

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

**CASE NO. CA&R130/2023**

In the matter between:

**A[...] M[...]**

**Appellant**

**and**

**THE STATE**

**Respondent**

**JUDGMENT**

**JOLWANA J:**

[1] The appellant was arraigned before the Regional Court in East London on charges of housebreaking with intent to commit assault, rape and kidnapping. He was found guilty and sentenced to twelve months imprisonment, life imprisonment and twelve months imprisonment respectively. He has exercised his automatic right to appeal against both conviction and sentence in respect of the rape conviction and the sentence of life imprisonment. There is no appeal against the conviction and sentence for housebreaking with intent to commit assault and kidnapping.

[2] The complainant's evidence was that on 06 February 2021 at about 19:30 she was at Y[...]’s home in Duncan Village. Y[...] was about to take a bath when there was a knock at the door. Y[...] enquired as to who was knocking. The person said he was

A[...]. Y[...] went to enquire what this person wanted. However, the door was kicked or pushed open and the appellant who was her ex-boyfriend barged in. The appellant started swearing at Y[...] asking her why she was a snitch. The complainant explained that apparently at some stage Y[...] and the appellant had an agreement that when Y[...] saw her she would inform the appellant, but Y[...] had changed her mind about that. She became aware of this when she was chatting with Y[...] before the appellant arrived.

[3] The appellant grabbed the complainant by her clothes on the chest and threatened to shoot her. Y[...] screamed. The appellant asked the complainant why she had obtained a protection order against him. She confirmed that she had applied for a protection order against him. The appellant pulled her outside and klapped her and hit her with clenched fists. Y[...] was outside at this stage. The complainant noticed A[...] who was known to her leaving the area. It was dark but the streetlights provided light. Y[...] went to look for her parents as the incident took place in her home.

[4] The appellant took her to an area called D Section by holding and pulling her. Even in D Section he klapped her and hit her with clenched fists. She did not want to go to D section. The appellant was asking her why she ended their relationship and why he set police on her. After the assault at D section, he took her to Ramaphosa Informal Settlement where he joined his friends. He told his friends that she was back with him. When these events happened, she had been living in fear of the appellant to an extent that she would not leave her home.

[5] They then went to another area in Duncan Village and as they were walking another girlfriend of the appellant appeared. The appellant became angry and assaulted his girlfriend. The three of them walked together to his shack. However, when they got to his shack it transpired that he did not have a key for the gate which was locked. The appellant decided that they should accompany his girlfriend to her home. This he decided on his own. After accompanying his girlfriend, they then went to Bebelele where they went to the shack of his friend. The complainant knew this shack because when they were still in a relationship they used to spend the night there sometimes.

[6] They got inside the shack and he closed the door and locked it. He started showing his anger again asking why she was ending their relationship. He asked who she was going out with. She told him that she did not have a boyfriend and that she was just sick and tired of his abusive behaviour. The appellant told her to undress herself. When she refused, he then threatened to assault her. Because she was afraid of him, she undressed herself and got into the bed. He also undressed himself. She got into bed because he was threatening to assault her. She told him that she could not have sexual intercourse with him because he had many girlfriends.

[7] Having told him that she did not want to have sexual intercourse with him he went ahead and raped her. In the morning, he again had vaginal sexual intercourse with her against her will. At some stage that morning one of his friends knocked at the door. He then left with his friend and locked her inside the shack and took the key with him. The appellant later came back and found her crying. He asked why she was crying, and she told him that she wanted to go home. He talked to his friend who was standing outside asking if he had seen that the place was full of people. Her impression was that they were talking about her home verandah which had many people. This would be because Y[...] went to tell people about what happened to her the previous night at her home.

[8] The appellant's friend left, and she and the appellant also left that shack. On the way he was assaulting her for a reason she did not know. When she arrived home, she told her sister and her friends about the incident via WhatsApp messaging. She had sustained some injuries as she was swollen and had a blue eye. She did not go to seek medical attention. She went to open a case against the appellant, and she was taken to Cecilia Makiwane Hospital by the police. She explained that the stab wound in the palm of the left hand which was reflected in the medical report related to an old stab wound inflicted on her by the appellant in 2020 which had healed and had become a scar.

