REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: A498/2008

DATE: 19 DECEMBER 2014

REPORTABLE

OF INTEREST TO OTHER JUDGES

In the matter between:

DANIEL JOHANNES STEPHANUS VAN DER BANK **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

THE COURT

[1] The appellant appeared before the Regional Court magistrate sitting in Pretoria, on charges of rape and indecent assault, allegedly committed during the year 1999. He pleaded not guilty and was convicted of both counts on 3 June 2005. He was referred to the High Court for sentencing in terms of section *52(1) (b) of Act 105 Of 1997*. The convictions were confirmed and on 27 March 2007 the two counts were taken together for purposes of sentence. The appellant was sentenced to a term of imprisonment of twelve years of which four years were suspended for a period of five years. The appellant appeals against his convictions with leave of the court. For convenience the parties shall be referred to as they were in the court a *quo.*

[2] The appellant raised three issues against the conviction namely (i) the appointment of an intermediary in

accordance with the provisions of section 170A (1) of Act 51 of 1977; (ii) that the court a *quo* erred in accepting the evidence of the complainant who, to all intents and purposes was a single witness; and (iii) rejecting the appellant's version as it was reasonably possibly true.

[3] Dealing with the first point raised in the appeal, the learned Judge on whom the imposition of the sentence reposed pointed out that: (i) the appellant had, in his plea, ".....admitted having had sexual intercourse on three occasions with the complainant...with her consent....."; (ii) it had to determine whether given the complainants "mental capacity" and the "...expert evidence.....that her mental functioning.....[being]....that of an eight and half year old.....a lay person may think of her being perhaps 13 or 14 years old....". But it would be apparent even to such a person that she was not normal. This was the evidence of the expert in the court a *quo,* (iii) the complainant had testified through an intermediary when she was over the age of 18 years; (iv) the constitutional imperative for the "....the equal protection of all persons including those with disability.

[4] At the trial Ms Rikkie Schoeman was appointed as intermediary in terms of the Criminal Procedure Act 51 of 1977 to assist the complainant during her testimony and there was no objection to such appointment by counsel for the accused. At the time of her testimony the complaint was nineteen (19) years old approaching twenty (20). The state initially led the evidence of Ms Barnard a clinical psychologist who had consulted and conducted tests on the complainant on several occasions. Her report was read into the record.

[5] The complainant was born prematurely on 3 August 1983 and had suffered brain injury at birth. Ms Barnard's first consultation was in January of 1999. At the time concentration was given to the complainant's coping skills in particular with her friends ('maatjies'). She concluded after a series of tests that the complainant functioned at an intellectual level of 8 years 6 months. According to her, it was not difficult for any lay person to discern that the complainant's comprehension faculties were affected and that she had the tendency to get agitated and confused when pressed for answers. The complainant's conversations were not that of a normal fifteen or sixteen year old.

[6] Ms Barnard consulted the complainant again after the rape charges were laid. In one of her consultations the complainant had informed her that she hated men and described them as '*gross'.* Ms Barnard stated that it was not unusual to find eight year old children using such vocabulary. The use of the word had to be understood within the context of complainant's report against the accused. Ms Barnard disagreed with the suggestion by the accused that the complainant appeared to him as a normal individual. She had sight of the complainant's school reports and these revealed and confirmed that her comprehension faculties had been affected.

[5] During 2005 when the complainant was 21 years old she was sent for a further evaluation by a

psychiatrist. Dr De Wet was head of the Forensic Psychiatry at Weskoppies Hospital. Apart from the two collaterals from the complainant's previous school at Sonnestraal, the report from Ms Barnard was not availed to him. He only posed two introductory questions to the mother regarding the incidents with the accused, being about when they occurred and how many times. His evaluation was not about the complaints against the accused but was about the intellectual capacity of the complainant and whether she could give informed consent to conduct of a sexual nature and of her understanding of the criminal proceedings. He had one session in the presence of her mother and the second session was with her alone because it dealt with issues around the criminal case. His first impressions of the complainant were that although she gave spontaneous answers she displayed a childlike shyness. She had a poor intellectual functioning and suffered from a moderate retardation. The complainant had the intellectual functioning of a child in the lower grades of between ages five (5) to seven (7).

