REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
APPEAL NO: A858/2014
DATE: 19 APRIL 2016
In the matter between:

GERHARDUS PIETER OTTO Appellant

And

THE STATE Respondent

JUDGMENT
PETERSEN AJ:
[1] This appeal is twofold:

(1) an appeal by the appellant against conviction on a charge of Rape in contravention of section 3 of the Criminal Law(Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007, with leave of Jordaan J and Strauss AJ, in terms of section 309C of the Criminal Procedure Act, Act 51 of 1977; and

(2) an appeal by the respondent against sentence, with leave of Bam J, in terms of section 31OA of Act 51 of 1977.

[2] The appellant, a 45 year old man is alleged to have sexually penetrated the complainant, a 15 year old girl by inserting his penis into her vagina on 23 July 2011 at [B……] in the regional division of Gauteng. He pleaded not guilty to the charge, tendered a plea explanation in terms of section 115 of Act 51 of 1977 and made admissions in terms of section 220 of Act 51 of 1977. The explanation of plea in brief is that the appellant owns a townhouse in [H…….]-[G…….], with two bedrooms, a lounge and an open plan dining room and kitchen. On 23 July 2011, the complainant, her brother and parents visited the appellant and his family. The appellant, his wife and the complainants' parents dined out that evening, returned at around 23h00pm and he retired for the night in his bedroom. He occupied the one bedroom with his wife, whilst the complainants' parents and her younger brother occupied the second bedroom. His two sons aged 19 years and 16 years slept in the open plan area, as did the complainant. The following morning he found nothing amiss, nothing was said and there

was no adverse behavior on the part of the complainant. On the contrary she had hugged him, kissed him, bade him farewell and left with her family. One month later he was arrested. The appellant admits that the complainant, who was 15 years old at the time, was present at his home at [3 M….. A…... B……, G…..] on 23 July 2011.

[3] The State relied on the oral evidence of four (4) witnesses; and documentary evidence in the form of a J88 medical report. The appellant elected not to testify in his defence and closed his case.

[4] The complainant testified without the assistance of an intermediary. An application by the state in terms of section 170A of Act 51 of 1977 was dismissed by the learned acting regional magistrate. He found that the facts placed before him by the state was insufficient to find that the complainant would be subjected to undue, emotional stress and suffering, if she had to testify in the ordinary course. The court had, however, without application, remarked that the child was a minor and that the proceedings were in camera.

[5] The complainant who had been admonished by the learned acting regional magistrate testified that on 23 July 2011 at around 23h00pm she was lying on a couch with her younger brother when her parents went to sleep. The appellant and his wife remained awake for a while watching television. Later his wife retired to the bedroom and he remained. She felt something on her upper body not knowing what it was and did not open her eyes to look. The sensation she felt stopped, returned and upon opening her eyes she saw the appellant. In her evidence in chief she testified that she could not recall what happened physically but for a few aspects. The appellant kissed her, she kept her mouth closed and said no. He left for the bathroom and she turned to face the backrest of the couch.

[6] The appellant returned and told her to face him. She initially refused to do so. However, upon turning her head to look at him, he placed his penis in her face. He instructed her to sit on the couch. She sat on the left side of the couch whilst he sat next to her. He told her to suck his penis, she initially declined, but thought that he would leave her be, if she but only once played along. She sucked his penis and chocked on it when he inserted it too deep into her mouth. She stood up and he led her to the kitchen.

[7] The appellant pulled down her pants and placed her on a kitchen counter top. He inserted his penis, as would appear from the cross examination for the first time, into her vagina, moving to and fro. She climbed off the kitchen counter top and he pushed her against it so as to make her lay on it. He inserted his penis from behind into her anus and it was very painful. At this point of her evidence she took time to ponder on what happened further, in her words loosely translated “I am now trying to remember”

and then testified that it all was over. She saw blood on the floor which the appellant wiped away with a cloth.

[8] They returned to the lounge where the appellant instructed her not to tell anybody or he would go to jail. He requested her cellular phone number which she gave to him. At around 03h00am they went to sleep. The next morning after spending about an hour at the appellant's home she left for home with her family. The appellant communicated with her thereafter via SMS and telephonically. The communication stopped when her cellphone was stolen.

