IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE		
(1)	REPORTABLE:	~~YES~~/NO
(2)	OF INTEREST TO OTHER JUDGES:	~~YES~~/NO
(3)	REVISED	
	DATE:……23rd March 2016……	
	SIGNATURE: …..……	

CASE NO.: A111/2015

In the matter between: DATE: 24/3/2016

KENNETH SKHUMBUZO MOKWENA Applicant

and

THE STATE Respondent

JUDGMENT

JANSEN J

[1] The appellant was found guilty of one count of robbery with aggravating circumstances as envisaged by section 1 of Act 51 of 1977 (read with the provisions of section 51(1), 52(2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997) in that on 10 August 2011 and at or near Mhluzi, he intentionally and unlawfully assaulted Queen Mahlangu and forcefully took from her a cell phone and R300-00 whilst threatening her with a knife.

[2] The appellant was also found guilty on one count of common assault (even though charged with sexual assault) in that on or about 10 August 2011 and at or near Mhluzi in the regional district of Mpumalanga, he unlawfully and intentionally sexually violated the complainant, Queen Mahlangu, by pushing her down, and undressing her whilst threatening her with a knife.

[3] The appellant was convicted on both counts on 24 October 2014 and sentenced to 15 years imprisonment in respect of the robbery (the minimum sentence) and three years' imprisonment in respect of the common assault, both sentences to be served concurrently. The appellant was also declared unfit to possess a firearm in terms of section 103(1) of Act 60 of 2000.

[4] Initially the appellant was granted bail but it was cancelled on 6 September 2013 when he failed to appear in court on two previous occasions.

[5] The court *a quo* granted the appellant leave to appeal in respect of his conviction and sentence.

[6] The appellant was 22 when the proceedings took place in February 2013 and was 20 years old when he committed the offences. He was born on 14 April 1991. He was legally represented throughout the proceedings.

[7] The prescribed minimum sentence was duly explained to the appellant in respect of count 1. The appellant pleaded not guilty on both counts. His plea explanations was that he was playing soccer with his friends at Mhluzi where there is a soccer stadium and two other fields higher up. He alleged that they were playing on the uppermost ground. He was wearing soccer boots and a T-shirt. He left his friends, as he was thirsty, with the consent of the soccer coach, to fetch water in a two litre plastic container at the toilets of the stadium. He then heard a woman shouting for help, calling the name Sam. This happened around 08h00 to 09h00.

[8] The appellant wished to return to the uppermost field but people came running towards him, throwing stones at him. He ran to a river close to the stadium where he was arrested by the police.

[9] The date and the place where the crimes were allegedly committed were formally admitted by the State.

[10] The complainant's testimony was that she was busy with her washing, and that the door of her house was unlocked and open. A male entered the house and told her to remain quiet. He requested her phone which she gave to him. He followed her into her bedroom where her handbag was lying on the dressing table. She handed him her bag and he took R300-00. He then ordered her to

climb on the bed. He grabbed her clothing and undressed her but whilst he was undressing, she wrestled with him and ran outside for help where there were people who came to her assistance.

[11] The complainant testified that when the male entered her house, he had a knife in his possession, about 26 centimetres in length, which he pointed at her. She said the knife broke during the ensuing struggle with the appellant but that she sustained only minor scratches to her hands. She also showed the court her cell phone, which the man had taken and which the community had given back to her after chasing the appellant. The SIM card in the phone was hers. She testified that he was wearing a white lumber jacket and denim trousers.

[12] The complainant stated that she only saw the appellant again at the police station, after the incident, as he had followed her when she ran outside and passed her and ran away.

[13] During cross-examination, the complainant stated that the money that was stolen was not recovered and that she found this strange. Mr D M (her husband) and a Mr Sam Mthethwa told her that the money had been lost. Mr D M was the person who returned the cell phone to her.

[14] According to the complainant, the broken knife remained in the house where it fell and it did not occur to her to give it to the police. In fact, she said that she did not even know where the knife was. She then stated that she did not know whether the appellant had taken the knife with him. When it was put to her

that she was lying because of the discrepancies in her evidence, she said that she did not know what had happened to the knife.

