 'n Ander*^[40] that the single intent and continuous transaction test and whether the evidence necessary to establish one offence involves proving another, involve two tests to determine whether there has been a duplication of convictions. The tests may be applied individually or collectively^[41]. These tests to determine whether a duplication of charges has occurred should be regarded as practical guides and are not rules of law, such that if they fail to yield results to the trier of fact, then common

sense/logic, wisdom, experience and fairness to both sides should dictate the Court's conclusion^[42].

[112] In respect of counts 4 and 5, I cannot agree with the submission regarding a duplication of charges. There were two minor children who were both present during their mother's rapes by the appellants. Count 4 relates to one child complainant and Count 5 relates to the other child complainant. These were individual complainants who were present on their mother's bed, on which

she was pushed and raped by each appellant. There can thus be no question of a duplication of charges.

[113] During argument of the appeal, the appellants' counsel queried how it was possible for the children to see the sexual offences committed toward their mother. In my view, the answer is found in the definition of the offence in section 21(1) of the SORMA Act, which states the following:

21 Compelling or causing children to witness sexual offences, sexual acts or self-masturbation

(1) A person ('A') who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ('C')

or not, compels or causes a child complainant ('B'), without the consent of B, to be in the presence of or watch A or C while he, she or they commit a sexual offence, guilty of the offence of compelling or causing a child to witness a sexual offence,"

[114] From the above description of the offence created in section 21(1), it is apparent that the following jurisdictional facts must be present to establish the offence of compelling or causing children to witness sexual offences: the accused must, whether for his own or a third party's sexual gratification, unlawfully and intentionally; compel or cause a child complainant without such child complainant's consent; to be in his/her presence or in the presence of the third party, or watch the accused or the third party; while such accused or third party, commits a sexual offence.

[115] From the above elements, it is clear that the sexual offence need not be perpetrated against the child and can be perpetrated by the accused, against anyone (the third party/ complainant). The child complainant is placed in the position where he/she is either present when the sexual offence is committed or watches the sexual offence being committed by the accused or third party. With reference to the facts of this case, and in respect of each of Ms C[...]s minor children and each of the appellants, the finding was that such children were present when the rapes occurred. The argument or query as to how the children could see what

was happening to their mother in the shack, misses the point.

[116] The evidence, which remained unchallenged, was that although one of the appellants switched off the shack's light, the first appellant provided light while the second appellant raped Ms C[...] on the bed, while the children were on the bed, crying. By all accounts, the ineluctable conclusion is that each child saw and was able to see, by virtue of their positions on the bed, the sexual offences perpetrated upon their mother on the same bed.

[117] More importantly, when I have regard to the definition of the crime in section 21(1) of SORMA, it is apparent that the Legislature's intention in the section was that the crime is committed (accepting that all other jurisdictional facts are present) when the child is in the presence of the accused or the third party OR watches the accused or the third party while the sexual offence takes place. Thus, even if, for arguments' sake, the children did not watch (and therefore, by implication did not see) the commission of the appellants' rapes of their mother, the offence is still committed as long as the sexual offence occurs in the presence of the child or children. This is sufficient to find that the elements of the offence are satisfied.

[118] The remaining aspect is whether it was established that each of the appellants caused or compelled the two children, without their consent, to watch or be present during the commission of the offences. In my view, even though the evidence indicates that the appellants had no physical interaction with the children before and during the rapes, I am satisfied that the circumstances prevailing during the early hours of 26 May 2021 in Ms C[...]’s shack, convince me that the children were compelled to watch or be in

the presence of the appellants’ commission of the rapes, for the following reasons: firstly, the children were present when the appellants entered the shack to rape their mother; the shack was an open-plan, one-roomed area, with one bed’ and, the

children were with their mother, asleep on the bed when the appellants entered after threatening to kill Ms C[...].

[119] The circumstances of the second incident (the rapes) and the ages of the children lead me to find that they did not consent to either being present or watching the sexual offences perpetrated against their mother. Furthermore, the door to the shack was closed and blocked by each of the appellants while the other committed the rape thus preventing the children from leaving the shack, and even if the children had the maturity and foresight to try to leave or protest, they were in a vulnerable and weakened position throughout the commission of the rapes due to their ages and the danger of the situation inside the shack.