[9] Under cross-examination the complainant testified that she had told the appellant that she was ending their relationship through facebook. He had received it because he

then said he wanted to see her so that they could have a discussion. Previously when she ended their relationship face to face, he would assault her. It was put to her that it was A[...] who responded when asked who was knocking or what he wanted and Y[...] willingly opened the door. As a result, the appellant never had to kick the door. She disputed the appellant's version in this regard.

[10] She testified that she never spoke to A[...], she just saw him walking away. She did not ask him for help when she was being forcibly taken away because she did not see him as someone that could help her. When she was outside with the appellant, Y[...] was screaming because the appellant was threatening to shoot them. When another person tried to intervene, the appellant told him to leave him alone and that man left. She did not shout for people to come and help her or to call the police because she thought that people were afraid of the appellant, and she did not think they would help her. After Y[...] screamed she left saying that she was going to look for her mother. She denied willingly going with the appellant.

[11] She knew L[...] and that he stayed at the hostel. That night she and the appellant went to L[...]’s place at the hostel. On the way, there were people walking and drinking. They met some women, but she did not scream for help or tell them that she was being taken against her will because she was afraid. When they arrived at the hostel there were about four people there. At the time the appellant was not dragging her but he was holding her. She denied willingly going to L[...]’s place.

[12] She testified that they met D[...] at the hostel, and she told him what was happening. However, D[...] said that he did not want to get involved. He did not tell the appellant’s friends that she had been forcibly taken from Y[...]’s place. However, when the appellant said they were back together she told them that they were no longer in a relationship, but he told them to ignore her. She did not ask them to help her because she did not think that they would help her, and he could have assaulted her in front of them.

[13] She denied that when they arrived at the appellant's friend's shack, she kissed him or willingly took off her clothes and had consensual sexual intercourse with him. She testified that the appellant fell asleep first after they had sexual intercourse. She was crying thinking about what she was going to say at home and after some time she also fell asleep. She could not escape because the key was with him. He had put it under the mattress on the side on which he was sleeping.

[14] The appellant woke up at about 05:00 am and had sex with her again. She testified that it was not the first time that they slept in that shack although she could not remember how many times before. Sometimes he would leave her alone in the shack and she would wait for him to come back and accompany her home. Her mother did not approve of their relationship when they were still in a relationship. During their facebook chats with Y[...] she was told by Y[...] that her mother and another lady went to her place to report what had happened that night. When she got home her mother and her sister were at home.

[15] It was put to her that the appellant left with his friend that morning which was something he normally did and she would wait for him to come back and accompany her home. On the day in question the same thing happened, she testified that on that day he locked her inside the shack and left with the keys whereas during normal occasions he would leave the keys with her. The appellant's friend, Q[...] saw her, but she did not ask him for help. The appellant accompanied her home with Q [...], but they did not reach her home.

[16] The next State witness was Y[...]. Y[...] testified that on 06 February 2021 at about 19:30 she was at home with the complainant together with her siblings. There was a knock on the door. She was washing her face at the time about to take a bath. She enquired who the person was and the response was it was A[...]. The door was closed but not locked. Then there was a bang, and the door was flung opened. The appellant came in and asked her why she was a snitch. He then asked her why she was causing

a quarrel between him and the complainant which was why he called her a snitch. He threatened to kill her and her mother.

[17] Her mother was not present at the time. When all of this was happening, the complainant was sitting on a chair inside the house. The appellant grabbed the complainant and slapped her. He started swearing at her and told her to go with him. The complainant asked where she was being taken to, and whether he had forgotten that she had obtained a protection order against him. The appellant grabbed the complainant with her clothing, pulled her and left with her.

[18] They returned about 30 minutes later. She heard her shouting her name and asking her to come out. She then went to her. She observed that the complainant was crying and said the appellant wanted to talk to her. He then shouted at her asking her why she was a snitch. The appellant had a pouch around his waist from which he drew a knife. He held it in a stabbing position. She screamed and went away to look for her mother. However, she could not find her. Her mother arrived at about 02:00 am and she told her what had happened. They slept and woke up at about 07:00 am and went to the complainant's home where they found the complainant's mother, her sister and her child. She told the complainant's mother what happened to the complainant the previous night.

[19] Under cross-examination Y[...] confirmed that she had an arrangement with the appellant that when she saw the complainant she would tell the appellant, but she did not do so. The knock at the door at her place was a normal knock and then she invited the person who was knocking to come in. Then there was a bang on the door and the appellant came in after the door was flung open. She was behind the door at the time as she was taking a bath.