[15] The complainant also insisted that the man who assaulted her wore long jeans and not shorts. She testified that under his white hoodie, it seemed to her that he was wearing a T-shirt.

[16] The complainant then changed her version and said that she was in the bedroom when the man entered her house.

[17] The complainant admitted that the appellant had no distinct features. She testified that when he left the house, he jumped over the fence behind the house. Her house, she testified, was within the fence of the stadium. The people who assisted her entered through the front gate when they heard her screaming. It was unclear from her evidence how she knew that the appellant had jumped over the fence at the back of the house because she remained in front of the house. She took the people to the back of the house and told them that the perpetrator had jumped over the fence there but did not give a description of the perpetrator. She did not see what happened thereafter.

[18] Even in the complainant's statement to the police, she stated that she was outside the bedroom when the person entered. She insisted that she was in the bedroom and that the police had taken her statement down incorrectly. She testified that the perpetrator himself took the money out of her handbag and that she did not give it to him. She testified that she gave the perpetrator her handbag, and that he took out the R300-00.

[19] She said that Mr Sam Mthethwa, Mr Malapane and Mr Enos Masethla came to her assistance at her house. She did not know how Mr D M, her husband, had obtained the phone.

[20] It also transpired during cross-examination that the complainant initially testified that it looked as though the perpetrator had a knife but she insisted that he did have a knife. She said that she made a mistake in stating that it looked as though he had a knife. She also admitted that she was the only person who saw and spoke about a knife but that she had mentioned it to the three people who came to her assistance. (Clearly the interpreter had not interpreted everything she had said in her evidence in chief.) However, none of the witnesses testified that she had told them about a knife.

[21] The complainant testified that Mr D M was her husband and an electrician working for the municipality. Whether he came to her assistance at the house is unclear. The other two people – Jacob and Enos – worked for the Parks Department. (It is emphasised that she only referred to a Malapane and did not know that his name was Jacob.)

[22] The complainant saw the appellant at the police station and he was not injured. She identified him as the perpetrator. She denied that he was playing soccer as he was not wearing shorts and a long sleeved T-shirt. The complainant reiterated that she had seen what the perpetrator was wearing. The version of the appellant was put to her that he heard her scream, was then assaulted by members of the community, struck on the head until he bled and lost

consciousness, and was taken to the hospital. He also contended that no money, knife or cell phone were found on him.

[23] The next witness was Mr Samuel Mandlagaiqise Mthethwa. He testified that he was fixing the irrigation on the soccer field and saw nobody playing soccer on the lower grounds – only on the upper grounds. He saw a person with a white lumber jacket exiting the complainant's house and who jumped over the fence at the back of the house. Mr Mthethwa testified that several people started chasing the perpetrator and he drove after the perpetrator in his van in order to prevent him from getting away. The perpetrator ran to the river, proceeded to run between reeds growing next to the river, and disappeared. The people who had been practising soccer pointed out where the appellant was hiding, who by then, had discarded his white lumber jacket amongst the reeds. Mr Mthethwa testified that the perpetrator used the main gate of the stadium and that the other two soccer grounds were quite far away from the main stadium. He noticed the perpetrator in the white lumber jacket because members of the public were not allowed in the soccer stadium. When the perpetrator entered the stadium, he was moving towards the caretaker's house, which was about 300 metres away. The complainant lived in the caretaker's house.

[24] Mr Mthethwa testified that the caretaker's house, from which the screaming emanated, was about 100 metres away from where he was working. There were two fences, one encompassing the house of the complainant, the second, encompassing the stadium. One could access the complainant's house using

the gate. About five minutes after Mr Mthethwa saw the person with the white jacket, he heard the complainant screaming. When he saw her, only her upper body was clothed. He then saw the person with the white lumber jacket exiting the house and running away at a fast speed. When he caught up to the perpetrator he noticed that he was wearing jeans and black boots. Mr Mthethwa stated that when they saw him at the reeds he had a bottle with him, not when he entered the gate nor when he exited the complainant's house.