[6] Dr De Wet testified that in assessing whether the complainant had the ability to give an informed consent, he considered various internal and external factors. It was about the capacity of the complainant to reason, her capacity to perform, her ability to communicate information to others and her ability to judge. He did not consult on her attitude towards male persons or whether she found pleasure in the sexual acts. The complainant's responses to questions around the incident were given on the same level of a very simplistic understanding of things, as displayed during the interview conducted during her mother's presence. The complainant's behaviour and responses were not those that could be attributed to a normal 21 year old. He concluded that she was not capable of giving informed consent or to meaningfully understand and contribute in court proceedings.

[7] The complainant testified that she moved with her mother to occupy a house on the property of the accused and that her mother was employed by him. The accused always fetched her from school. He had sexual intercourse with her on several occasions (*sommer honderde kere),* in his bakkie, his car, at his house and in her bedroom. He used to undress himself and also remove her panties and would insert his penis into her vagina 'er? *toe druk hy sy tottie in myne'.* She had on all the occasions resisted and told him to stop what he was doing. He never listened '*ekhet virhom gesê hy moet ophou...en toe hou hyaan daarmee'.* She did not report these incidents to her mother because he told her that if she did, he would end up in prison or if she told anyone, they too would know about their encounter. She testified that when he inserted his penis into her vagina she did not understand the meaning of the act and she did not find pleasure in what the accused was doing to her.

During cross examination she admitted to playing tickling games with the accused but this had been at his initiative and never done in her mother's presence. She denied that she had given consent or that she had told him that she loved him. On the day that she made a report to her mother, the accused had had sexual

intercourse with her on the garage floor. Her vagina was sore and she had a bath.

[8] The complainant's mother, M[...] v[...] d[...] V[...] ('M[...]'), testified that from childhood tests had to be conducted on the complainant on a continuous basis to assess the extent of the brain damage. When the complainant was in her lower grades she was placed in a special beginner's class. Further tests established that the complainant had the intellectual capacity of a seven to eight year old. The complainant was transferred to a special school at Sonnestraal, it being a school for children with learning disabilities. When the complainant was about sixteen years old she was advised by the school that the complainant's condition would not improve. She decided to take the complainant out of the school because no purpose would be served by keeping her there.

[9] When the incidents complained about occurred M[...] was employed by the accused and she also rented a house on his property. Some of her coemployees and their families were also tenants of the accused. The complainant displayed no difficulty interacting with younger children who had come to play with her. However M[...] observed that she had problems communicating with adults, especially males and strangers. The accused had been a frequent visitor in their home and had sometimes shared meals that she had prepared, and they used to discuss the complainant's condition. When she could not fetch the complainant from school, that is, when she had to prepare a meal or because of work commitments, she would ask the accused to do so.

[10] One day the complainant reported to her that she was feeling uncomfortable in her private parts. She found it strange that on that day the complainant bathed during the day. Complainant was used to taking a bath in the morning and at night before going to bed. She took some salve and applied it to the complainant's private parts. When she enquired from the complainant the following day why her private parts were sore, the complainant explained that the accused had scratched her and that he had put his finger into her vagina. The next day en route to Home Affairs the complainant told her that the accused had also put his penis into her private parts. During cross-examination she denied that the complainant and accused used to frequently play games of tickling each other in her presence or that they had struck a good relationship and were used to each other. It had always been the accused who would tickle the complainant and she had not observed that the complainant, despite not being comfortable with men had easily conversed with the accused in her presence. She testified that the complainant had later told her of more sexual encounters and that these had taken place at a house at 21st street, in the car, in the bakkie and at their home. The accused had told the complainant not to inform her mother because she would be very angry with her.

[11] She confronted the accused and he admitted to wrongdoing and persuaded her not to inform anybody because there were other children on the property. He undertook to give her anything she demanded, and even offered her one of his houses. She first consulted her attorney and did not immediately report to the

police. Their relationship deteriorated to such a degree that she had to seek other accommodation. She denied that the accused had explained that the complainant had consented to sexual intercourse. She was responsible for laying the rape charges against the accused because she believed that the complainant was not capable of understanding what sexual intercourse entailed.

[12] The accused was 57 years old when he had his first sexual encounter with the complainant and he had been in five previous marriages. The complainant got used to him because they frequently spent time together. He was sometimes asked to fetch her from school or was asked to look after her in the afternoons. This occurred 2 to 3 times in a month. The complainant would hang around him at the workplace which was on the same premises where they lived and she liked going for a ride with him in his vehicle. She conversed with him in her own simple way and if compared with other children her age, she was not a very intelligent person. The complainant loved to be tickled and this developed into a game which was played sometimes in her mother's presence or when they were alone. Her mother had approved of his display of affection towards the complainant because her father had not shown interest in her and because her mother's boyfriend Mr Nel rejected her.