[20] Y[...] denied that the door opened normally and said that the appellant was intoxicated. When the appellant grabbed the complainant, the complainant was sobbing. She did not ask for help from anyone as there was no one there and the elderly people

were sleeping. The appellant left with her, and she followed them, and looked for them but she could not find them. At no stage did the complainant ask her to call the police or to go and report the incident at her home. She woke up on her own in the morning with her mother and reported the incident at the complainant's home. She denied that the appellant never brandished a knife and insisted that he was carrying a knife. After Y[...]’s evidence the State closed its case with the documentary evidence like the medico-legal examination report having been handed in by agreement between the prosecutor and the appellant’s legal representative.

[21] The appellant opened his case and testified in his defence. His evidence was that he together with A[...] went to Y[...]’s place. A[...] knocked because he did not want to knock himself as he would be seen to be disrespecting that homestead. When A[...] knocked the response from inside was who was knocking and A[...] said it was himself. Y[...] then opened the door. When the door was opened the complainant was sitting in line with the door. The appellant then said he was asking for her and the complainant stood up and came to him. They left together and stopped next to SokhA[...]’s shack. He described as lies the evidence that when he entered Y[...]’s home he called her a snitch. He denied that he kicked the door as testified to by the complainant. The appellant disputed Y[...]’s evidence that there was a bang on the door which was then flung open, and he entered. He denied threatening to kill Y[...]. He denied assaulting the complainant in the shack of his friend saying he never lifted a finger on her. He further described as lies Y[...]’s evidence that he assaulted the complainant with an open hand, grabbed her by her clothing and took her out of Y[...]’s home by force.

[22] He testified that when they were next to the complainant’s shack, he told her that he heard that she was looking for him and wanted to know what was going on. At that stage his relationship with the complainant was okay. He disputed that the complainant had broken up with him via facebook and that he was aware that she had ended their relationship. The complainant told him that she tried to locate him from SokhA[...] and A[...]. He asked her what was the problem and she said that her problem was that she was stressed and she wanted to go out and drink alcohol. He told her that he did not

have money. She then suggested that they should go to L[...] and D[...] and the other people for whom he normally bought alcohol when he had money.

[23] They then left for Ramaphosa Informal Settlement and went to Yamkela's place. He described as lies the complainant's evidence that he forced her to go to the Ramaphosa area or Yamkela's place saying she went there on her own free will. They found Yamkela smoking occa pipe with D[...] and other young men. They stayed there for some time, approximately 30 minutes. The complainant never indicated to Yamkela and others who were there that she had been forced to be there. The complainant then said they should go to the hostel. He disputed telling his friends that the complainant was back with him and that she disputed that. They went to Ponponi who was at L[...]’s place in the hostel. He asked Ponponi about the whereabouts of L[...]. Ponponi said L[...] was there. They then went to D[...]’s place to look for him and found him there with Nqandezi and Chopa. They came out carrying wine in a box. The complainant took a glass from D[...] and got herself some wine. At some point Nqandezi said that the wine was getting finished. They proceeded to Bongani's Tavern which they found closed.

[24] They went to another liquor outlet in the hostel. The complainant had remained behind with Chopa and others. They then went to Nqadezi and the complainant suggested that they should go to Makhomba at Duncan Village. They all boarded a vehicle including the complainant. The complainant stayed at Ntangazele Street in Ziphunzana. The complainant's house was the fourth house from Makhomba's place. Makhomba's place was in the same street in which the complainant stayed and she knew that they were at her street. They got some liquor at Makhomba's place.

[25] At some point he and the complainant went to his friend's shack where they spent the night together. At no stage since they left Y[...]’s place together did the complainant make it known that she did not wish to be with him. When they got to Kisto's shack who was one of his friends, they found one L[...] there who was 19 years old. The complainant told L[...] that he could not sleep there with them and that he must go and sleep at the appellant's shack. He did not deny having sexual intercourse with the



complainant at Kisto's shack. He said that the complainant lied when she said that she did not consent to having sexual intercourse with him. When L[...] left he and the complainant sat and had a chat. The complainant even said that she had been missing him for a while and that he should stop womanising.