[25] Mr Mthethwa stated that the bottle which the perpetrator had in his possession when he was found hiding in the reeds looked like a glass wine bottle. He stated that the perpetrator was hitting people with it. He was adamant that the perpetrator was not wearing soccer clothing and he was sure that the perpetrator had not been playing soccer on the upper fields. He also testified that the complainant's husband, Mr D M, searched the perpetrator.

[26] Mr Mthethwa testified that the members of the community caught up with the perpetrator, and wanted to kill him. He also stated that the perpetrator did not speak to him whilst climbing into the police van.

[27] Under cross-examination, Mr Mthethwa testified that he was in the stadium with his colleagues Malapane and Masethla, and that he did not know the names of the others. The complainant's husband, Mr D M, was in the municipality's workshop "on the yard". It was later established that the workshop had some association with the stadium but was situated in the town. He only saw the perpetrator enter through the gate (it was earlier testified by him that people used that part of the stadium illegally as a short cut). He saw

the perpetrator but was in discussions with his co-workers. He did not see the person entering the caretaker's house. He denied that he or any of his colleagues went into the yard of the caretaker's house as testified by the complainant.

[28] Mr Mthethwa said that he got into his van, but lost sight of the perpetrator until he saw him in the reeds, where he had left his jacket. He had a bottle with him when he exited from the reeds but a glass one, not a two litre bottle used for carrying water.

[29] When it was put to Mr Mthethwa that it would be the appellant's testimony that he went to fetch water to drink, he testified that all the toilets were locked and that, in any event, he knew the people who practised soccer on almost a daily basis. He testified that it was the soccer players who told him where the perpetrator had gone. It was also put to him that there was a special tap from which the soccer players could drink. Mr Mthethwa said he would screw the tap on in the mornings and take it out in the evenings and he had not yet screwed it on when the incident occurred. Mr Mthethwa's evidence was highly confusing regarding the tap and where people were playing soccer that day.

[30] It was put to Mr Mthethwa that the appellant would testify that people attacked him and he answered that it was a lie and even an eight year old would know that. It was put to him that the appellant crossed the river and was then arrested at Mathole. It was also put to him that the appellant would testify that nothing was found on him, but Mr Mthethwa denied this and stated that Mr D

M found a cell phone and R300-00. It was put to him that Mr D M was in town and not close to the witness. Mr Mthethwa said that he phoned Mr D M when the incident occurred. Mr Mthethwa stated that he and his colleagues never searched the appellant.

[31] Apparently, even though Mr D M found the R300-00, the appellant's friends (it later transpired when the magistrate called witnesses that they were the appellant's soccer friends) threatened Mr D M with a knife and took the money from him. This was new testimony. Mr Mthethwa also denied that the appellant was unconscious because the appellant was able to climb into the police van of his own accord.

[32] The names of the people with whom the appellant was allegedly playing soccer were put to Mr Mthethwa. He denied it and said he knew the people who practised soccer.

[33] The next witness was the complainant's husband, Mr D M. He testified that he was on his way to the industrial area when he received a phone call informing him of an incident involving his wife. He returned and observed blood on her hands. This statement bears out the complainant's version that she struggled with the perpetrator who was armed with a knife.

[34] Mr D M testified that the complainant had told him that the man who had robbed her cell phone and R300-00 had a knife in his possession. He went in the direction to which the perpetrator had fled, went to the reeds in the river and then found that the perpetrator had been arrested at Mathole where he was

being assaulted by members of the community. Whilst the perpetrator was lying on the ground, he searched him and found the cell phone and the money in his pockets. He was wearing long jeans and black boots. Friends or acquaintances of the perpetrator then wanted to stab him and came with knives and he gave them the R300-00. He retained the cell phone which he gave back to his wife.

[35] Mr D M testified that he did not play soccer but knew the soccer players. He said he knew the appellant from a car wash at Khumbulu. He said he did not know his friends and that they did not play soccer.

[36] During cross-examination, he corroborated the evidence of the previous witness (Mr Mthethwa) that there was a pipe which one could adjust to get water and that Mr Mthethwa usually inserted the tap.