[13] Their first sexual encounter occurred when the complainant had gone with him to check on a roof leak at one of his properties in the area. She put her arm around him and the tickling game began. He accidently touched her breast and, she told him that she experienced pleasure. Then one thing led to another. When he inserted his finger into her vagina she was wet like any woman would have been when aroused and he discovered that she was not a virgin. The complainant did not show any resistance and she appeared to have experience in the act especially when she also touched and played with his private parts. When they engaged in sexual intercourse the complainant was an active and willingly participated in the act. He never ejaculated into her.

[14] When he was eventually confronted by the complainant's mother she accused him of rape, that he had destroyed their lives, that he was a rich man and that the least he could do for the complainant was to give her one of his houses. He denied having admitted the rape or to any sexual intercourse to her. During cross examination he described his conversations with the complainant to have been child talk, for example, about 'koeitjies and kalfies'. The complainant's mother had only explained that the complainant was struggling at school. He had never assisted her with her homework and had no idea what her school work entailed. He did not consider himself as a father figure but rather a friend of the complainant.

[15] The first port of call in this matter is to determine:

(a) what the object of Section 170A(1) is;

(b) what the phrase undue mental stress means;

(c) whether both the trial court and the court a *quo* had a discretion to use an intermediary as contemplated in Section 179A(1); and

(d) whether the court a *quo* interpreted Section 179A(1) correctly.

[16] Section 170A may be invoked only where the biological or mental age of the witness is less than 18 years. Before the amendment of sub-section (1), in terms of section 68 of Act 32 of 2007, the referral was simply to age which was taken to mean 'biological age'. See S *v Dayimani 2006(2) SACR 594 (E).* The age referred to the date on which the witness testified and not the age at the time of the commission of the crime. In Dayimani the witness (who was the complainant in a rape charge) was over 18 years, and it was held that this irregularity rendered her evidence inadmissible. What distinguishes this case from Dayimani is that in Dayimani the complainant was a normal person, whereas in the instant case the complainant is mentally retarded - she is an "idiot or an imbecile."

[17] Du Toit et al -Commentary on the Criminal Procedure Act -[Service 51,2013] 22-110, opine that the term 'mental age' is not defined, but presumably empowers a court to make a finding on the level of mental maturity of the witness and to assess whether that level falls below that of a typical eighteen year old. Given the purpose of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the courts may give a generous interpretation. However, one must be mindful of the fact that at the time of the trial only the 'biological age' was applicable and not the 'mental age'. Despite this, a court can still give a generous interpretation, although the amendment cannot be applied with retrospective effect.

[18] In the recent past the nature of the enquiry to determine whether a child could testify through an intermediary, was the same as in a civil trial, as was the case in *S v F 1999(1) SACR 571 (c)* in which the court found it impossible to make a finding on a balance of probabilities that were the complainant to testify in a normal manner it would expose her to undue stress or suffering. The reference to the burden of proof must now be read subject to what was said by the Constitutional Court in *Director of Public Prosecutions Transvaal v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC) at [114],* where it was said by Ngcobo J (as he then was) that it is inappropriate to speak of a burden of proof in such cases. Further that, the enquiry is conducted on behalf of a person who is not a party to the proceedings but also possesses constitutional rights.

[19] Section 179 A(1) of the Criminal Procedure Act provides that whenever criminal proceedings are pending and it appears to the court that a child witness would be exposed to 'undue mental stress or suffering' by testifying at such proceedings, then the court may appoint a competent person as an

intermediary for that witness. Once an intermediary has been appointed, the section goes on to provide that the child witness will give his or her evidence through that intermediary.

