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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: A103/2015
28/6/2016
Not reportable
Not of interest to other judges
Revised.

In the matter between:

OUPA WILLIAM MEMANE Appellant

and

THE STATE Respondent

JUDGMENT

TEFFO, J:

[1] The appellant was convicted in the regional court, Nigel, on one count of rape of a 14 year old girl, in contravention of s 3 of the Sexual Offences and Related Matters Act, 32 of 2007 read with the provisions of s 51 of Schedule 2 of the Criminal Law Amendment Act, 105 of 1997 (the Act). He was sentenced to 20 years imprisonment. He now appeals against his conviction and sentence with the leave of the court a *quo.*

THE APPEAL AGAINST CONVICTION

[2] The issues raised in the appeal against conviction were that the trial court erred in finding that the State proved the guilt of the appellant beyond a reasonable doubt and that there was corroboration in the evidence it tendered. It was argued that the trial court did not treat the evidence of the complainant, who was a single witness with regard to the rape count, with caution. According to the appellant, the trial court's evaluation of the evidence was flawed and misdirected.

[3] It was pointed out that the trial court erred in rejecting the evidence of the appellant as not being reasonably possibly true, holding against the appellant the evidence which was not put to the state witnesses and giving importance to minor discrepancies between the defence witnesses. It was further submitted that the trial court erred in convicting the appellant on the basis that he did not put to the complainant the evidence that she had sexual intercourse with the appellant the day prior to the rape at a stage when it was not necessary to do so because the State only later brought DNA evidence after the appellant had already testified.

[4] It was also argued that the trial court erred in allowing the State to reopen its case after the appellant had already testified. The trial court did not afford the appellant a fair trial, so it was argued, in that the State should have known all along that it could have presented DNA evidence if it wanted to but elected to proceed with the trial without the DNA evidence. A submission was made that the defence prepared its case based on the evidence the State indicated it would use, but after the appellant had testified, the State decided to use DNA evidence. The defence had to change its strategy at the end of the trial and the trial court criticised the appellant for changing its strategy. It was pointed out that the trial court erred in granting the State the application to reopen its case in order to lead DNA evidence in instances where the State was bound by its decision not to use this evidence.

THE APPEAL AGAINST SENTENCE

[5] With regard to sentence it was argued that the sentence imposed is strikingly inappropriate as it is out of proportion to the totality of the accepted facts in mitigation

and disregards the period of two years that the appellant spent in custody awaiting trial. It was submitted that the trial court failed to take into account the mitigating factors inherent in the facts proved, the age of the appellant, the fact that he was a first offender, the absence of injuries on the complainant and the fact that the appellant was a breadwinner who had to support his three children. Accordingly, so it was argued that the trial court over-emphasised the seriousness of the offence, the interests of society, the prevalence of the offence, the deterrent effect of the sentence and the retributive element of sentencing.

[6] The State disagreed with the submissions made on both conviction and sentence. It was argued on behalf of the State that the appellant was correctly convicted and that the sentence imposed is justified and appropriate.

THE EVIDENCE

[7] The State called four witnesses, namely, Mr J. T. M., Constable Mhlongo, Constable Mlambo and Ms R. I. M. (the complainant) in support of its case while the appellant testified and also called Mr Laka Sebati Mogele as his witness.

[8] Mr J. T. M. (T.) testified that he was with the complainant, who was his girlfriend at the time, at his parental home in his bedroom on the night of 13 January 2013 at approximately 21h00. Shortly after they had supper and as they were sitting on the blankets on the bed, he heard a knock at the door. He asked who that was and the person identified himself as Oupa (the appellant). He opened the door for him. The appellant entered the house holding a knife. He ordered the complainant to accompany him to her friends. He told the appellant that the complainant said it was late in the night. The appellant eventually ordered him and the complainant to leave with him to the place where he wanted to go. He and the complainant walked with him to show him one of the complainant's friends' homestead. On their arrival at the complainant's friend's parental house, he pulled the complainant and ordered her to go and call her friend. The complainant entered the yard and knocked at the door. As the complainant was knocking, her friend, J., saw the appellant and informed her mother that he wanted to take them away by force. J.'s mother called out a neighbour aloud and the appellant left J.'s parental home's yard pulling the complainant.

[9] The appellant and the complainant walked through Lutule Street to Nhlalo Street and he followed them. At another friend of the complainant, Th.'s parental home, the appellant ordered the complainant to go and call Th.. Th.'s mother peeped through the window and asked them what did they want in the night as Th. was asleep. At that time because he did not have shoes on, he told the appellant that he was going home. The appellant threatened to stab the complainant with a knife in case he did not go. Upon hearing what the appellant was saying, he turned away and ran to his parental home.