[37] Mr D M testified that he never saw a two litre water bottle, but only stones, and saw no glass bottle where the appellant was arrested. It was put to him that the appellant was unconscious which he denied. He admitted that his wife was not present when the appellant was arrested. The state closed its case.

[38] An application for discharge in terms of section 174 was dismissed by the magistrate.

[39] The appellant was called first on behalf of the defence. He said he played for Arsenal and named his fellow players who were with him that day. He said he went to fetch water because he became thirsty during practice and that the

coach, Chriswell, gave him a two litre bottle to fetch water and he heard a woman screaming. He said the tap that he went to was close to the railing of the grand stand. He said he saw Mr Mthethwa climbing into a bakkie and driving out of the stadium. The appellant said he knew Mr Mthethwa from the car wash where he, the appellant, worked. The appellant alleged that Mr Sam Mthethwa was not called as a witness (it was later established that he was referring to his friend Samuel and not Mr Samuel Mthethwa and thus was confused as they are both called Samuel). The appellant testified that he then climbed through a hole in the palisade fence close to a tennis court.

[40] The appellant testified that people approached him throwing stones at him. He ran to an open space where there is a stream. He said he dropped the bottle filled with water. He then ran to the Mathole bottle store. The people chasing him caught him and assaulted him. His brother, Mr Patrick Mokoena, arrived and called the police. He said he was struck on his head with a hammer and was assaulted until he lost consciousness. He testified that nothing was found on him. He said he was wearing denim jean shorts, soccer boots and a brown long sleeve T-shirt with yellow stripes. He said his soccer friends David and Godi came to the scene where he was arrested. David, the appellant's friend, told the people of the community that he was practising with them and went to fetch water, but then David was also attacked. The appellant denied doing anything to the complainant.

[41] Under cross-examination, he stated that he played for Arsenal and that it was always the same players practising – about nine or ten players.

[42] The appellant testified that he saw Mr Sam Mthethwa leaving in a bakkie and thereafter people left through a small gate. It was put to the appellant that there was only a main gate, not a small gate. He was also queried about the tap but he insisted that it was functioning that morning and that it existed.

[43] The appellant testified that he was the only person running away and that the training fields were far away and hence he went to Mathole's filling station (no longer the bottle store). It was pointed out to him that his location in the reeds was pointed out by his fellow soccer players and that this was not disputed. He denied knowledge of a wine bottle and denied ever wearing a white jacket.

[44] The appellant said that the people who pursued him were even armed with garden spades. The appellant added that at Mathole, he was also assaulted with iron rods, a hammer and garden spades. He said that his friend David covered his body and once again reiterated that David had told them that he had been practising soccer with him and then David was also assaulted. His brother, Patrick also arrived, and called the police. He once again stated that he lost consciousness. It was put to him that the state witnesses said that he entered the police vehicle on his own.

[45] When asked whether his brother Patrick and his friends David and Godi would come to testify, he stated that his brother had died the previous year, and that Godi and David were at work and could not testify on his behalf. He also proffered another convoluted story as to why David and Godi were not in court to testify on his behalf.

[46] However, after an adjournment, Mr David Bubi Mnisi gave evidence on behalf of the appellant. He confirmed that they were practising soccer together. He mentioned the coach, Chriswell, who the appellant had testified had told him to go and fetch water.

[47] Mr David Mnisi stated that the coach gave the appellant a two litre bottle to fetch water. They then heard the municipal workers screaming. According to him, the appellant wore a short sleeved brown and yellow T-shirt and short jeans.

[48] Mr David Mnisi stated that the person whom the municipal workers were screaming at was the appellant and they were screaming that he should be stopped. He stated that he heard the appellant calling for help and ran to him with some of the players following. The said players' names were Sean, Sihile, Godfrey, Ngobile and Innoccent. At the scene they found the appellant being assaulted. They tried to intervene and did not know why he was being assaulted. The appellant grabbed his feet and he fell on top of him. He was assaulted and his friends dragged him away. He said the appellant was his neighbour. He said he soiled himself and went home to wipe himself and dress in clean clothes. He found nobody at the appellant's house. When he returned, the appellant was unconscious and was loaded into a police van. He said he never saw a hammer.