[20] Regarding the object of section 170A (1) in Director of Public Prosecutions, Transvaal *(supra),* Ncgobo J (as he then was), explained that section 170A (1) is aimed at preventing a child from experiencing 'undue mental stress and suffering' while giving evidence. Its objective, therefore, is to reduce the level of stress a child witness may experience so as to create an atmosphere in which a child can speak freely about the events relating to the offence. In addition, section 170A (1) read together with section 170A (3), also accepts that children are often intimidated by the courtroom environment especially if they must confront their alleged abusers. These sections thus contemplate that a child who testifies through an intermediary will not ordinarily testify in the presence of the accused. Section 170A(1) must therefore as Ngcobo J held, be construed so as to give effect to its objective to protect child witnesses from exposure to undue mental stress or suffering when they give evidence in court. This objective, he held further, is consistent with the objectives of Section 28(2) of the Constitution and in particular, with the 'Guidelines on Justice Matters involving Child Victims and Witnesses of Crime' adopted by the Economic and Social Council of the United Nations. Although the decision in Director of Public Prosecution Transvaal was handed down in 2009, the principles contained therein were adopted years ago.

[21] It is worth remembering that the UN Child Victims and Witnesses of Crime Resolution was adopted decades ago and the Constitution of the Republic of South Africa came into operation in 1997. Both the instruments predate the trial and the date on which the complainant testified. In interpreting Section 170A, therefore, both these instruments are relevant.

[22] Ngcobo J, went on to explain that the phrase 'induce mental stress and suffering' must be interpreted in the context of the objective of section 170A(1), which is to protect children from undue mental stress or suffering that may be caused by testifying in court. Testifying in court, Ngcobo J explained further, will always be a highly stressful experience for a child witness. The cross examination may be intensively protracted and even aggressive. Taken together, Ngcobo J concluded, these events will often be more traumatic and damaging to the child as the original abusive act was. Given these factors, Ngcobo J held, it must be accepted that a child complainant in a sexual offence matter, who testifies without the assistance of an intermediary always faces a high risk of undue mental stress and suffering. The problem therefore, is not with the interpretation but with its implementation.

[23] The interpretation of Section 170A in general and in particular sub-section 170A(1), should be interpreted within the context of the *dictum* in *Bato Star Fishing (Pty)Ltd v Minister of Environmental Affairs and Tourism 2004(7) BCLR(CC) at paras 72, 80 and 90.* The interpretation that is placed upon a statute must advance the values underlying the Bill of Rights. Notable also, is the observation that when interpreting

Section 170A the court is bound to prefer any reasonable interpretation of legislation that is consistent with international law, over any alternative interpretation that is inconsistent with international law - *Progress Office Machines CC v South African Revenue Services and others 2008(2) SA13 (SCA).* In *casu*, the best interest of the child must supersede any other consideration. While one accepts that at the time of the trial, the amendment of section 170A (1) which included the mental age was not yet in operation, the court a *quo's* interpretation cannot be faulted.

[24] The court *a quo* at page 396 paras [15-18] sums up the issue on interpretation tersely thus:

> "*[15] Section 39, sub-sections 1 and 2, provide:*
>
> *When interpreting the Bill of Rights a court, tribunal or forum,*
>
> > *(a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.*
> >
> > *(b) Must consider international law and;*
> >
> > *(c) May consider foreign Law.*
>
> *Sub-section 2*
>
> > "*When interpreting any legislation and when developing the common law or customary law every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*
>
> [16] *The question to be answered is does section 170A, if given its literal interpretation, that is, the chronological age of a witness, promote the spirit, purport and objects of the Bill of Rights. In my view, it does not, as it does not take into account the particular circumstances that the court was faced with in this matter. That emphasis was placed on the complainant's mental age rather her physical age, was, in the circumstances, in my view, not unfair or prejudicial to the accused.*
>
> *[17] Section 170A provides for the use of an intermediary for a witness under 18 years where the witness may suffer undue mental stress or suffering when testifying. As I said expert evidence was led about the complainant's mental age being about eight and half years old. The requirement of Section 170A is undue mental stress. To say that the requirements of 18 years in such circumstances is the chronological age of a witness, would in my view not be in accord with the purpose of the section of the Act.*

[18] I am further of the view that given the expert evidence and the Constitutional imperatives that to have not allowed the use of an intermediary in the circumstances of this case, would have been unfair to the complainant and contrary to the provisions of the Constitution".

[25] The appellant argues that Section 170A (1) does not confer a discretion on the judicial officer to appoint an intermediary. We do not agree with this contention. Even before the decision in Director of Public Prosecutions Transvaal, *(supra)* in which Ngcobo J held that Section 170A (1) is not unconstitutional simply because it confers a discretion to appoint an intermediary, the Constitutional Court had already pronounced that no rigid rules were desirable: it was for the trial court to exercise a proper discretion having regard to the circumstances of the case. - See for example *Tshabalala v Attorney General of Transvaal 1995(2) SACR 761 (CC) at 777 para [38] and 784 para [55]*. It is therefore our conclusion that although the appointment of an intermediary is not compulsory in all cases involving a child witness in order to entertain the needs, wishes and feelings of the child, the court must exercise a discretion because it must give weight to the constitutional right of child complainants and the objectives underlying section 170A(1).