[10] The appellant took the complainant away by force. Upon his arrival at home, his brother asked him what was going on. He told him what happened. They went out (him and his brother) to look for the complainant but did not find her. They proceeded to one of the appellant's friends' parental home where they requested some children to go and knock. The appellant's friend came out and told them that the complainant and the appellant were not there. They went back to J.'s parental home and J.'s mother advised them to call the police.

[11] The police were called and ultimately came. He and J. accompanied the police to the parental home of one of the appellant's friends. At that house they called Tb.. Tb. informed them that he did not walk with the appellant and the complainant but Tc. did. They eventually left with Tc. to the appellant's parental home where they found him and the complainant. Upon their arrival at the appellant's parental home, the police knocked at the door. Suddenly the complainant came out of the house. She was not wearing a t-shirt and was without shoes. The police came out of the house with the appellant and handcuffed him as he tried to flee. He was then put in the police van. They proceeded to the police station where he made a statement.

[12] The complainant was crying. She did not talk at the scene. She only started talking at the police station. As and when the police went into the house with J. at the appellant's parental home, he remained in the police van.

[13] He disputed under cross-examination that the appellant was the complainant's boyfriend and that he was her ex-boyfriend. He also disputed that the complainant left with the appellant freely and voluntarily. He further disputed that when the appellant left

with the complainant, he met her on the street and did not find her at his parental home as he testified. He knew the appellant by sight prior to the incident. He heard his friends calling him, Oupa. He did not see any police officer assaulting the appellant.

[14] Constable Sibonjas Shitangu Mhlongo also testified. His evidence was that he was stationed at D.za and had two years service in the SAPS at the time of the incident. At approximately 23h00 on 13 January 2009, while on duty, he attended a complaint in the company of Constable Mlambo. They received the complaint from the radio control room. The first state witness, T. complained that a male person came to his parental home and took his girlfriend away forcefully while holding a knife. They asked him to give them directions of the place where he was. They proceeded to the place where they found T. with J. and he told them that he could identify the person but did not know where he resided. J. directed them to Tb.'s place and Tb. took them to the appellant's parental home. He corroborated T.'s evidence that he entered the appellant's parental home with Constable Mlambo. They knocked for a long time without any response. Ultimately a certain male person, who did not open the door for them, responded and asked who they were. They introduced themselves as police officers.

[15] They told him they were looking for the appellant. He told them the appellant was not there and also asked what did he do. He opened the door a little bit and they insisted that they were looking for the appellant. As this male person was standing at the door, talking to them and holding the door with his two hands, the complainant who was naked ahd crying, came out of the house running. She passed underneath his arms and stood outside. T. pointed her as his girlfriend. She stood next to Constable Mlambo and they started talking. Constable Mlambo asked her what happened. At that time the appellant came out of the house. He introduced himself to the appellant and told him that they had received a complaint that he took the complainant away by force where she was and that they were arresting him for kidnapping. As he was busy explaining the charge to the appellant and explaining his constitutional rights, Constable Mlambo informed them that they were not arresting him for kidnapping only. The complainant had just informed her that the appellant raped her twice. He eventually handcuffed him. Suddenly the appellant started running as they were walking to the police van outside while he was handcuffed. He jumped into the neighbouring yard and he fell on his head. He pulled out his firearm and as he was holding it, the appellant

stood up and ran towards the street. They ultimately arrested him and proceeded to the police station. At the time they saw the complainant, she was wearing a mini skirt and carrying a top in her hand.

[16] Under cross-examination he disputed that the complainant was not crying when she came out of the house. He testified that T. also pointed the appellant out when he came out of the house before he was handcuffed and that only one shot was fired. He disputed that there were two female police officers present at the scene at the time of the appellant's arrest and that the appellant was assaulted. He also testified that T. was standing outside with them when they were knocking at the door of the appellant's parental home. According to his evidence the complainant was T. who called them and Ms M. (I.) was the victim who was kidnapped and raped. The male person they found at the appellant's parental home who said the appellant was not there and who was making noise when they arrested the appellant, told them that I. was the appellant's girlfriend.

[17] Constable Victoria Thandi Mlambo testified that she had two years and four months service in the SAPS and was stationed at D.za police station at the time of the incident. She corroborated the evidence of Constable Mhlongo with regard to the receipt of the complaint from T. on the night of 13 January 2013 while they were on duty, how they met with T. and J. who led them to Tb.'s parental home and how Tb. took them to the appellant's parental home where they ultimately found him and the complainant. She also corroborated Constable Mhlongo's evidence with regard to what transpired at the appellant's parental home, how the complainant came running out of the house as they were still standing at the door, how the complainant was dressed as she came out of the house, and how she engaged the complainant to tell her what happened. After the complainant had told her that she was taken forcefully from T. 's parental home, she took her aside and she further told her that the appellant raped her. At that time the complainant was shaking and shocked. She only had her skirt on and she had placed her T-shirt on her chest. She eventually escorted the complainant to the police van. Nobody was injured or assaulted in her presence. She also pointed out the appellant in court.