[49] Under cross-examination, Mr David Mnisi testified that he played for the "Mups" and had played for the team for a long time. He testified that they trained three times a week.

[50] Mr David Mnisi testified that the appellant's brother was not on the scene and only heard about what had happened from him when he was on his way to the police station.

[51] Mr David Mnisi denied that the people playing soccer pointed out where the appellant was, namely in the reeds. He denied various things which the appellant had said, namely that his brother Patrick was phoning the police and that he lay on the appellant voluntarily.

[52] Mr David Mnisi admitted that he did not know what the appellant might have done. The defence then closed its case.

Addresses to the court:

[53] During his address to the court, the prosecutor pointed out that the defence witness contradicted the appellant and that the appellant's version was improbable. He also stated that the other witnesses were very clear about the identity of the perpetrator. In any event, the defence witness did not see what had happened.

[54] For the defence, the disappearance and the doubts regarding the whereabouts of the knife were emphasised. The complainant testified that she did not know whether the knife was left behind in her house after the incident, which is improbable because she would have found it, if this were the case. She also contradicted herself as to where she was when the perpetrator entered the

house. The strange aspect of the money being stolen from the complainant's husband and not the cell phone was also addressed. The complainant also never described the perpetrator to the municipal workers.

[55] Another strange aspect was the version of a glass wine bottle and the appellant stating that he carried a plastic water bottle. The issue of the white jacket was also not pursued.

[56] One of the state witnesses admitted that there were people practising soccer on the upper ground.

[57] The state witnesses, contrary to the complainant's evidence, denied entering her yard.

[58] None of the other state witnesses testified about the R300-00 (save the complainant's husband).

[59] The court, of its own volition, decided to call Mr Jacob Malupane. He testified that he was working at Mhluzi stadium and heard a woman scream. A woman came out of the caretaker's house screaming. A male person was giving chase and jumped over the wall behind the caretaker's house. The suspect ran to the river filled with reeds. He said they found the top/jacket (which he believed was white) of the suspect in the reeds. He said they did not run in the complainant's direction but chased the suspect. It was then disclosed to the court that there was indeed a small gate leading to the tennis court in addition to the main gate. They used the small gate to give chase. They were found by

the soccer players, who pointed to the reeds. When he went into the reeds, the appellant confronted him and Jabu, a colleague, with a glass bottle. He then found the perpetrator being chased by a group of people, and taken to a school where he was assaulted.

[60] Mr Jacob Malupane and his colleagues went back to work and the police arrested the suspect. He testified that friends of the suspect threatened them.

[61] The magistrate then conducted an inspection in *loco*. The appellant and Mr Jacob Malupane and the legal representatives were present. The sketch plan accorded with the testimony given by the witnesses.

[62] Cross-examination of Mr Malapane followed.

[63] Mr Malapane testified that because the perpetrator was battered and bruised when he saw him after he had been assaulted, and because he had seen him at the river, he could no longer say whether he was one and the same person according to his features, but confirmed that the person who had been chased and who had been assaulted, was the same person.

[64] Mr Malapane suddenly came with a completely new version and said that the appellant had hidden the cell phone and the R300-00 in the reeds and pointed it out to the complainant's husband. Mr Malapane then tried to correct his evidence by explaining that the appellant left his jacket in the reeds and the items were found in the jacket's pockets. He also acknowledged that he lost

sight of the suspect for a while, but was emphatic that they chased the right person.

[65] Mr Malapane further denied ever entering the complainant's yard with Mr Sam Mthethwa and Mr Enos Masethla. He also denied that the appellant came to the tap which was close to them where they were working on the lower grounds. He also stated that he never saw the money.

[66] Mr Enos Masethla was the next witness. He stated that the appellant appeared from the gate which people use as a short-cut. He then heard a woman screaming for help, waving her hands. He saw the appellant coming from the house running to the back thereof and jumping over the fence. His supervisor phoned Mr Sam Mthethwa and he started running after the appellant. The supervisor drove with his van. The appellant ran into the reeds. He wore a white coloured top. He left his top there and went into the direction of Eqwazini school. The appellant was apprehended there and the community assaulted him. The police arrived after a while. He did not notice anything on the appellant when he exited the reeds.