[26] It is trite that courts are always mindful of the profound social interest in bringing the person charged with a crime to trial and resolving the liability of the accused. This matter can be decided on whether the accused will, if the appeal is dismissed, suffer prejudice or not. In order to succeed, an accused must establish any prejudice protected by a right. However, if an accused person consents to action or process that is to be taken it will be difficult to establish such prejudice. In our view, there was no prejudice suffered by the appellant when an intermediary was appointed. There is no disadvantage suffered by the appellant flowing from the process of appointing an intermediary. The appellant was legally represented and the appointment of the intermediary was with the consent of the defence. *Sanderson v Attorney General, Eastern Cape 1998 (1) SACR 227.* The issue never arose during the trial.

[27] The issue of prejudice must be balanced against the right to a fair trial. The right to a fair trial entails fairness to both the accused and the State case. Moreover, in a case where the complainant is an imbecile or child then it is essential to deal with a child in a way which takes full account of his or her age and level of intellectual capabilities. The appellant in this case received a fair trial and as a result no prejudice was suffered by him. - TV United Kingdom [2000] 30E.H.R.R 121.

[28] We now turn to deal with the mental status of the complainant at the time she testified in court. The nub of the argument of the appellant is that because the complainant was already over the age of 18 years when she testified Section 179A(1) ought not to have been employed. The use of an intermediary dispenses with the use of Section 164 of the Criminal Procedure Act - it entails that an oath or affirmation should not be administered and in cases where there may be doubt, the trial court should give reasons for so doing. Moreover, the presiding officer may rely on his own observations of the witness concerned in coming to the

conclusion that section 164 should not be used - Stefaans 1999(1)SACR 182(C). In *casu* the trial court dispensed with the use of section 164 and instead correctly resorted to the procedure of using Section 179A(1) due to the mental condition of the complainant.

[29] The other argument of the appellant is that the state did not place any evidence before the trial court to prove that the complainant is an idiot or an imbecile. Both the trial court and the court a *quo* have adequately dealt with this issue by providing sufficient reasons for their judgments. It is our take that the enquiry as to whether the complainant is an idiot or an imbecile accords with facts and is legally sound. Both the trial court and the court a *quo* cannot be faulted on this aspect.

[30] Since 1940, our courts have been at pains to define the words "idiot" and "Imbecile" - See *Rex v Dimane 1940 T.P.D. Rex v* S *1951(3) SA 209 (c); and Rex v K 1951(4) SA 49(0).* It seems to us that the appellant does not challenge the definition of these two words but the insufficiency of the evidence proving that the complainant is an idiot or an imbecile. It is however prudent to mention that it has been found that an imbecile has a mind, though she/he has but a limited mental capacity. On the other hand, an idiot suffers from a worse degree of defective mentality than an imbecile. An idiot may have a mind depending on the degree of idiocy to which he/she is subjected. While the margins are ill-defined an idiot usually has an intelligence quotient ranging from 0 to 25, an imbecile between 25 and 50, while a person with a quotient above 50 but still sub-normal may be regarded as feebleminded. An imbecile can have sexual instincts while an idiot cannot. An imbecile falls under class 4 and is described as a person in whose case there exists from birth, or from an early age, mental defectiveness not amounting to idiocy and, who although capable of guarding himself against common dangers is incapable of managing himself/herself or his/her affairs, or if he/she is a child, of being taught to do so - *Rex v K* (supra).

[31] In the Criminal Law and Sexual Offences and Related Matters Amendment Act No 32 of 2007, the definition of a 'person who is mentally disabled is quite enabling (although it may not technically be applied with retrospective effect) :"means a person affected by any mental disability, including any disorder or disability of the mind to the extent that he or she at the time of the alleged commission of the offence in question was -

(a) Unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;

(b) Able to appreciate the nature and reasonably foreseeable consequences of an act, but unable to act in accordance with that appreciation;

(c) Unable to resist the commission of any such act; or

(d) Unable to communicate his or her unwillingness to participate in any such act."