[9] On Wednesday 27 July 2011 she visited her grandmother and felt the need to disclose to her what had happened. She then in fact disclosed to her grandmother what had happened and requested her not to tell anyone.

[10] The complainant's grandmother testified that the complainant had visited her on 27 July 2011 at around 16h00pm. As the complainant sat at the table doing her homework she could see that she was very anxious. Eventually she told her that she needed to tell her something as something big had happened. Upon enquiring what had happened she initially did not want to talk about it but after some prodding, she said her uncle had raped her. She was asked what had happened and explained that she was lying on a couch, seemingly with her back to the couch, when her uncle came to her and bothered her. He then touched her on parts he was not supposed to. He took out his private part and showed it to her. She turned her back on him and told him to leave. He continued touching her, she tried to stand up but he instead pushed her to the kitchen where it happened. The complainant asked her not to tell anyone because she was scared of her nephews. She told the complainant that she had no choice but to tell what happened. She phoned her daughter and reported what she was told. Her daughter in turn contacted the complainants' parents. Her other daughter took the complainant to the police station and to the Doctor.

[11] The complainant's father testified that when they returned from dinner on the 23 July 2011, he retired to the bedroom with his wife, whilst the appellant and his wife sat on one couch watching television; and his daughter slept on another couch. The appellant's two sons were sleeping on a mattress in an open area next to the lounge which is separated from the lounge by a curtain. He had observed something was amiss with his daughter on the morning of 24 July 2011. She was particularly quiet and did not appear to be herself.

[12] Doctor Ferras Martinez a medical practitioner at Laudium Clinic testified that he examined the complainant on 01 August 2011 at around 17h45. Upon examination he noted that the complainant had no previous history of sexual intercourse, that the first date of her last menstruation cycle was 21 July 2011 and that it had lasted 5 days. The vaginal examination showed that the hymen was annular and swollen and there was a tear at position 9. His conclusion was that there had been penetration possibly by an erect penis which penetration extended past the labia majora. The anal examination revealed a fissure at position 12. He noted that there was no reported history of constipation.

[13] Under cross examination the complainant was confronted with her statement made to the police, the evidence in statements deposed to by her grandmother and

father; and the medical evidence. As a result, the appellant submits that the following evidence constitutes material contradictions:

[13.1] The complainant testified in chief that she was awake when she felt her upper body being touched, whilst in cross examination testifying that she was also touched between her legs. In her statement to the police she stated “and then I fell asleep on the sofa and then while I was sleeping I felt someone touching my breast.” According to her father she reported to him that the appellant had sucked her breasts.

[13.2] The complainant testified in chief that she was pushed to the kitchen by the appellant, whilst in her statement to the police she stated “I then stood and he kissed me again and pulled me to the kitchen.” The complainant testified that she was picked up by the appellant from the table and placed on the ground whilst in her statement to the police she said “... I climbed off from the desk."

[13.3] The complainant testified that she was made to lay on a desk at least 90mm high and that the appellant penetrated her while standing barefoot on the ground, a feat it is submitted is not possible. The learned acting regional magistrate despite placing on record that the table would be measured never had it done.

[13.4] The complainant testified in chief that she permanently suffered from constipation. The doctor testified that an anal fissure takes very long to heal and had queried whether the injury was penetration related and somehow found that there was no history of constipation.

[14] The appellant submits that the following evidence constitutes improbabilities in the evidence of the complainant:

[14.1] During cross examination the complainant was given ample opportunity to explain exactly how she was dressed. She could not relate that she was, at the time of the incident, in the second day of her menstrual cycle and had to be reminded in cross examination. The question begged is how the complainant could not remember this. The submission goes that if she was raped whilst in the second day of her menstrual cycle with blood left on the floor after the rape that she gets dressed and lays behind the appellant on the couch smoking a cigarette, smoking which she does not want her parents to know about. It is submitted that one would have expected her to go to the bathroom to wash the blood from her legs before engaging in the relaxing act of smoking.