[18] Under cross-examination she testified that the complainant was not crying when

she came out of the house but one could see that she was nervous and/or shocked. She further testified that when she saw the complainant at the door, she jumped out of the house, came straight to her and immediately told her that the appellant forcefully took her away.

[19] The complainant also testified. She corroborated the evidence of T. that she was with him on 13 January 2009 at his parental home when the appellant arrived there and knocked. He told T. to accompany him to certain girls from the white house who took his R100,00. T. told him that it was late at night, he would not be able to accompany him. The appellant said T. should accompany him as he knew the girls who took his R100,00. He became angry, took out a knife and insisted that she and T. should go and show him J.'s home. They eventually left with him. On the way he had a knife in his hand. She corroborated the evidence of T. about what happened at J.'s parental home and that before J.'s neighbour came out, the appellant told her that they should leave. Suddenly he said she should accompany him to Th.'s home to look for Si..

[20] She told him it was in the night while T. also told him that they were turning back home as it was in the night. The appellant did not allow them to go back home. They ultimately went with him to Th.'s home. He made her knock and Th.'s mother asked who it was and what did she want. She told her someone wanted to know if Th. was there. She asked her what did she want from Th. in the night. Th. came out and told her Si. was not there, she had gone to Makuno. The appellant then ordered her to accompany him to the place where Si. was. T. told him once more that they were turning back. He said nobody was turning back. After T. told him that he did not put on his shoes, he did not allow him to go with them any further. He threatened to stab him with a knife if he persisted on going with them. At that time he was holding a knife in his hand. He forced T. to go back home while he took her away forcefully. He also threatened to stab her if she did not go with him.

[21] She eventually accompanied him to Si.'s place where he took the bread and told her to sit down. They did not meet people on the way. As they were at Si.'s place, T. came back with his friends. The appellant's friend went to them and told them they were not there. From Si.'s place she and the appellant went to his parental home. While on the way, T. came with others from the corner and called her but the appellant ordered

her not to look back. At that time he threatened to stab her with a knife should she look back. They ultimately reached the appellant's parental home. They went to the bedroom. She told him that she was going home. He said he would take her home after putting the bread.

[22] All of a sudden he took out a knife and said they should sleep. He made her to undress while holding a knife in his hand and ordered her to go under the blankets. He took out his penis and inserted it into her vagina. After raping her, T. arrived with the police. When the police knocked, he told her to hide under the bed. She pushed him and went out of the bedroom. The appellant told his brother not to open the door. Eventually his brother opened the door. The police found her in the house. At that time she did not have her skirt on. She then got dressed while the police took the appellant to the police van. She told the police what happened.

[23] She corroborated the evidence of T. to the effect that the appellant's friend accompanied the police to his parental home where she was found. The next day she was examined by a doctor. She sustained injuries in that her private parts were sore. She did not have a relationship with the appellant. He had sexual intercourse with her without her consent.

[24] Under cross-examination she testified that she only knew the appellant by sight and she heard people calling him Oupa in the street. She did not tell people at J. and Th.'s parental homes that the appellant was carrying a knife because he was threatening her. She only saw people at the appellant's parental home when the police were there. Prior to the arrival of the police, she did not see anybody there. She explained that when the appellant ordered her to undress, she was standing. She undressed all her clothes including her panty and the appellant told her to climb on the bed. She did as ordered as the appellant was carrying a knife in his hand and he had sex with her. She kept on pushing him away with her hands. He did not stop and eventually the police arrived.

[25] She disputed that T. was her ex-boyfriend, that the appellant met him on the street on the day of the incident and asked her where was she going and she told him she was going to his homestead. She also disputed that upon their arrival at the appellant's homestead, they first had a meal together that night. She further disputed that the police

arrived prior to the appellant having sexual intercourse with her.

[26] She further testified that she was crying when the police arrived at the appellant's parental home, the appellant was not assaulted, he tried to run away after he was handcuffed and the police fired a shot in the air.

[27] The appellant also testified. His evidence was briefly as follows: The victim is known to him as D.. He had a relationship with her for four months at the time of the incident. Their relationship was not that serious. When he proposed love to her, she told him that she had a romantic relationship with one Ma.. He also knew Ma.. Ma. is T.. He disputed that he went to his homestead on 13 January 2009. On the day of his arrest, he went to the shop where he met the complainant on the way at the corner. She asked him where was he going. He told her he was going to the shop. He asked her to accompany him to the shop and she agreed. They went to the shop together where he bought her a packet of chips and bread. From the shop they went to his parental home.