[120] Having regard to the above, I am thus satisfied that the children were compelled to witness and be in the presence of the commission of the sexual offences perpetrated by the appellants against Ms C[...], and that the State proved all the elements of counts 4 and 5. Thus, the Regional Court’s finding on conviction on counts 4 and 5, cannot be faulted. The appeal against conviction on counts 4 and 5 thus fail.

Appeal against sentence

[121] During the appeal it was submitted on behalf of the appellants that there were substantial and compelling factors which warranted a deviation from the life imprisonment and minimum sentences imposed on counts 6 and 8 respectively imposed. The Regional Magistrate found no substantial and compelling factors applicable to either appellant.

[122] The determination of sentence falls within the discretion of the trial Court. In *Director of Public Prosecutions, Kwa Zulu Natal v P*[43], the Supreme Court of Appeal framed the test for interference by an appeal Court in the sentence of a trial Court, as follows:

“the test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate”.

Interference on appeal may also occur where the sentence imposed by the Court a quo is so disproportionate or shocking that no reasonable Court could have imposed it[44].

- [123] The appellants' personal circumstances were placed on record in a brief and perfunctory manner. The first appellant was a first offender, 22 years old at the time of sentencing, unmarried, unemployed and had a three-year old child who received a SASSA grant. He attained grade 10 at school and had contracted HIV Aids while awaiting trial in prison.
- [124] The second appellant had previous convictions, was 39 years old at the time of his sentencing, unmarried with an eight-year-old child. He worked as a gardener prior to his arrest, earning R600 per week and was the sole breadwinner for his child. His highest progress academically was grade 10 and as for his health, he suffered from asthma and was provided with an asthma pump while in incarcerated. The second appellant had two convictions in November 2018 for housebreaking with intent to steal and theft, which were taken together for purposes of sentencing and for which he received a wholly suspended sentence of three years' imprisonment suspended for five years on condition that he does not commit a similar offence.
- [125] The legal representative for the appellants submitted that life imprisonment has no room for reformation of the appellants, that the sentence should be tempered with the element of mercy and that the accused were still young. The respondent submitted that the offences were very serious and that the maximum sentence should be imposed for the rape counts and robbery with aggravated circumstances. The judgment on sentence took into account the triad, as well as mitigating and aggravating factors, the effect of the crimes on the complainants, and the aims and purpose of sentencing. In this regard, I am satisfied that the Regional Magistrate properly considered all these aspects and that the sentences she imposed were not tainted by irregularity or misdirection.
- [126] In *S v Malgas*[45] the SCA held that Courts are free to depart from prescribed minimum sentences but may not merely pay lip service to the fact that the legislature prescribed specific minimum periods of imprisonment which ought to be appropriate in respect of certain crimes. Similarly, in *S v Matyiti*[46], Courts were firmly reminded that the departure from prescribed minimum sentences should not be for vague and ill-founded reasons. In this matter, it has been submitted that life imprisonment does not allow for reformation of the appellants, who are young and that the imposition of such a sentence is shockingly inappropriate. The first appellant's HIV status has also been brandished as a factor warranting a departure from the prescribed minimum sentences.
- [127] As far as the appellants' personal circumstances are concerned, the Regional Magistrate was correct to find that there were no special factors for consideration, and nothing stands out in respect of their circumstances. It has been submitted that the youth of the first appellant is an important factor, yet the first appellant actively participated in returning to Ms C[...]s shack hours after the first incident, watched as the second appellant raped her in the presence of her minor children, provided a light source to his co-accused during the commission of the rape and then himself, raped her.