[14.2] That the behavior of the complainant after the alleged rape of voluntarily spending further time alone with the appellant by laying at his back watching television and smoking a cigarette raises a host of questions which tends to cast serious doubt on

the probability of the rape allegation. S v Ncube[1] is relied upon. “[19] This then leads to the inescapable conclusion that after the alleged rape the complainant voluntarily remained alone in the appellant’s company for a considerable period of time. This conduct, in my opinion, raises a host of questions which tend to throw serious doubt on the probability of the rape allegation. ”

[14.3] The complainant alleged that she was anally penetrated, whilst the doctor queried if the anal injury was related to penetration. The submission is that the doctor’s evidence does not support the complainant’s version.

[14.4] It is highly improbable that the appellant’s sons, with the television’s light against the wall, in the same open area, would not have heard the complainant stifling her talking and subsequently being raped.

[14.5] There is no reasonable explanation for the complainant’s failure to report the incident to her parents, aunt or nephews at the first reasonable opportunity after she had been raped, considering that she had not been threatened should she report the incident.

[14.6] The complainant’s grandmother testified that she was requested not to tell anyone about the rape as she was scared of her nephews who were present at the time. The complainant did not testify about being scared of her nephews. It is submitted that this is indicative that she probably feared her nephews knowledge that no rape occurred.

[14.7] The complainant’s grandmother testified that her daughter is a pharmacist and that the pharmacist had requested on the Wednesday that “they look at the complainant for AIDS and “daardie goetertjies”. The state failed to call the pharmacist who requested that the checks and other things be conducted on the complainant, to explain exactly what the checks involved and if those tests could have caused the injuries. The complainant only saw the doctor 5 days after these checks/tests, which accords with the doctor’s evidence that the injuries were 5 days old.

[15] Before proceeding to a consideration of the issues, it is opportune to deal with the manner in which the prosecution was dealt with. In S v Mponda[2] the learned judge noted grave concerns about the formulation of charge sheets. He remarked, inter alia, as follows: “It is most unsatisfactory that too frequent sufficient care is not paid to the appropriate formulation of the charge sheet, especially in serious cases where the potential sentence faced by the accused person can be of the highest severity, particularly where a multiplicity of counts is involved.” “The slovenly formulation of the charge sheet is potentially prejudicial not only to the accused, but also to the administration of justice.” “An inadequately formulated charge sheet may well, by its failure to inform him or her of the charge with sufficient detail to answer it, infringe an accused person’s basic constitutional right to a fair trial.” “The prejudice to an accused person in the circumstances described is illustrated by the magistrate’s remarks during sentencing from which it is apparent that notwithstanding the content of the charge sheet the appellant was treated for sentencing purposes as having recurrently raped the complainant. This was a material misdirection.” “The administration of justice is

[1] 2007 (1) All SA 335(SCA) para 19
[2] 2007 (2) SACR 245 (C)

potentially prejudiced because the allegation of only a single count of rape in the charge sheet, where the evidence supports a multiplicity of counts, means that the properly convicted accused can be sentenced only as a single count offender. As mentioned this is cause for particular concern in matters where the legislature has determined that offenders convicted of multiple counts should receive prescribed higher minimum sentences. It is liable to obstruct the achievement of legislative objects in the fight against crime and to bring the criminal justice system into public disrepute" "A Charge sheet must set forth the relevant offence in such a manner and with such particulars as to the time and place at which the offence is alleged to have been committed as may reasonably sufficient to inform the accused of the nature of the charge." Nugent JA was more succinct in S v Vilakazi[3]: "The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important..'' In this matter, the pro forma charge sheet, the drafting of the charge by the prosecutor and the cursory manner in which the evidence was led demonstrates the concerns raised by Nugent JA. The charge refers to section 281 of Act 51 of 1977 which is not applicable to the charge of rape and appears rather to be a reference to the competent verdicts to Rape in section 261 of Act 51 of 1977. Section 52 of Act 105 of 1997 was repealed by section 2 of Act 38 of 2007.[4] If the prosecutor had carefully prepared for the matter, the evidence of the complainant that she had been made to suck the penis of the appellant, that her breasts or upper body had been touched and that she had been kissed by the appellant should have been reflected in the charge and/or additional charges in contravention of Act 32 of 2007 should have been proffered against the appellant. The evidence in chief of the complainant extends over 4 and half pages. Many of the issues were traversed only in cross examination. This appeal accordingly calls for "accurate understanding and careful analysis of the evidence.