[28] Upon their arrival at his parental home, they had a meal, and 15 minutes later they went to the bedroom where they took off their clothes, had a chat and he asked her if they could have sex. At that time his sister and brother were in the house. The complainant asked if he had a condom. He told her he did not have it. The complainant said they cannot have sex without a condom. Shortly thereafter he heard a knock on the kitchen door. His sister opened the door. It was the police and he overheard them telling her that they were looking for them, they came to arrest him for the rape of D.. He asked them which D. because he was together with D. in the house. Ma. was also present and said it was D. who was in the house.

[29] Ma. is the ex-boyfriend of D.. He pointed him out to the police and the police arrested him. D. came out of the house. She was normal. She did not cry nor scream.

[30] He maintained that the police arrived before he had sexual intercourse with her. When asked why would T. and D. say he had a knife in his possession and took D. away against her will, he said D. had earlier on told him that if T. could know about their relationship, he would assault her. At some stage T. approached him and told him not to continue a relationship with D. as she was his girlfriend. He was asked what would be

T.'s motive to lie about him in court, he said maybe he loved D. but he also loved her. When the police arrested him, he requested them to ask D. if she wanted to lay charges against him. There was one female police officer who was drunk. She said he would explain his story in court. She slapped him with an open hand and he jumped the fence to a neighbouring yard. Police fired two shots. He ran to the street where they apprehended him and put him in the police van. They further assaulted him in the street.

[31] When he arrived at his homestead with D., his brother and sister were present. They saw D.. They also saw her when she went out of the house when the police were there.

[32] Under cross-examination he testified that the first time he proposed love to the complainant was in September 2008. She did not accept his proposal as she told him that she was in a relationship with T.. He did not ask for her personal details. It could have been an oversight on his part not to ask her details when they first met. The complainant told her in December 2008 when they met that she was no longer in a relationship with T.. He met her again on 13 January 2009. He met the complainant earlier on the night of his arrest before he went home with her, next to the show house. He did not know that she was a child of 14 years at the time. He did not have the opportunity to know her better.

[33] When he arrived with the complainant at his parental home his brother, Laka was in his room while his sister was watching TV. They entered through the kitchen door, sat in the kitchen for a while and left to the bedroom. His sister saw the complainant. She opened the door when they entered the house, they exchanged greetings and she went to her bedroom to watch TV. They remained sitting in the kitchen. He saw his brother before he went to his room.

[34] When asked as to how did T. know that he came to his parental home with the complainant, he said T.'s neighbour saw him with the complainant leaving the shops. He further said he would not be able to tell how did he know. After he was told that the complainant testified that he took her away by force from T., he said he had already testified that T.'s friend and neighbour saw him and the complainant leaving the shops.

The complainant was visiting him at his parental home for the third time. Every time she visited him, his siblings saw her. She first came to his home in November 2008. The second time was in December 2008 and the third time was on the day of his arrest. He was asked as to why on the first and second visit of the complainant at his parental home, police were never called but were called on the third visit. His response was maybe T. was told about their relationship and he decided to call the police.

[35] He further testified that he was also surprised as to why T. did not call the police on the first two occasions. He was asked as to why did he not tell the police that the complainant was not coming to his parental home for the first time. He said everything happened so fast and when he wanted to explain, the female police officer said he would explain in court. When asked how did the police know that he raped the complainant before they spoke to her, he said maybe they were told by T. because when they arrived, T. pointed him out to the police and said he was the person he was telling them about, who raped. He was asked as to how did T. know that he raped the complainant. His response was that he did not know how that happened and how did it come that he came to his homestead with the police because he did not see him going with the complainant to his parental home. Mention of T.'s neighbour and friend was just speculation.

[36] When the police arrived at his parental home they knocked. His sister opened the door for them and they told her they were looking for him. He left the complainant in the bedroom and went to them. He told them he was with the complainant in the house. The complainant was still in the bedroom but they told him that he raped her. The female police officer said they were tired of the rapists. They put him in the van and told him he would explain his story in court. When he told the police that the complainant was in the bedroom, she came out of bedroom to the kitchen where they were.