[26] She undressed herself and they kissed and engaged in consensual sexual intercourse. He denied that on arrival at Kisto's shack he locked the door, confronted her asking her why she dumped him and asking who she was having a romantic relationship with. He testified that it was also lies that he told her to undress herself and threatened to assault her when she refused. He further disputed that she undressed herself and got into bed because she was scared of him. He denied being told by the complainant that she did not want to have sexual intercourse with him because he had many girlfriends. He disputed that when he was having sexual intercourse with the complainant, she was asking him to get off her. He denied having sexual intercourse with her again in the morning.

[27] The appellant denied locking the complainant inside the shack when he left with Q[...] that morning. He testified that when Q[...] knocked and asked if he was still asleep, he told him that he had just woken up. Q[...] asked him to accompany him and he then left with Q[...] for about 20 minutes. When he left with Q[...] the complainant asked him where he was going, and he told her that he was accompanying Q[...]. She then said he must not be gone for too long and asked him to bring her a score energy drink. He testified that Kisto's shack had no key at all. It just had a burglar gate at the door, but it did not have a padlock. When he and Q[...] returned he gave her the score energy drink she had asked for. She drank it, got dressed and asked them to accompany her and they agreed. They all left and when they reached the area of his home, they could see her home.

[28] The complainant noticed that there were some people at her home and wondered why so many people were present. She suggested that they should change direction because her mother did not approve of her relationship with him. At some point they

parted ways. The appellant testified that when he parted ways with her, she did not have any injuries. He testified that she told him that her mother did not approve of their relationship which was the reason she said that he assaulted her. When he was with the complainant, she did not have injuries. It was her mother's disapproval of their relationship that caused her to falsely accuse him of having assaulted, raped and kidnapped her. He explained that he knew why Y[...] testified that he assaulted the complainant at her house, grabbed her with her clothes and forcibly took her away. This was because Y[...] accused him of organising a girlfriend for Q[...] with whom she had a secret love relationship. He further testified that three days after they parted ways with the complainant, he and Q[...] met her stepfather. The complainant's stepfather told him that people were complaining about him. He further told him that a hitman might be organised by the complainant's mother to get rid of him.

[29] Under cross-examination the appellant testified that his relationship with the complainant had its own hiccups as one month they would be fine and the next month they would be quarrelling. He confirmed that the complainant had obtained a protection order against him, but he denied abusing her. He testified that he was related to L[...] and that it was the complainant who told him to leave the shack they were sleeping in. He confirmed that during that night they came across his other girlfriend, L[...] at the hostel. He denied forcefully taking the complainant to all the various places they went to. He found out that the complainant was at Y[...]’s home when A[...] and SokhA[...] told him that she was looking for him and that if he needed her, she would be at Y[...]’s place that night.

[30] He explained that after A[...] had knocked at the door at Y[...]’s place he was invited to come in and Y[...] opened the door. He then saw the complainant who was sitting in line with the door which was open by then. He denied that Y[...] did not open the door for him and that he pushed or kicked the door open. The reason he went to Y[...]’s place with A[...] was that A[...] was studying with Y[...]. When Y[...] invited A[...] to come in and opened the door he then saw the complainant. He said Y[...] opened for him because they had agreed that when she saw the complainant she would tell him. He denied

assaulting the complainant inside Y[...]’s house. He denied forcing the complainant to have sex with him that night. He testified that during that night the complainant was never assaulted, and she did not have any injuries.

[31] When they accompanied her home the following morning she had no injuries. They accompanied her to her home and turned back at her street a distance from her home. He denied assaulting her as a result of which she suffered contusions on her eyes. He further denied locking the complainant in the shack from the 6 February 2021 until the 7 February 2021 in the morning. He denied asking the complainant to go with him and testified that it was the complainant who said she wanted to have some drinks and then they decided to go and have drinks with his friends. On being asked some questions by the court he testified that he never phoned the complainant, and he did not have her phone number. He testified that they had a fairly stable relationship even though they had disagreements sometimes. Their problem was the complainant’s mother who did not approve of their relationship.