[16] The appellant did not testify in his defence; his version as put to the complainant was tantamount to a bare denial and untested. No reliance can be placed on it insofar as it differs from the evidence of the complainant on the issues in dispute. The state's evidence is the only evidence to be considered against the onus of proof, beyond a reasonable doubt, which rests on the state. In S v Boesak[5] Langa DP, said: "293E-F: The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to the decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion will be justified will depend on the weight of the evidence.

[17] The state had to prove beyond a reasonable doubt that the appellant raped the complainant. The complainant's evidence called for a dual approach; a cautionary approach as a single witness to the alleged rape with reference to section 208 of Act 51

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[3] 2009 (1) SACR 552 (SCA) at [21]

[4] [S. 52 amended by s. 34 *(a), (b), (c), (d), (e)* and *(f)* of Act 62 of 2000 and repealed by s. 2 of Act 38 of 2007.]

[5] 2001 (1) SA 912 (CC) at 293E-F, S v Brown and Another 1996 (2) SACR 49 (NC)

of 1977; and on the basis of the cautionary rule applicable to the evidence of a child.
[18] Cautionary rules are rules of practice (so called judge-made rules) calling on the adjudicator of fact to warn himself to be cautious when evaluating evidence which experience has shown to require circumspection. S v M[6]. They are no more than guidelines in the evaluation of evidence. In S v J 1966 (1) SA 88 (LA) 89F-H and S v Snyman 1968 (2) SA 582 (A) 585H the Court remarked that: "... the exercise of caution should not be allowed to displace the exercise of common sense". On the approach to the evidence of a single witness, the dictum of De Villiers JP in R v Mokoena[7], often misconstrued, is often relied upon. The dictum has its origins in the following passage: "Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by [the section], but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect(my emphasis). Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc."
[19] A historical overview of the dictum highlights that a common sense approach to the dictum is called for. In R v Nhlapo[8] the court placed the dictum in context, adding what De Villiers JP said at 17: "it does not mean . . . that an appeal must succeed if any criticism, however slender, of the witness' evidence were well-founded". Broome JP was critical of the dictum "as a proposition of law" in R v Abdoorham[9], finding it "entirely unhelpful". He accepted that a court "may be satisfied that a witness is speaking the truth notwithstanding that he is in some respects an unsatisfactory witness". Macdonald AJP in R v J[10] held the view that the cautionary rules are "no more than guides, albeit very valuable guides, which assist the court in deciding whether the Crown has discharged the onus resting upon it", adding that "the exercise of caution should not be allowed to displace the exercise of common sense" and once a judicial officer has anxiously scrutinised the evidence of a single witness he should not be "swayed by fanciful and unrealistic fears". In S v Webber[11], Rumpff JA at 758G-H: "dis natuurlik onmoontlik om 'n formule te skep waarvolgens elke enkele getuie se geloofwaardigheid vasgestel kan word, maar dit is noodsaaklik om met versigtigheid die getuienis van 'n enkele getuie te benader en om die goeie eienskappe van so 'n getuie te oorweeg tesame met al die faktore wat aan die geloofwaardigheid van die getuie kan afdoen." In S v Teixeira[12] the court stressed that, in evaluating the evidence of a single witness, "a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities". On the cautionary rule applicable to the evidence of children it was said in R v Manda[13]: "The dangers inherent in reliance upon the uncorroborated evidence of a young child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps, to suspicion. It seems to me