[37] He disputed that the complainant was crying when she came out of his bedroom while the police were there and was adamant that she was fully dressed. According to him the only thing that she did not wear was her jersey. The complainant did not say anything to the police when she came out of his bedroom but they told him they were arresting him for rape. They only spoke to her at the police station. When told that the complainant also did not tell the police that she was his girlfriend, that she came there

on her own and that he did nothing to her, he said maybe he made a mistake by running to the neighbouring yard after they slapped him. He ran because he thought they were taking advantage of him and his siblings as there was no elderly person in the house. He thought the neighbours would be of assistance even when he was arrested and did not want to be assaulted. He was asked what did he do with the assault. He said he was told to lay charges once he was acquitted of the rape. He testified that he was assaulted when his sister was telling the police that he had a relationship with the complainant and also asking the complainant why she did not tell them that he was raping her during the long time she spent in the house. He did not hear what the complainant said in response thereto. He was assaulted outside the house inside the yard at the gate on his way to the police van.

[38] He knew nothing about the complainant. He did not know her age. He did not know her family. All what he could say was that she was attending some training at a satellite school. He never met physically with T. since he had a relationship with the complainant. T. was able to point him out to the police because they knew each by sight. At some stage he testified that he did not know the complainant's boyfriend.

[39] After the accused had finished testifying but before he could call his witness, the State made an application to reopen its case to introduce DNA evidence. The application was opposed but eventually granted.

[40] The State then called Ms Flora Selaelo Buthani who testified that she worked for the SAPS at the biology unit at the forensic science laboratory. She was a warrant officer, a forensic analyst and a reporting officer. Her duties involved mainly doing DNA analysis, the preliminary testing of biological evidentiary material, monitoring and evaluation of the DNA process, DNA result comparison and report writing. Her qualifications were also placed on record. She made a s 212(4) statement where she recorded her conclusions as an analyst and reporting officer. She had 11 years experience in the field. The laboratory received the blood sample from the appellant under reference number 10D4AA2581XX. It also received the sexual assault kit on 24 June 2010 under reference number 08D1AD3309XX. The sexual kit was examined for preliminary testing on 21 July 2010. The reference sample was received on 16 July 2010 and it was finally analysed on 10 November 2011. There was a delay between the

receipt of the comparison sample in July 2010 and the final analysis in November 2011. The DNA result of the reference sample 10D4AA2581XX was read into the DNA result obtained from the vulva swab 08D13309XX. The most consecutive occurrence for the DNA result from the vulva swab 08D1AD3309XX for all possible contributors to the mixture DNA result is 1 in 4 800 people.

[41] After the presentation of DNA evidence, the appellant made the following formal admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977: That on 13 January 2009 Dr Wiets Hermanus Steyn took DNA evidence from the vulva swab of the complainant. That the swabs were properly sealed and sent to the forensic laboratory in Pretoria together with the sexual assault kit number 08DAAD3309. That blood was also drawn from the appellant some time in 2010, was sealed and also sent to the forensic laboratory in Pretoria. That the tests were done on the vulva swab (the sexual assault kit) from the complainant and the samples were examined by Warrant Officer, Flora Selaelo Buthani. That the appellant's blood was also tested for DNA analysis at the forensic science laboratory and the results were also handed to Warrant Officer, Flora Selaelo Buthani for forensic analysis. That both analysis were put together in exhibits B and C respectively and that the DNA of the appellant was found in the sexual assault kit (vulva swab).

[42] The complainant was recalled at the request of the defence after the presentation of DNA evidence. She disputed under cross-examination that the appellant had sexual intercourse with her the day prior to the incident at his parental home. She testified that she was never at the appellant's parental home on 12 January 2009. She also disputed that at that time she was in a relationship with the appellant for four months. When told that the appellant says he thought she was above the age of 16, she was adamant that she and the appellant did not know each other at the time. She also testified that she did not know Laka, the appellant's brother and his sister, Karabo before the incident.

[43] The accused was also recalled by the defence and he testified that prior to 13 January 2009 he could have had sexual intercourse with the complainant either on 11 or 12 January 2009 and it was with her consent. The first time they used a condom but the second and third time they did not use it. He conceded under cross-examination that although he testified that he had a romantic relationship with the complainant for

about four months prior to the incident, he knew nothing about her except her name. He stated that they never spoke about her age. When asked why would the complainant refuse to have sexual intercourse with him without a condom on 13 January 2009 but agree to have it with him without a condom on 12 January 2009, he stated that the complainant saw him with a certain woman of the church and told him to use a condom.

[44] Mr Laka Sebati Mogele (the appellant's brother) also testified. He was present at home when the appellant arrived home with the complainant on the night of the 13 January 2009 between 21h30 and 22h00 and when he was arrested. He knew the complainant through the appellant. She was his girlfriend. He was not seeing her for the first time. He could have been seeing her for the third time together with the appellant at their parental home. The complainant knocked at the door as the appellant was in the toilet outside the house. He opened the door for them and they entered the house. They proceeded to the kitchen to make food and took the food to the bedroom while he went to lock the door.