[67] During cross-examination he said that the complainant's upper body was naked and she was wearing something on her lower body. She was about 100 metres away from him.

[68] Mr Enos Masethla reiterated that the appellant came through the gate wearing a white top, sky blue jeans, black boots and a T-shirt known as a round neck. He said the jeans were long and the T-shirt green. He denied that the appellant

was wearing soccer clothing. He stated that he did not observe whether the appellant was unconscious.

[69] Mr Enos Masethla denied any knowledge of a cell phone or money. He also confirmed that he never entered the complainant's yard. He admitted that he did not see the complainant clearly nor the man running and jumping over the wall and confirmed that he lost sight of him.

[70] Mr Enos Masethla stated that he only saw two people on the upper soccer field but admitted that he was not paying attention. These two people showed them the place to which the perpetrator had run. Mr Masethla denied the version of the appellant that he fetched water. He stated that the appellant was the perpetrator because he saw him with "his naked eyes" using the gate.

[71] The complainant, for all practical purposes, was a single witness insofar as the assault and robbery were concerned. In ***R v Abdoorham*** **1954 (3) SA 163 (TPD)** at 165E–F the court held as follows: —

> ***"The court is entitled to convict on the evidence of a single witness if it is satisfied beyond a reasonable doubt that such evidence is true. The court may be satisfied that a witness is speaking the truth notwithstanding that he/she is in some respect an unsatisfactory witness."***

[72] In ***S v Sauls and Others*** **1981 (3) SA 172 (A)** at 180E–G the court held that: —

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Webber. . .). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in R v Mokoena 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded" (per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[73] It was argued by the counsel for the State, that the complainant's evidence was corroborated by other state witnesses in the following aspects: —

- ***The complainant came out of her house, her lower body naked whilst screaming for help;***
- ***A male person dressed in a pair of long jeans and a white hooded top, followed her out of the house and jumped over the back wall of the property;***
- ***The municipal workers who were present at the stadium, followed in hot pursuit;***

- ***The appellant was apprehended;***
- ***The complainant's cell phone was found in the appellant's possession.***

[74] One can add to this list that the complainant's husband found her with blood on her hands.

[75] There were various contradictions in the evidence of the State's witnesses. However, the improbabilities in the appellant and his witnesses' version are numerous. As emphasised by counsel for the State: —

- ***It is highly improbable that the appellant would start running away if he did not do anything. The witnesses further testified that the appellant was not at the tap as he suggested but ran away from the complainant's residence and that is the reason why they pursued him.***
- ***All the witnesses for the state as well as the two witnesses called by the court testified that the appellant was dressed in a long pair of jeans with a white hooded top. It is highly improbable that the appellant was practicing soccer dressed in this manner.***
- ***It is improbable that the people practicing soccer would point out the hiding place of the appellant if he was innocent and part of their team.***
- ***It is highly improbable that all the witnesses for the state falsely implicated the appellant.***

Conviction:

[76] On behalf of the appellant it was argued that the learned magistrate misdirected himself in finding the evidence presented by the state witnesses sufficient with reference to three cases, namely, ***R v Blom*** **1939 AD 188** at 202 to 203; ***S v Motsweni*** **1985 (1) SA 590 (A)** and ***S v Mosoinyane*** **1998 (1) SACR 583 (T)** at 593b – e**.**

[77] It was argued on behalf of the appellant that even should the Court find that the appellant was indeed a dishonest witness that this would not automatically have the result that the State had proved its case beyond a reasonable doubt. It was argued that certain dishonest statements on the part of the appellant did not, necessarily, lead to a conviction as was held in ***S v Dladla*** **1980 (1) SA 526 (A)** at 530 D – E; ***S v Motsweni*** *supra;* ***S v Reddy*** **1996 (2) SACR 1 (A)** and ***S v Bruinders*** **1998 (2) SACR 432 (SE).**