[32] The next witness for the appellant was S[...] M[...]. He testified that his nickname was Q[...]. He and the appellant were as good as brothers as they had been friends for a long time. He also knew the complainant and he went to the same school with her at K[...]. She was the appellant’s girlfriend. On 6 February 2021 the complainant came to his shack with the appellant and D[...]. The appellant was standing next to a Tazz vehicle which they were travelling in. The complainant came and knocked at his shack and asked him to come out which he did. She was drinking liquor and said she wanted to go and drink some more. He came out and saw that drinking was taking place. He went out and got into the Tazz vehicle and they drove towards the hostel. The complainant was drinking alcohol. The appellant never drank on that day because he did not want to drink. When they got to the hostel a child called L[...] arrived shortly after they had arrived. L[...] called the appellant and had a conversation with him, and they ended up all going together, that is the appellant, the complainant and L[...]. He however, remained in the hostel. He then went to wake up the appellant in the morning and asked him to accompany him to his mother’s sister. The appellant came out of the

shack leaving the complainant in the shack. When they left the complainant asked them to bring her a score energy drink. The complainant closed the door and locked herself inside the shack by locking the burglar gate. They later returned with her drink, and she opened for them.

[33] The complainant asked the appellant what she should say to her mother as she was not happy with their relationship. The appellant told her that she should tell her that she was enjoying herself with him. From the shack she could see her mother standing in front of the verandah at her home. They then accompanied her home. He denied that on the way home the complainant was assaulted by the appellant. He did not see any injuries on the complainant when they accompanied her home.

[34] Under cross-examination Q[...] testified that the complainant was drinking old buck gin. During the 30 minutes that he was present the appellant was always present, and they were sitting together throughout. At the hostel the complainant was sitting next to the appellant, and she was enjoying herself, drinking. The appellant never left at any stage. He insisted that the complainant's face was not swollen. The case for the appellant was closed after Q[...]’s evidence.

[35] The court a quo rejected the appellant's evidence that his relationship with the complainant was a normal relationship with some hiccups here and there. It further rejected the appellant's evidence that it was in the context of a normal relationship that they spent the night together and had sexual intercourse which was initiated by the complainant who even undressed herself. The appellant's evidence flew in the face of the evidence of the complainant corroborated by that of Y[...] about his arrival and assault on the complainant at Y[...]’s place and the complainant being taken against her will by the appellant. The court a quo also considered the evidence of the appellant that when they were closer to the complainant's home the following morning, they observed that there were many people there which the court a quo regarded as confirming Y[...]’s evidence that the following morning she went to the complainant's home and reported

what happened in her place the previous night when the complainant was forcibly taken away.

[36] I pause now to point out that there was no appeal against the conviction and sentence in respect of assault and kidnapping convictions and sentences. The appeal was only against the rape conviction and sentence. This is important for many reasons. Firstly, it means that the appellant accepted that he was correctly convicted and sentenced in respect of housebreaking with intent to commit assault and kidnapping. Secondly, it means that he was not challenging the court a quo's findings in respect of the credibility of the State's witnesses and the assessment of the entire evidence in respect of those counts. Naturally this has a bearing to a lesser or greater extent on the appeal in respect of rape as all these offences arose out of the same incident and in the same factual matrix involving the same witnesses.

[37] In respect of the rape conviction the complainant, as is normally the case, was a single witness. The court a quo was well aware of this fact when it rejected the appellant's evidence of a normal relationship and a normal sexual intercourse in which the complainant was a willing participant. It further rejected the appellant's version that she was the one who told the appellant that she missed him and that she initiated the kissing at K[...]s shack and told L[...] to leave and then undressed herself. All of this version of the appellant ignored their history of an abusive relationship which in 2020 resulted in the complainant having a scar on her hand which was never disputed by the appellant. It also ignored the fact that the complainant obtained a protection order against the appellant and told him via facebook that she was ending their relationship.

[38] I am of the view that the appellant's entire version was so improbable that it was false beyond reasonable doubt, punctuated with a number of contradictions and as a result, inconsistent. It was, in my view a concoction of events put together as the case went along. The evidence of Q[...] was similarly false. I am in no way suggesting that the evidence of the complainant and Y[...] was perfect. I am saying that even such inconsistencies being considered and factored in, these two State witnesses told the

truth, this even on the application of the cautionary rules. The evidence of the complainant and that of Y[...] was clear, credible and consistent in all material respects. Notwithstanding the minor contradictions in their evidence, of which I am mindful, together with the necessary exercise of caution, to which I have referred, I am satisfied that the sexual intercourse took place without the complainant's consent.

[39] In *Ximba*<sup>1</sup> Nicholls JA said:

“Invariably, in any rape matter, the complainant will be a single witness. There is no formula for assessing the credibility of a single witness. A trial court should consider the evidence in its totality and should determine whether the truth has been told, despite any shortcomings and contradictions. As has been repeatedly stated by this Court, the correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strength and weaknesses, probabilities and improbabilities on both sides and having done so, decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. In other words, what is required is credible evidence which renders the complainant's version more likely that the sexual intercourse took place without her consent, and the appellant's version less likely that it did not.”