[45] They sat and had their meal in the bedroom. Their bedroom door was not closed. He also went to bed. Shortly thereafter just after 22h30 and before 23h00 the police arrived at his homestead. He saw the complainant again. She was calm. He disputed that she was crying when the police were there. The appellant at some stage ran away from the police because at that time they were assaulting him. They grabbed him by his clothes and slapped him with an open hand. He warned the police not to assault him. They stopped assaulting him and he got the chance to run away. He disputed that the appellant could have raped the complainant as he said he could have heard because his bedroom is next to that of the appellant. When asked what did he think they were doing in the bedroom, he stated that he would not know.

[46] Under cross-examination he testified that the appellant and the complainant were going out together for some time prior to the incident. He spoke to the complainant on the night of the incident when she asked for a cigarette from him. They did not talk much. When asked how old could she have been at the time, he testified that he did not pay much attention about that and did not ask her. In the house people who were there were the appellant, the complainant, him, his sister and their two nephews aged 15 and 7. His sister was in the outside room. He opened the door when the police arrived at his

homestead. He was told that his evidence differed with that of the appellant in that the appellant testified that upon his arrival at home with the complainant, he knocked at the kitchen door and their sister opened the door for them. His evidence was that it was the complainant who knocked while the appellant was in the outside toilet. He opened the door and the complainant first entered and the appellant followed. The appellant testified that when they arrived there, he was already asleep in his room. In response thereto he said he was in the kitchen when they entered the house and they were both drunk. He was also told that it was put to the complainant by his counsel that his sister opened the door to the police. The complainant testified it was him who opened the door to the police while he also stated that he opened the door to the police.

[47] Section 208 of Act 51 of 1977 *("the Criminal Procedure* Acf') provides that an accused person may be convicted of any offence on the single evidence of a competent witness. It is however, a well-established judicial principle that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (S *v Stevens* 2005 (1) All SA (1) (SCA).

[48] The correct approach to the application of the so-called *'cautionary rule'* was set out by Diemont JA in *S v Sauls and Another* 1981 (3) SA 172 (A) at 180E-G where he said the following:

> *"There is no rule of thumb test or formula to apply when it comes to* a *consideration of the credibility of* a *single witness ... 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 had been told. The cautionary rule referred to by De Villiers JP 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 ...' It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."*

[49] The evidence presented by the State was to the effect that the complainant was forcefully removed from her boyfriend, T.'s parental home by the appellant who threatened her and her boyfriend with a knife. She ultimately landed at the appellant's parental home where the appellant had sexual intercourse with her without her consent. She was clear in her evidence that prior to the incident, she only knew the appellant by sight. She did not even know his name. After T. was threatened with a knife to return home alone without the complainant, he returned with his brother to the streets and the place where he thought they could be found, to look for the complainant, as he did not know the appellant's parental home. With the assistance of J., the complainant's friend and Tb., the appellant's friend, he was able to take the police to the appellant's parental home where the two, were found. The conduct of the complainant immediately she realised that the police were there, how she ran to the door and left the appellant's parental home, the report she made to Constable Mlambo, the fact that she was half dressed when she came out of the appellant's house, and the fact that she was crying at the time or shocked and shaking, all these show that something irregular happened to her. This conduct is inconsistent with the behaviour of a person who had just visited her boyfriend voluntarily and had frequented his place as testified by the appellant and his brother.

[50] The trial court correctly found the witnesses of the State to have been credible witnesses and that their evidence corroborated each other with regard to the circumstances that led to the commission of the offence and what transpired thereafter.

[51] The complainant was a single witness with regard to the rape. She was adamant that she did not know the appellant prior to the incident. She only knew him by sight. The appellant's evidence and that of his brother, Laka, revealed that they both knew little about her. The trial court correctly found that she was not shaken during cross-examination, that her evidence was credible and could be relied upon. The court below further found that her evidence as to how she landed at the appellant's parental home was corroborated in all material respects by T.'s evidence and the evidence of the two police officers who found her with the appellant at his parental home. The trial court correctly found that her evidence with regard to the rape was satisfactory in all material respects.

[52] The appellant and his brother, Laka did not impress the court a *quo* as good witnesses. The court below found them to have been poor witnesses compared to all the state witnesses. Their evidence materially contradicted each other as highlighted in the summary of the evidence *supra.* In my view the trial court correctly rejected their evidence as not being reasonably possibly true.