[78] It was also argued that the appellant's version was reasonably possibly true. Reference was made to the cases of ***S v Mkhize and Others*** **1998 (2) SACR 478 (W)**; ***S v Makobe*** **1991 (2) SACR 456 (W)** and ***R v Mtembu*** **1956 (4) SA 334 (T).**

[79] However: ***"Even when it can be said that the accused version may be reasonably possibly true, it does not follow per se that his version ought to be accepted where the evidence of the state is so overwhelming that it undoubtedly points to the guilt of the accused."*** as was held in ***S v Van Tellingen*** **1992 (2) SACR 194 (C).** The above means that the principle that an accused's version ought to be accepted if his version is reasonably possibly true, does not go as far as to imply that one should not have regard to all

semblance of reality or exclude every possibility as was held in ***S v Ratte*** **1998 (1) SACR 323 (T)** at 336 H.

[80] The court is satisfied that the appellant's convictions should stand. The evidence indubitably points to the appellant.

Ad sentence:

[81] It was argued on behalf of the appellant that the regional magistrate had not followed the correct approach regarding sentencing.

[82] It was submitted that although sentencing is within the trial court's discretion, the triad of ***S v Zinn*** **1969 (2) SA 537 (A)** was not followed. It was submitted that the sentence was disproportionate and induced a sense of shock. The court was referred to the matter of ***S v Sobandla*** **1992 (2) SACR 613 (A)** at **617 g** per Howie AJA who held that a sentence will be destructive if: ***"(h)aving regard to all the facts of the present matter, however, it seems to me that Appellant's Counsel (who appeared at the Court's request, and for whose assistance we are grateful) was right in contending, in effect, that Appellant was sacrificed on the altar of deterrence, thus resulting in his receiving an unduly sever sentence. Where this occurs in the quest of an exemplary sentence, a trial court exercises its discretion improperly or unreasonably."***

[83] The appellant's counsel also relied on ***S v Reay*** **1987 (1) SA 873 (A)** at **877 C** where it was held that "… ***severe sentence may be justified in order that it may act as a deterrent to others. This does not mean, it is submitted, that where the personal circumstances of an appellant and his reasons for***

committing the crime are such that in his case a prison sentence may not be appropriate, he should nevertheless be sent to jail.*"*

[84] The matter of ***S v Vilakazi*** **2009 (1) SACR 552 (SCA)** was also relied upon: —

> ***"If any circumstances were present that would render the prescribed sentence disproportionate to the offence, this would constitute weighty justification for the imposition of a lesser sentence. Thus, a prescribed sentence could not be assumed a priori to be either proportionate to the offence, or, indeed, constitutionally permissible. Proportionality was to be determined on the circumstances of the particular case. Accordingly, the notion that the prescribed sentence was to be imposed in 'typical' cases, and departed from only in 'atypical' ones, was without merit. (Paragraphs [13]-[19] at 559e-562d.)"***

[85] In the premises, it was argued that the appeal against the sentence should be upheld and replaced with a more appropriate sentence, with reference to ***S v Gerber*** **2006 (1) SACR 816 SCA**.

[86] The personal circumstances of the appellant were as follows: —

- He completed grade 9.
- He was employed doing piece jobs at a car wash.
- He was not married and had no children.

- His mother and brother passed away after he stood trial in this matter. He is currently staying alone.
- His age; namely 20 years when he committed the crimes.
- The time spent in custody: namely approximately 13 months, before sentencing and one month before bail was granted to him.
- He had previous convictions (four in all) – namely housebreaking, robbery and escaping from custody.

[87] The trial court found no substantial and compelling circumstances to deviate from the minimum sentence for robbery. The court cannot agree. In 2007, when the appellant was only sixteen years old, he was convicted to three months' imprisonment. However, when he was 17 years old and committed housebreaking, he was sentenced to six months' correctional supervision. Later that year, he was sentenced to six months wholly suspended and when 18 years old he was imprisoned for six months.

[88] This demonstrates that his youth was taken into account when convicted on the last three occasions.