[40] The facts which were either common cause or were not disputed with even the bare minimum of cogency reveal the following. On the night in question the complainant was at Y[...]’s place when A[...] knocked at the door and was invited in. However, and suddenly the door was forcibly flung or kicked open. The appellant, who had not knocked barged in and A[...] who had knocked and was invited to come in did not come in. On the complainant's and Y[...]’s version the appellant swore at Y[...] calling her a snitch apparently for failing to inform the appellant that the complainant was at her home, or that she had seen her as they had agreed. The appellant himself confirmed

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<sup>1</sup> *Ximba v The State* (957/22) [2023] ZASCA 6 (19 January 2024) para 26

this arrangement with Y[...] in his evidence. It was further common cause that the complainant had obtained a protection order against the appellant.

[41] The appellant pulled the complainant outside at Y[...]’s place, klapped her and hit her with clenched fists. The medico-legal examination report reveals swelling and contusions on both cheeks which could only have been caused through violence. Early the following morning Y[...] went to the complainant’s home and reported what had happened. It is common cause that the appellant took the complainant around the informal settlement to his friend’s places or where some liquor was consumed. They ended up at K[...]’s shack who was the appellant’s friend. This was where on both versions, sexual intercourse took place. However, according to the complainant the sexual intercourse was without her consent. The appellant’s version that their sexual encounter was consensual is clearly improbable, far-fetched and false beyond reasonable doubt. This is *inter alia* so because their relationship had, on complainant’s version, been ended and the appellant had been informed of this via facebook. This aligns very well with the appellant having probably used A[...] to knock for him at Y[...]’s place where the appellant had been told by A[...] that the complainant was on the appellant’s version. If their relationship was anywhere near normal and had not been ended, the appellant would not have needed to get A[...] to knock for him.

[42] The evidence of violence that preceded what, on appellant’s version, was the complainant’s initiative of them going around the informal settlement, drinking and ending up having consensual sexual intercourse was just one of the many problems with his version. This is besides the objective evidence of the medico-legal report confirming the complainant’s version of having been assaulted by the appellant. The appellant denied having raped the complainant twice, first on their arrival at K[...]’s shack and the following morning before Q[...] arrived. On complainant’s version the first sexual encounter with the appellant was preceded by him asking why she had ended their relationship and asking for the name of the person she had a romantic relationship with. She told him that she was not going out with anyone. She was just tired of

appellant's abusive behaviour. It surely was the abusive behaviour that would have resulted in the complainant obtaining a protection order against him.

[43] The complainant's evidence was that he then told her to undress herself. When she refused, he threatened to assault her. Because she was afraid of him she indeed undressed herself. The complainant had every reason to be afraid of further assault as she had been assaulted before being kidnapped at Y[...]’s place. Her refusal to have sexual intercourse with him because of his promiscuous behaviour was ignored and he went ahead to have sexual intercourse with her against her will. They then slept and in the morning, he again had vaginal sexual intercourse with her which was the second non-consensual sexual intercourse. She explained that even in this instance she did not consent to have sexual intercourse with him. At some stage that morning a friend of the appellant, Q[...] knocked at the door and they left locking her inside the shack. The findings of the court a quo on this evidence of the complainant having been locked in that shack when the appellant and Q[...] left that morning is not being challenged on appeal there being no appeal against the kidnapping conviction and sentence.

[44] The evidence of Y[...] also revealed that she went to the complainant's home the following morning with her mother to report the incident. The complainant's home is, on the undisputed evidence, very far from Y[...]’s home. It escapes me why Y[...] would go to the complainant's home to report what happened at her home the previous night if the evidence of the appellant about how all the events unfolded was true. She had also reported the kidnapping to the complainant's family via facebook. The evidence of Y[...] reporting the incident at the complainant's home makes the picture of a normal relationship in which there was no violence at Y[...]’s home against the complainant so improbable as to be false. In addition to that it was the evidence of the complainant that she reported to her sister that she was raped by the complainant. The evidence of the appellant and his friend Q[...] also shows that there were some people at the complainant's home's verandah that morning.