[53] Prior to the presentation of the DNA evidence the appellant's version was that in the four months he was in a romantic relationship with the complainant, she came to his parental home three times, viz, in November and December 2008 and on 13 January 2009. His version was that on the night of the incident he requested to have sexual intercourse with the complainant but she refused because he did not have a condom. After the presentation of DNA evidence he admitted having sexual intercourse with her without a condom. The trial court correctly found that it could not be probable for the complainant to agree to sexual intercourse without a condom on 12 January 2009 and the subsequent night on 13 January 2009 to refuse to have sexual intercourse without a condom.

[54] I would like to deal with the issue of the introduction of DNA evidence at the late stage of the proceedings, in particular in this matter after the State had closed its case and the appellant had testified. Issues were raised that the appellant did not have a fair trial because of the introduction of DNA evidence at the late stage of the proceedings which he did not know about at the commencement of the trial. The trial court was criticised for allowing the State to reopen its case in order to allow it to present DNA evidence.

[55] In *Shabalala and Others v Attorney General, Transvaal and Others* 1996 (1) SA 725 (CC) the Constitutional Court dealt with s 25(3) of the Interim Constitution in terms of which the accused persons are guaranteed the right to a fair trial. The court in that case applied the section in the context of the State's claim to a blanket privilege against disclosure. It considered judgments from comparable jurisdictions where an accused's right to a fair trial is guaranteed. The Canadian case of *R v Stinchcomble* (1992) 68 CCC (3d) 1 (SCC) 18 CRR (2d) (210) was cited with approval and applied. In the *Stinchcomble* matter the Supreme Court of Canada held that an accused person's right to make full answer and defence, which is one of the pillars of the criminal justice

system, requires full disclosure by the crown of all material it proposes to use at the trial and especially all the evidence which may assist the accused if the crown does not propose to adduce it. A trial judge has the power of reviewing, should the issue be raised with him or her, a refusal or failure to make disclosure. Courts of appeal must of course, consider, whether there is a reasonable possibility that such failure or refusal has affected the outcome or impacted on the accused's rights to a fair trial and, when necessary, in the interests of justice, order a new trial.

[56] The Supreme Court of Appeal in the *Grossberg* matter [2008] JOL 21511 SCA referred to a Canadian Supreme Court decision in *Taillefer* where the following was said at para [81]:

> *"First the onus is on the accused to demonstrate that there is* a *reasonable possibility that the verdict might have been different but for the crown's failure to disclose all of the relevant evidence. The accused does not have the heavy burden of demonstrating that it is probable or certain that the fresh evidence would have affected the verdict ... As this Court held in Dixon:*
>
> > *'In imposing* a *test based on reasonable possibility the court should strike* a *fair balance between an accused's interest in* a *fair trial and the public's interest in the efficient administration of justice. It recognises the difficulty of reconstructing accurately the trial process and avoids the undesirable effect of undermining the crown's disclosure obligations* ..."'

At para [82] he further said:

> *"Second. Applying this test requires that the appellate court should determine that there was* a *reasonable possibility that the jury, with the benefit of all the relevant evidence, might have had* a *reasonable doubt* as *to the accused's guilt ... An overall effort must be made to reconstruct the overall picture of the evidence that could have been presented to the jury had it not been for the crown's failure to disclose relevant evidence. Whether there is* a *reasonable possibility that the verdict might have been different must be determined having regard to the evidence in its entirety."*

[57] After the appellant had testified but before his witness adduced evidence, the State requested a postponement of the trial in order to obtain final results of the preliminary DNA results it had which pertained to exhibits which were not in the docket but were traced by the new investigating officer. Subsequent to receipt of the final results the State launched an application to reopen its case to introduce DNA evidence. From its application it was apparent that on the J88 medical report which formed part of record and handed in by agreement between the parties, it was mentioned that swabs were taken from the complainant. The application was opposed but eventually granted by the court a *quo.* It was clear from the explanation by the State that the docket was at the time handled by a different investigating officer and that the case was postponed on various occasions to obtain the DNA report. In my view after considering the explanation by the State, the granting of the application by the State to reopen its case to introduce DNA evidence cannot be faulted in that it was done in the interest of justice. The non-disclosure of DNA evidence at the commencement of the trial and its introduction at that late stage was not purposeful and the appellant suffered no legally recognisable prejudice thereof. Moreover as stated above, the J88 medical report, which indicated that the swabs were taken from the victim, had been admitted into evidence by consent. It is important to take into account that the appellant was not only convicted on DNA evidence. There was overwhelming evidence against him surrounding the circumstances that led to the commission of the rape and the commission of rape thereof. It is therefore my view that the court a *quo* correctly convicted the appellant of rape. The appeal against conviction is therefore bound to fail.