[32] Evidence was placed before the trial court that the complainant was born prematurely on 3 August 1983 and had suffered brain injury at birth. Ms Barnard's first consultation with the complainant was in January 1999. She is a qualified clinical psychologist. She concluded after a series of tests that the complainant featured at an intellectual level of 8 years 6 months although she was a teenager at the time. According to her it was difficult for any lay person to discern that the complainant's comprehension faculties were affected and that she has a tendency to be agitated and confused when pressed for answers. The complainant's conversations were not that of a normal fifteen or sixteen year old. Ms Barnard again consulted the complainant after the rape charges were laid. The complainant had informed her that she hated men and described them as 'gross'. Dr de Wet, a psychiatrist said among others that the complainant was 21 years old when he consulted with her. She was of a relative age of 13 -14 years. In his opinion the complainant is secondary to an impaired intellectual functioning not capable of giving informed consent.

(her insight, reasoning and judgment are poor secondary to her low-intellectual functioning)

[33] The criticism of the nature of complainant's evidence is to our mind, an indication of her reliability given the handicap she has. Had her evidence been direct and flawless that would have been contrary to the evidence of her handicap. Whether the appellant's counsel has difficulty in understanding how the rape or sexual intercourse could have been perpetrated in the cab of the bakkie is not for this court to decide. Likewise the issue of whether the intercourse occurred in the appellant's bedroom or her bedroom serves only to emphasize and underscore her intellectual affliction. The reference to the number of "rapes" i.e being either three or "*sommer 100 kere.....*" can be ascribed to the victim's limited understanding to differentiate between a completed sexual act or what she understood by this term.

[34] The same applies to the criticism on the various "so called inconsistencies" e.g that he hurt her yet she admits that ".....hulle gespeel en mekaar gekielie het....." whilst also causing her to feel pain.

[35] The credibility finding of the court a *quo* on the evidence of the complainant cannot be faulted, more so as it contains the various issues criticised by the appellant's counsel. A version without blemish given her mental capacity and her inexperience serve as confirmation of a person who was subjected to experiences she was unfamiliar with. As stated in the cases referred to by the appellant's counsel the trial court examined the victim's evidence and concluded that it could safely accept her evidence. That it did not use the words "...that the evidence given by the witness (was) clear and substantially satisfactory in all material aspects.../' does not in our considered view affect her credibility: she was clearly not in a position to have understood what was being done to her.

[36] We find ourselves in total agreement with the views expressed by Dr de Wet that the complainant suffered from "mental retardation of a moderate degree". This account for the criticism levelled by the

appellant's counsel at the complainant's evidence; her general conduct and demeanour. Experience has taught many a trier of fact that those who are inclined to sexual molest or abuse young girls generally choose those who are of low mental intellect or of tender age in order to stand a better chance of avoiding a conviction should the long arm of the law catch up with them. The victim is this case was "...of mental retardation or a moderate degree..."

[37] It is common cause that when the complainant was in her lower grades she was placed in a special beginner's class. Further tests established that the complainant had the intellectual capacity of a seven to eight years old. As a consequence she was transferred to a school at Sonnestraal it being a school for children with learning disabilities.

[38] There is no doubt that the complainant is a person who is mentally disabled. In our opinion, the complainant is unable to appreciate the nature and reasonably foreseeable consequences of a sexual act; or able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation and unable to resist the commission of any such act. All these factors taken together qualify her as an imbecile.

[39] The courts have developed a principle that for the charge of the State in the rape of a person who is mentally disabled to stand, the prosecution must prove that the complainant was an imbecile at the time the act was committed. Further, that the accused knew that such a person was an idiot or an imbecile. As was said in *R v K 1958 (3) SA 420 (A) at 425 B* in which Steyn JA quoted from Rex v Kalil Katib, 1904 O.R.C "*.....If you are satisfied that the girl is in such a state of idiocy as to be incapable of expressing consent or dissent, and that the prisoner had or attempted to have conversation, you should find him guilty of rape.....*"

In doing so the court must consider what Bunchel & Hart Vol 1 on page 369 have opined:

> Requirements of the defence of consent:
>
> " *(a) It must be real consent*
>
> *(b) It must be given by a person capable in law of consenting."*

This is supported by Snyman Criminal Law, Fourth Edition page 100:

> *(a) "the consent must be given voluntarily*
>
> *(b) The person giving the consent must be capable of forming a will. It means the person has the mental capacity not only to know the nature of the act to which he/she consents, but also to appreciate its consequences. If a woman is mentally ill .....she cannot give valid consent to sexual*

intercourse".