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6 1992 (2) SACR 188 (W) 191A-B
7 1932 OPD 79 at 80
8 1953 (1) PH H11 (A)
9 1954 (3) SA 163 (N) at 165E
10 1966 (1) SA 88 (SRA) at 89F and 90E-F
11 1971 (3) SA 754 (A)
12 1980 (3) SA 755 (A) at 761
13 1951 (3) SA 158 (A) at 163E - F

that the proper approach to a consideration of their evidence is to follow the lines adopted in the case of accomplices. . . . The trial court must fully appreciate the dangers inherent in the acceptance of such evidence and where there is reason to suppose that such appreciation was absent a court of appeal may hold that the conviction should not be sustained. The best indication that there was proper appreciation of the risks is naturally to be found in the reasons furnished by the trial Court." The complainant was a child mere months shy of her 16th birthday. On sentence it is submitted that this factor be considered when considering deviating from the mandated sentence of life imprisonment, which would have been downgraded to 10 years imprisonment if she was 16 years old. On the same token the argument may then be that the cautionary approach to her evidence as her child should be approached only on the footing as a single witness, nothing more and nothing less.

[20] The contradictions inherent in the evidence in chief of the complainant against the statement made to the police are inescapable. It is likewise clear that the report made by the complainant to the first report, her grandmother and the version given to her father lacks consistency. The weight to attach to those contradictions and inconsistencies, in the totality of the evidence, bears careful scrutiny. The learned regional magistrate gave a detailed comprehensive judgment dealing with his views on these issues, preferring to accept that they were not so material to affect the credibility of the complainant.

[21] The inconsistencies and contradictions logically raise questions any reasonable person would beg. The most obvious being why the complainant, if the sexual intercourse was non-consensual would in a modest two bedroomed townhouse where her cousins were lying within earshot of the couch where she lay and the kitchen; and where her parents and aunt occupied bedrooms not far from the lounge, not scream out for help at any stage of the various acts of penetration and sexual assault. The complainant's proffers an explanation for this; if she had screamed she would have been heard, but she chose to remain silent because she knew what her father would do: "My pa sal hom geslaan het en goeters dan sou my pa opgeeindig het in die tronk want ek weet my pa kan baie kwaad raak en goed en hy kan optroppelis raak" See page 29 lines 17-22. In the face of the authority over her by her uncle, she was concerned about the consequences which could flow for her father.

[22] When the sexual intercourse in the kitchen was complete, the complainant returned to the lounge where she was laying on the couch smoking with the appellant and remaining awake until around 3am. Whilst lying at the appellant's back or any stage preceding that, he did not threaten the complainant or her family with death or harm if she spoke out, but played on her emotions that he would go to prison. He later reinforced this by making telephonic contact with her. He abused her trust. The complainant's evidence on the rape at first glance appears improbable. The matter, however, does not end there. The complainant's evidence on the sequence of events from the kissing, the sucking of the appellant's penis, the vaginal and anal penetration,

the smoking of cigarettes whilst lying on a couch with the

[23] Her uncontested evidence on the sexual penetration must be seen against the backdrop of the attack on the medical evidence. The attack is premised predominantly on the anal fissure and the evidence of the complainant that she suffered from chronic constipation as a child, whilst the doctor noted no such history in the J88. The complainant's evidence carefully considered does not attest to the chronic constipation being a condition existent at the time of the alleged rape. Nothing material turns on his noting no history of chronic constipation in light of the complainant's evidence. Whilst latching onto this aspect of the medical evidence, the swelling of the hymen and the fresh tear at position 9 of the vagina which the doctor found to be consistent with penetration by penis past the labia majora is hypothesized on the failure to call the pharmacist who proposed a certain course of action be taken. One cannot embark speculative hypothesis on what may have happened on the course of action may have proposed. The uncontroverted evidence is that the complainant had been examined only by the doctor - the only course of action on record. The doctor's findings are consistent with the evidence of the complainant that she had been vaginally and anally penetrated.