[58] I now turn to sentence. It is trite that in every appeal against sentence, whether imposed by a magistrate or a Judge, the court hearing the appeal:

> *"(a) should be guided by the principle that punishment is 'pre- eminently* a *matter for the discretion of the trial court', and*
> *(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been Judicially and properly exercised'."*

(See *S v Rabie* 1975 (4) SA at 857D-F.)

[59] The court in *S v Ma/gas* 2001 (1) SACR 469 (SCA) at 478E-H said the appeal court can only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection or where the disparity between the sentence of the trial court and the sentence the appellate court would have imposed had it been the trial court, is so marked that it can be described as *'shocking', 'startling'* or *'disturbingly'* inappropriate. (See also *Madiba v S* [2015] JOL 33686 (SCA).

[60] The following personal circumstances of the appellant were placed on record in mitigation of sentence:

He was 23 years old at the time of the commission of the offence. He was a first offender. He spent two years in custody awaiting trial and was granted bail. He was employed at Oros where he earned R2 500,00 per month. He is not married but has a girlfriend with whom he has three children aged 5, 2 and 9 months. The mother of his children is unemployed. He passed matric and is asthmatic.

[61] The State made the following submissions in aggravation of sentence:

The offence is serious and prevalent in South Africa. The complainant was 14 years old when she was raped. She was forcefully taken away from her boyfriend's parental home in his presence where she thought she was safe. The appellant did not show any remorse throughout her trial. Even if the complainant did not suffer any injuries, rape itself is traumatising.

[62] The Supreme Court of Appeal in *S v SMM* 2013 (2) SACR 292 (SCA) at para [14] at 297-298d remarked as follows regarding sentence:

> *"Our country is plainly facing* a *crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce* a *sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Although Government had introduced various programmes to stem the tide, the sexual abuse of particularly women and children continued unabated. There was consequently increasing pressure on the courts to impose harsher sentences primarily,* as *far* as *the public was*

concerned, to exact retribution and to deter further criminal conduct. It was trite that retribution was but one of the objectives of sentencing and that in certain cases *it played* a *more prominent role than the other sentencing objectives. One could not however only sentence to satisfy public demand for revenge: the other sentencing objectives, including rehabilitation, could never be discarded altogether in order to attain* a *balanced and effective sentence."*

[63] At 345C-D the Supreme Court of Appeal in *S v Chapman* 1997 (3) SACR 341 (SCA) said the following:

"Rape is a serious offence constituting as *it does* a *humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to the dignity, the privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have* a *legitimate claim to walk peacefully in the streets, to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the equality and enjoyment of their lives ... The courts are under* a *duty to send* a *clear message to the accused, to other potential rapists and the community: We are determined to protect the quality, dignity and freedom of all women and we shall show no mercy to those who seek to invade these rights."*

[64] The circumstances that led to the rape of the complainant, a 14 year old girl are aggravating. The way she was forcefully taken from her boyfriend's parental home being threatened with a knife is to disrespect other people's homes. She is a vulnerable, defenceless young woman who did not deserve to be traumatised as she was and go through what she went through. The appellant took advantage of her and her boyfriend. The evidence does not indicate if he used a condom when he had sexual intercourse with the complainant. The fact that no visible physical injuries could be found does not mean that she did not suffer psychologically and emotionally. She testified that her private parts were sore. Surely she suffered some pain as a result of the rape. Even though she was already sexually active, to be raped by a man of the appellant's age young as she was at the time, will continue to impact her psychologically and

emotionally. Her boyfriend, T., could not even protect her because both were threatened by the appellant with a knife. The appellant did not take her from the street. He took her in the sanctity of her boyfriend's home where she thought she was safe. The incident of rape will continue to haunt her for the rest of her life.

[65] The trial court correctly found that there were substantial and compelling circumstances that justified the imposition of a lesser sentence and imposed a sentence of 20 years imprisonment after looking at the totality of the evidence before it. The state's evidence was that the complainant was raped more than once and taking into account her age, the trial court can therefore not be faulted for its findings. In my view it properly considered the principles of sentencing and the evidence before it when it imposed the sentence of 20 years imprisonment. I am not persuaded that the sentence imposed is shockingly inappropriate. In the result the appeal falls to fail.

[66] I therefore make the following order:

66.1. The appeal against both conviction and sentence is dismissed.

_____

M J TEFFO
JUDGE OF THE COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree:

_____

S A THOBANE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

FOR THE APPELLANT M B KGAGARA

INSTRUCTED BY	PRETORIA JUSTICE CENTRE
FOR THE RESPONDENT	J P VAN DER WESTHUYSEN
INSTRUCTED BY	THE DIRECTOR OF PUBLIC PROSECUTIONS
HANDED DOWN ON	28 JUNE 2016