[40] In sexual offences cases involving persons who are mentally disabled, the principles laid down by Satchwell J in *Holtzhauzen v Roodt 1997 (4) SA 766 (w)* must be applied in a more liberal approach than a conservative one. To adopt a conservative approach will be to stereotype the rights meant to protect the vulnerable and persons with disabilities in our society. We are of the view that the approach adopted in *Chepete v* S *[2009] Jol 24466 [ECG]* is the correct one. In Chepete *(supra)* the complainant was incapable of giving evidence because she was a person who was mentally disabled. It was common cause at the trial that the complainant was not capable of consenting to sexual intercourse and the appellant was aware of this. The court dismissed the appeal on this basis. The appellant in *casu* finds herself in a similar dilemma. The appeal must be dismissed on this basis.

[41] The state bears the onus of establishing the guilt of the accused beyond a reasonable doubt and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent or if his version might be reasonably possibly true. In S *v Van Aswegen 2001 (2) SACR 97 (SCA),* the Supreme Court of Appeal reiterated that in whichever form the test if applied a court must be satisfied upon the consideration of all the evidence. In as much as a court does not look at the evidence implicating an accused person in isolation in order to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true.

[42] "*The question for determination is whether*; *in the light of all the evidence adduced at the trial, the guilt of the appellant* was *established beyond a reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all,* a *mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. But, once that has been done, it is necessary to step back a pace and consider a mosaic as a whole. If that is not done, one may fail to see the wood from the trees". (S v Hadebe and others) 1998 (1) SACR 422 (SCA) at 426 F-L).*

[43] In *casu,* the evidence of the State and that of the appellant must be evaluated within the principle laid down in Hadebe *(supra).* There is convincing evidence that the complainant was mentally defective from birth. She functioned at the level of an 8 -9 year old child. She was aggressive and traumatised and could not testify in an open court, as a consequence an intermediary had to be appointed and the trial was held in *camera.* Dr de Wet testified that any ordinary person can observe, that the complainant was not a normal

child -she suffered from "mental retardation of a moderate degree" (an imbecile). The mother of the complainant Mrs Van der Vyfer testified she had to be placed in a special school. Further, Mrs Terreblance, her teacher at the special school said that the complainant, despite the fact that she was 16 years old, she functioned like a child in standard 2 and that she had a low IQ.

[44] The appellant admitted to have had sexual intercourse with the complainant and also put his fingers into her vagina - indecent assault. This evidence was confirmed by the complainant. Further to that, the complainant and her mother lived in a house within the premises of the appellant's property. The mother worked for the appellant and he used to share meals with the complainant and her mother in the house which they rented from him. The appellant used to pick up the complainant from the special school. He was aware she could not give voluntary consent. He was also aware that she was not a person capable in law of consenting, and that she was not able to appreciate the nature and reasonably foreseeable consequences of a sexual act, but unable to act in accordance with that appreciation. The appellant is a rich man who offered to buy a house for the complainant's family and offered other goods of high value. This he did to escape the responsibility of serving a term in prison.

[45] It is trite that 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 record of the evidence shows them to be clearly wrong. The court a *quo* did as well in this case after it found no material misdirection by the trial court.

[46] Despite the appellants' objection to the use of the intermediary by the trial court and confirmation thereof by the court a *quo,* even when the complainant was not below the age of 18 years, it is our considered view that the court a *quo* did not misdirect itself in interpreting Section 179A (1) of the Criminal procedure Act, No 51 of 1977 in the manner it did in the circumstances of this case. It is also our view that the court a *quo* possessed a discretion which it exercised properly. This court has considered the evidence in its totality and is not persuaded that the trial court erred in any respect in the course of the trial and the conclusions it reached. Our considered view is that upon a conspectus of all the evidence adduced in the trial the court was totally correct in rejecting the defence version and concluding that the appellant's guilt had been proved beyond a reasonable doubt.

[47] In the circumstances we come to the conclusion that the evidence proved the guilt of the appellant beyond a reasonable doubt. The appeal must fail.

[48] In the result, the appeal is dismissed.

TJ RAULINGA

JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

G WEBSTER

JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

VV TLHAPI

ACITNG JUDGE OF THE NORTH GAUTENG HIGH COURT