[24] Whilst the appellant did not testify, it is evident from the cross examination that he disputed sexual intercourse with the complainant. In S v York[14] the court stated: "It is always, of course, for the prosecution to prove the absence of consent. This entails that even if the defence, as here, is that no intercourse took place, the court must, in the adjudicative process, be alive to the possibility that there might have been consent nonetheless. What requires emphasis, though, is that without an evidential basis such a possibility would be no more than speculative and one would be free to disregard it in coming to one's eventual conclusion. And it need hardly be said that an accused's failure to allege consent will be weighed in the scales when considering whether the postulated possibility is reasonable or not". Nugent AJA confirmed this principle in S v Vilakazi supra at [47] as follows: "Once having rejected the evidence of the appellant the magistrate appears to have considered that to be the end of the matter and did not pertinently direct his mind to whether all the elements of the offence had been established...In the case of rape those elements include both absence of consent and knowledge by the accused of the absence of consent (or at least knowledge of that possibility.) As Howie P said in S v York in relation to the absence of consent: "It is always, of course, for the prosecution to prove the absence of consent. This entails that even if the defence, as here, is that no intercourse took place, the court must, in the adjudicative process, be alive to the possibility that there might have been consent

[14] 2002 (1) SACR 111 (SCA) at [19]

nonetheless. That applies as much to the presence of mens rea and this court said as much in S v S. In that case the accused denied that sexual intercourse had occurred, in circumstances in which an admission to that effect would have exposed him to conviction under the Immorality Act. After finding that sexual intercourse had indeed occurred the court said the following (my translation): “However, this finding is not by itself sufficient to bring home a conviction of rape. Although the appellant had sexual intercourse with the complainant without her consent and against her will he is not guilty of rape if he bona fide believed that she consented. In the present case the appellant does not allege that he believed that the complainant consented to intercourse and he could not allege that, given his denial that he had intercourse with her. That does not relieve the State however of the obligation to prove mens rea, although the appellant's false denial that intercourse occurred makes the State's task in that regard considerably easier.”

[25] In light of the evidence of the complainant with the contradictions and inconsistencies inherent therein and the fact that sexual intercourse was disputed, this court is enjoined to consider the issue of consent insofar as the elements of the crime of rape is concerned.

[26] The central question, in my view, is did the complainant consent to the sexual intercourse which may render the appellant liable to a conviction under the competent verdict of “statutory rape” rather than rape. Counsel for the appellant conceded that the appellant may be liable to a conviction on the competent verdict. A careful conspectus of the totality of the complainant’s evidence on the question of consent demonstrates the following:

[26.1] When the appellant kissed the complainant the first time she refused and said no. At page 23 lines 14-16 she says “okay, en toe het hy my ewe skielik begin soen, maar ek het my mond toegehou, ek het geweieren ek het gese nee”(my emphasis). The appellant left for the bathroom and the complainant turned her back to the television.

[26.2] The appellant returned from the bathroom and told the complainant to look at him. She initially said no. At page 23 lines 24 she says “Ehm, en toe het hy, toe kom hy terug, toe se hy vir my ek moet hiernatoe kyk. Toe se ek vir horn, nee, ek wil nie.”

[26.3] The complainant eventually turned her head and was confronted by the appellant’s penis in her face. He told her to sit next to him and did not ask her to suck his penis, but told her, in other words instructed her, to suck his penis. She initially said no but then thought he would leave her be if she but on that one occasion played

along. At page 24 lines 5-6 she says “En toe het ek vir die eerste keer nee gese. Toe dink ek maar net vir ‘n slag as ek net saamspeel sal hy my dalk uitlos.” Under cross examination the complainant likened what the appellant asked her to do to having been somewhat forced. At page 35 lines 20-25 she says in response to a question on force: “Maarjy se “vra”, want hoekom ekjou vra, die, hey het jou nie geforseer of, of geslaan of seergemaak of...hy het nou vir jou gevra? - Nee, hy want dit is waar ek gedink het, okay, ek, ek moet net saamspeel da thy my net kan uitlos, maar hy, hy het my soort van geforseer, maar gev..maar net vra, hy het nie soos my seergemaak or nader getrek of iets nie.”

[26.4] When the complainant chocked on the appellant’s penis she stood up, he stood behind her and pushed her to the kitchen. She clarified the contradiction in her statement to the police maintaining that she had been pushed.