[45] The court a quo found that that gathering could only be because, as Y[...] testified, she had gone there with her mother that morning to report the complainant's kidnapping. That kidnapping and assault of the complainant could not, in my view, possibly lead to consensual sexual intercourse with the complainant whose evidence was that she had broken up with the appellant. She had even obtained a protection order against him which was common cause. She had not only been assaulted at Y[...]’s place but was also forcibly taken away and ended up spending the night with the appellant at one of his friend’s shack. For her to then be spending a happy night, moving around the informal settlement with the complainant all at her initiative including her initiating the kissing, cuddling and having consensual sexual intercourse points to the version of the appellant being false beyond reasonable doubt. It makes matters worse that the appellant denied having assaulted the complainant and the complainant having no injuries when they parted ways all of which flew in the face of the medical evidence of contusions on her cheeks.

[46] Recently the Supreme Court of Appeal confirmed that mere submission or acquiescence or lack of resistance do not convey a willingness to engage in a penetrative sexual act in *Coko*. It went on to say that such behaviour would not constitute consent<sup>2</sup>. This is how this principle was articulated by that court:

“[56] As this Court made plain in *Mugridge v S*, mere submission, or acquiescence, or lack of resistance does not convey a willingness to engage in a penetrative sexual act. Thus, none of these would constitute consent. The court had this to say:

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

“The authorities are clear upon the point that though the consent of a woman may be gathered from her conduct, apart from her words, it is fallacious to take the absence of resistance as per se proof of consent. Submission by itself is no grant of consent, and if a man so intimidates a woman as to induce her to

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<sup>2</sup> Director of Public Prosecutions Eastern Cape, *Makhanda v Coko* (248/2022) [2024] ZASCA 59 (24 April 2024).

abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless.”

[47] Therefore, on the totality of all the evidence, the State proved its case beyond reasonable doubt<sup>3</sup>. In the circumstances the court a quo was correct in concluding that the complainant was raped on two occasions between the 6 and 7 February 2021. Therefore, the appeal against conviction must fail. This brings me to the appeal against the sentence of life imprisonment.

[48] The appellant was sentenced to life imprisonment in respect of the rape conviction. His appeal against that sentence is on the basis that the trial court did not properly consider his personal circumstances. Furthermore, it over-emphasised the seriousness of the offence and the interests of society which led to the court imposing a grossly disproportionate sentence. The personal circumstances of the appellant are simply that there was a pre-sentence incarceration of about a year as an awaiting trial detainee. He was thirty two years old, unmarried with no children. It was submitted, without elaboration, that he could still be rehabilitated.

[49] The submission about the appellant’s prospects of rehabilitation ignored the fact that on 30 August 2011 the appellant was convicted of rape and was, on 15 December 2011 sentenced to 10 years imprisonment. When he committed this offence on 6 February 2021 he had not even finished serving his sentence in respect of the said prior rape conviction. He would have used the freedom made available to him by being placed on parole to commit another rape. This he did by kidnapping his jilted lover, taking her to his friend’s shack where he raped her twice. It is very clear that the period he spent in prison serving his sentence for his prior rape conviction did not lead to a changed behaviour. Therefore, the submission about good rehabilitative prospects is

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<sup>3</sup> S v Van der Meyden 1997 (2) SA 79 (WLD).

difficult to understand. The reasons cited for the submission that there were substantial and compelling circumstances are the sort of reasons that in my view were defined as flimsy reasons for departing from a minimum sentence in *Malgas*<sup>4</sup>. In the result the appeal against sentence must also fail as there is no reason in this matter for interfering with the sentencing discretion exercised by the trial court which was in any event correctly exercised in my view.

[50] In the result the following order is made:

1. The appeal against conviction for rape is dismissed.
2. The appeal against the imposition of the sentence of life imprisonment in respect of the rape conviction is dismissed.

**M.S. JOLWANA**  
**JUDGE OF THE HIGH COURT**

I agree:

**I. BANDS**  
**JUDGE OF THE HIGH COURT**

**Appearances**

Counsel for the appellant : V. M. Sojada  
Instructed by : Legal Aid South Africa  
Makhanda

Counsel for the respondent: L. Vena  
Instructed by : Director of Public Prosecutions  
Makhanda

Date heard : 08 May 2024  
Date delivered : 20 June 2024

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<sup>4</sup> S v Malgas 2001 (2) SA 1222 at 1234 para 22.