- [128] Rather than sounding the alarm or changing his mind and helping her, he thought nothing of raping her and himself committing a most despicable crime, invading her bodily integrity, preying on her vulnerability and doing so while her young children looked on. At the time of the commission of the offences in respect of both complainants, he was 19 years old, having just attained adult status.
- [129] The first appellant was not deterred by his youthfulness when he committed surely one of the most serious crimes of rape. As a first offender at the time, he displayed no concern for the victim and her children who witnessed the commission of sexual offences. Insofar as his HIV status is concerned, he would be able to receive treatment in prison. In my view, the Court a quo was correct not to consider this to be a substantial and compelling factor warranting a deviation from the prescribed minimum sentence. Thus, the argument regarding the first appellant's youthfulness as a substantial and compelling factor is, in my view, unconvincing.
- [130] As for the second appellant who was in his late 30s, he had already embarked on a path of crime. Having read the SAP 69s, it is apparent that he was convicted in November 2018 on housebreaking charges and sentenced to three years' imprisonment wholly suspended for five years, meaning that at the time of the commission of the offences in this matter in 2021, the 2018 suspended sentence was hanging over his head. The suspended sentence clearly did not deter him from committing housebreaking offences in respect of Ms Payi's property and I view this as an aggravating factor. As with the first appellant, I am satisfied that the Regional Magistrate did not err in finding that there were no substantial and compelling factors present to justify a deviation from the prescribed minimum sentences.
- [131] The question remains whether the sentence of life imprisonment was disturbingly inappropriate, disproportionate or so shocking that no reasonable Court would have imposed it. One must have regard to the manner in which the offences were carried out. The appellants preyed on the vulnerability of both complainants, especially Ms C[...], and like cowards, struck firstly in the early evening, and then in the early hours of the morning when she was asleep in her home with her children. These appellants violated the sanctity of the complainants' homes, women who lived in the same community, within walking distance of them.
- [132] The rapes were committed so brazenly, in disregard of Ms C[...]'s bodily integrity, the privacy of her home and the presence of her young children. Sexual offences and rape particularly, is a daily scourge and inundate the Regional Courts, and the actions of these appellants infringed Ms C[...]'s right to her bodily integrity, privacy, human dignity and equality, as highlighted in *S v Mudau*[47].
- [133] Ms C[...] was threatened with her life and raped twice so to submit that life imprisonment, which is the applicable minimum sentence for rape as referred to in Part 1 of Schedule 2, is either inappropriate, disproportionate or shocking, is not only unconvincing but based on an unsound reasoning or failure to appreciate the serious nature of the offences in the

circumstances. The seriousness of the rape offences were correctly emphasised above the personal circumstances of the appellants in determining the appropriate sentences to impose, and mercy, in my view, pays no part in the sentencing of these appellants.

- [134] It is evident from the victim impact statement that the rapes had a severely negative impact on Ms C[...]’s life and marriage. Her life fell apart, she became distant from her husband, feared men and being touched and eventually, her marriage ended, and she moved to a different area. Her statement clearly sets out the stark reality of the effect that the sexual violation had on her, and the unfortunate and in my view, unfair stigma which some people in her community attach to her as a woman who was raped.
- [135] At the time of writing her statement, she was struggling to pay rent, had started drinking alcohol and was in need of therapy or counselling which she had not received. The effect on her children of witnessing the sexual offences is unknown as they, too, had not been for counselling. I consider it an aggravating factor that as a result of the rapes, Ms C[...] contracted HIV Aids.
- [136] In all the circumstances addressed by the Court a quo and highlighted above, including the period spent in custody awaiting trial, the imposition of life imprisonment for the appellants on Counts 2 and 3 is appropriate, proportionate to the nature and seriousness of the offences and circumstances and just. Thus, the sentences of life imprisonment on counts 2 and 3 shall be confirmed.
- [137] Ms Payi similarly gave an account of the effect of the housebreaking at her premises. Her relationship with her husband was fractured and she was fearful of even leaving her house as a result of her experience of these serious crimes. I would hope that both complainants (and Ms C[...]’s children) receive the necessary therapy or counselling which they have expressed they need.
- [138] In conclusion, in view of the interference in the findings on conviction on counts 1 and 6, it is important to note that the minimum sentences imposed in respect of both these sentences would not apply. In the circumstances, the sentences of 15 years; direct imprisonment for each appellant on count 1, which I have found to be theft, will be substituted with 6 (six) years; and, the sentence of 15 years’ for the second appellant on count 6, which I have found to be housebreaking with intent to rob and robbery, will be substituted with 10 (ten) years’ direct imprisonment. These sentences will be backdated to 27 June 2024.