[89] The appellant's primary care giver died, namely his mother in 2013, and so did his brother in 2012. His sister lives in Secunda with her own family. He only left school due to financial reasons.

[90] No pre-sentencing report was obtained. The reason for this was because the magistrate stated the following: ***"I do not think there is really a need for a***

pre-sentence report in view of the fact that there is a prescribed minimum sentence in respect of count 1."

[91] This reasoning cannot be counteracted. The judicial system had failed the appellant previously as he was not treated in the manner prescribed by the Child Justice Act 75 of 2008. (However, this Act only came into operation on 1 April 2010.)

[92] The preamble of this Act recognises that: —

> ***"…before 1994, south Africa, as a country, had not given many of its children, particularly black children, the opportunity to live and act like children, and also that some children, as a result of circumstances in which they find themselves, have come into conflict with the law.***
>
> ***The Constitution, while envisaging the limitation of fundamental rights in certain circumstances, emphasises the best interests of children, and singles them out for special protection, affording children in conflict with the law specific safeguards, among others, the right –***
>
> - ***not to be detained, except as a measure of last resort, and if detained, only for the shortest appropriate period of time;***
> - ***to be treated in a manner and kept in conditions that take account of the child's age;***

- ***to be kept separately from adults, and to separate boys from girls, while in detention;***
- ***to family, parental or appropriate alternative care;***
- ***to be protected from maltreatment, neglect, abuse or degradation; and***
- ***not to be subjected to practices that could endanger the child's well-being, education. Physical or mental health or spiritual, moral or social development; and***
- ***the current statutory law does not effectively approach the plight of children in conflict with the law in a comprehensive and integrated manner that takes into account their vulnerability and special needs;"***

[93] The definition of a child in the Child Justice Act is: —

> ***"'child' means any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4 (2);"***

[94] The question to be posed is how one should deal with this situation.

[95] The appellant, since the date of the cancellation of his bail on 6 September 2013, has been in custody – a period of two years and five months before judgment in his appeal.

[96] The damage has been done as far as incarceration of a youth is concerned.

[97] The manner in which he has been handled by the judicial system cannot be ignored. This is particularly so, given the fact that children should only be incarcerated as a last resort.

[98] However, one cannot deny that correctional supervision, and a suspended sentence did not prevent the appellant from continuing with a life of crime. However, one should take into consideration how young he was. Furthermore, he was employed at a car wash doing piece jobs when he committed the crimes relevant to his trial. He was further severely assaulted by members of the community when he was arrested and had to be hospitalised for a period of approximately two weeks.

[99] Due to the lack of a pre-sentencing report, and the manner in which the justice system failed the appellant, there are substantial and compelling circumstances which justify a departure from the minimum sentence. The best course of action would have been to obtain a pre-sentencing report. This was, unfortunately, not requested by the magistrate on the erroneous grounds mentioned.

[100] Fortunately, even though things may have turned out differently, the complainant was only scratched on her fingers because she fought back and she was not raped. Yet the intrusion into the privacy of her home was serious and as she was half-undressed the intention was clearly to rape her.

[101] In the premises, a more appropriate sentence of eight years is proposed.

Order

1. The convictions are confirmed.
2. The following order is substituted for the regional magistrate's order in respect of sentencing: —
    - In respect of count 1 – eight (8) years of imprisonment which is antedated, in terms of section 282 of the CPA, to 24 October 2014.
    - In respect of count 2 – (amended to a charge in terms of section 5(2) of Act 32 of 2007) a period of three years' imprisonment which is to be served concurrently with the sentence in respect of count 1 and which is similarly antedated to 24 October 2014.
3. The appellant is declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000.

MM JANSEN J

Judge of the High Court

I agree and it is so ordered.

DE KLERK AJ

Judge of the High Court

For the Appellant **Advocate M Bouwer** (012-331 4805/082 908 3025)

Instructed by Legal-Aid South Africa Middelburg Justice Centre (Ref: Madiba/Mokoena)

For the Respondent: **Advocate S Scheepers** (084 520 0593)

Instructed by The Director of Public Prosecutions