M PANGARKER

JUDGE OF THE HIGH COURT

I agree and is so ordered,

BP MANTAME

Appearances:

For Appellant:

Adv L N Adams

Instructed by:

Legal Aid

For Respondent: Adv Thaiteng

Instructed by:

Director of Public Prosecutions

[1] Record, p58

[2] Ms Payi testified that after the appellants left her shack and went to Ms C[...], she went to her door to check if it could still lock and then.

[3] Exhibit C

[4] Exhibit C, point 11.

[5] Transcript, p200

[6] Transcript, p202

[7] Exhibit D

[8] Transcript, p353

[9] *Snyman's Criminal Law, Seventh Edition*, updated by SV Hكتور, p448.

[10] 1982

(1) SA 844A at 850B-C

[11] *Supra*, 850B-C

[12] *LAWSA, Second Edition, Volume 6: Criminal Law, Common Law Crimes: Crimes against property*, par

297. See also *Snyman supra*, p449.

[13] See *R v Sitole* 1957 (4) SA 691 (N) 692-693, *S v Pachai* 1962 (4) SA 246 (T) 249

[14] *Snyman's Criminal Law, Seventh Edition*, updated by SV Hكتور, p449

[15] *Snyman supra*, p449

[16] *Ex parte Minister of Justice; in re R v Gesa; R v de Jongh* 1959 (1) SA 234 (A) 24

[17] Transcript, p356-357

[18] Ms Payi's version indicates that she handed over the phone, and not, for example, that the phone was grabbed with force from her hand. She makes no reference to any force used.

[19] 1980

(2) AD 939 at 943A-945G

[20] Record, p134

[21] S v MacDonald supra, at 945E-G

[22] Ex parte Minister of Justice: in re R v Gesa; R v De Jongh 1959 (1) SA 234 (A) 241

[23] Count 7

[24] Record, p353

[25] Record, p353; see also, pages 344-345, 348.

[26] 2014 1 SACR 437 (CC) at para [33]-[34]

[27] See, for example, Davids v S 2019 (1) SACR 257 (WCC) at para [7]-[8]

[28] 2024

(1) SACR 81 (WCC) par [37]

[29] See Mahlahla v S 2023 ZAECGHC 125 (Unreported – Malusi J, delivered 25 January 2023 para [13]-[14]

[30] See S v Bam [2020] ZAWCHC 68 par [86]

[31] Transcript, p45

[32] Schedule 2, Part 1, Rape as contemplated in section 3 of SORMA, when committed as set out in (a)(ii)

[33] See doctrine of common purpose generally, S v Safatsa 1988 (1) SA 868 (A) 894, 896, 901.

[34] S v Prins 11144/2003, Moosa J, Erasmus J concurring, delivered 29 August 2003, par 6

[35] 2012

(2) SACR 1 (SCA)

[36] S v Whitehead & others 2008

(1) SACR 431 (SCA) para 35; S v Dos Santos & another 2010

(2) SACR 382 (SCA) para 44.

[37] S v Grobler en 'n ander 1966

(1) SA 507 (A) at 523F.

[38] See: National Director of Public Prosecutions v King 2010

(2) SACR 146 (SCA) para 5.

[39] At 522F-G.

[40] 1966

(1) SA 507 523F

[41] S v Benjamin en 'n Ander 1980(1) SA 950 (A) at 956 G, 957 E-H.

[42] See National Director of Public Prosecutions v King 2010(2) SACR 146 (SCA) par [5]

[43] [2005] ZASCA 127 par [10]

[44] S v Sadler 2000 (1) SACR 331 (SCA) par [8]

[45] [200] ZASCA 30 at par [25]

[46] 2011

(1) SACR 40 (SCA) at par [23]

[47] [2014] ZASCA 43 par [6]; see also S v Chapman [1997] ZASCA 45; 1997 (3) SA 341 (SCA) 345A - B.

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