[26.5] When the appellant placed the complainant on the kitchen counter top(kombuis rak) he inserted his penis in her vagina(privaatheid) and moved to and fro. She felt pain and the appellant helped off the counter top. She clarified her statement to the police that she did not climb off the counter herself.

[27] Section 1(3) of Act 32 of 2007 has codified the common law principles applicable to consent and defines the words “voluntary or un-coerced” as: “(3) Circumstances ... in respect of which a person (“B”) (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration . . . include, but are not limited to, the following: (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act,”

A “sexual act” is defined in section 1(1) as including an act of sexual penetration or sexual violation, and the word “complainant” is defined as “the alleged victim of a sexual offence”.

Snyman: Criminal Law (6th ed) at page 352 opines “If Y (the complainant or victim) had offered physical resistance. or loudly proclaimed his or her opposition (or both) to the proposed intercourse, there is, of course, no problem in holding that the act of sexual penetration took place without consent. It is, however, wrong to assume that a court may find that the act took place without Y’s consent only if he or she had offered actual physical resistance or had expressly stated or shouted his or her opposition to the act(my emphasis). Just as Y’s consent to the act may be signified either expressly or tacitly (by implication), her refusal to consent may, likewise, be signified either expressly or tacitly.” Section 1(2) and

(3) of Act 32 of 2007 as Snyman summarises it provides: “For consent to succeed as a defence, it must have been given consciously and voluntarily, either expressly or tacitly, by a person who has the mental ability to understand what he or she is consenting to, and the consent must be based on a true knowledge of the material facts relating to the intercourse” Burchell : Principles of Criminal Law (3rd ed) says “South African practice...widened the offence, the essence of which is now that

intercourse should have occurred without consent, whether the lack of consent was due to force or fear or fraud or incapacity to consent. On this approach the fact that the woman did not physically resist and passively submitted to intercourse is not directly relevant, the central question being whether it was in fact her present and freely made decision there and then to engage in sexual intercourse. Consent deprives the penetration of a criminal character. To have this effect the consent must have been (a) real and (b) have been given before the penetration occurred.

[28] The legal principles applied to the complainant's evidence on consent as highlighted supra, demonstrates that the consent by the complainant was neither real, given voluntarily nor demonstrated tacitly. The appellant irrespective of denying intercourse could not have reasonably believed that the complainant had consented to the kissing, the sucking of his penis or the vaginal or anal penetration, all acts which on their own constitute either sexual penetration or sexual violation.[15] In that regard he acted both unlawfully and had the requisite mens rea to rape the complainant.

[29] In the premise, the appeal against conviction on a charge of rape in contravention of section 3 of Act 32 of 2007 stands to be dismissed.

THE APPROACH TO THE APPEAL AGAINST SENTENCE BY THE STATE

[30] The approach to an appeal against sentence was reiterated in the locus classicus of S v Malgas[16] where the Court said: "The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large...".

[31] It was conceded at petition that the learned regional magistrate misdirected himself on sentence. Counsel for the appellant during argument, however, submitted that the appellant had not been apprised of the applicability of the mandated sentence of life imprisonment. The issue taken is that the learned acting regional magistrate had not explained the minimum sentence of life imprisonment to the appellant and

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[15] **"sexual penetration"** includes any act which causes penetration to any extent whatsoever by—*(a)* the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; **"sexual violation"** includes any act which causes— *(a)* direct or indirect contact between the—(ii) mouth of one person and— *(bb)* the mouth of another person;

[16] 2001 (1) SACR 469 (SCA) at 478D at [12]

that his attorney's submissions to the learned acting regional magistrate did not suffice. The submission is made with reliance on the decision of S v Ndlovu[17]. A careful reading of Ndlovu on this point call for a reading of paragraph [11] and paragraph [12]:

"[11] Whilst it is desirable that the charge-sheet should set out the facts the State intends to prove in order to bring an accused within an enhanced sentencing jurisdiction, to do so is not essential. R v Zonele and Others 1959 (3) SA 319 (A) at 323A - H; S v Moloi 1969 (4) SA 421 (A) at 424A - C. But in a recent judgment of this Court Cameron JA reminds us that an accused person has a constitutionally guaranteed right to a fair trial that embraces a concept of substantive fairness. He said the following: 'The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force". (S v Zuma and Others 1995 (1) SACR 568 (CC) (1995 (2) SA 642; 1995 (4) BCLR 401) in para [16], drawing a contrast with S v Rudman and Another, S v Mthwana 1992 (1) SA 343 (A) at 377; and see Sanderson v Attorney-General, Eastern Cape 1998 (1) SACR 227 (CC) (1998 (2) SA 38; 1997 (12) BCLR 1675) in para [22], per Kriegler J.) The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said (in S v Zuma and Others 1995 (1) SACR 568 (CC) (1995 (2) SA 642; 1995 (4) BCLR 401) in para [16]), is broader than the specific rights set out in the subsections of the Bill of Rights' criminal trial provision (Constitution, s 35(3)(aJ - (o)).

One of those specific rights is "to be informed of the charge with sufficient detail to answer it" (Constitution, s 35(3)(aJ). What the ability to "answer" a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under (the Act) should be clearly set out in the charge- sheet.' (Michael Legoa v The State, case No 33/2002, judgment delivered on 26 September 2002,* in para [20].) Cameron JA declined, however, to lay down a general rule that the charge-sheet must in every case recite either the specific form of the scheduled offence (in that case dealing in dagga with a value of more than R50 000) with which an accused is charged, or the facts the State intends to prove to establish it. He held, in the end, that: 'Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will depend on a vigilant examination of the relevant circumstances' (in para [21]).

[12] The following extract from the judgment of the Full Court in S v Seleke en Andere 1976 (1) SA 675 (T) at 682H was quoted with approval by Cameron JA (his translation from Afrikaans): 'To ensure a fair trial it is advisable and desirable, highly desirable in the case of an undefended accused, that the charge-sheet should refer to the penalty provision. In this way it is ensured that the accused is informed at the outset of the trial, not only of the charge against him, but also of the State's intention at conviction and after compliance with specified requirements to ask that the minimum sentence in question at least be imposed.[1] The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that

[17] 2003 (1) SACR 331 (SCA)

an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly."

[32] In Legoa Cameron JA "declined to lay down a general rule that the charge-sheet must in every case recite either the specific form of the scheduled offence (in that case dealing in dagga with a value of more than R50 000) with which an accused is charged, or the facts the State intends to prove to establish it."

[33] Counsel for the respondent submits that prosecutors are advised to refer to provisions of section 51 of Act 105 of 1997, in what would be a catch all phrase. If the state were to refer only to section 51(2) of Act 105 of 1997 and the evidence proves the applicability of section 51(1), the state would be bound by its error. The logic of this submission is demonstrated by what happened in S v Makatu[18], where the state relied on section 51(2) but the appellant was sentenced under the provisions of section 51(1). The appeal against sentence was upheld on the basis of a material misdirection. Lewis JA said: "[7] As a general rule, where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder, it should state this in the indictment. This rule is clearly neither absolute nor inflexible. However, an accused faced with life imprisonment - the most serious sentence that can be imposed - must from the outset know what the implications and consequences of the charge are(my emphasis). Such knowledge inevitably dictates decisions made by an accused, such as whether to conduct his or her own defence; whether to apply for legal aid; whether to testify; what witnesses to call; and any other factor that may affect his or her right to a fair trial. If during the course of a trial the State wishes to amend the indictment it may apply to do so, subject to the usual rules in relation to prejudice."

[34] Upon a vigilant examination of the record, the following is reflected at page 12 in the interaction between the learned acting regional magistrate and the appellant's legal representative:

"HOF: Mnr Mickeljohn, kan u vir my bevestig of u klient bewus is van die bepalinge van artikel 51 wet 105 van. 1997 met betrekking tot minimum vonnisse?

MNR MICKELJOHN: Ek bevestig Edelagbare en ek het dit met hom in konsultasie bespreek en die minimum vonnisse ten opsigte van hierdie spesifieke aanklag is dan ook aan hom verduidelik."

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[18] 2006 (2) SACR 582 (SCA) at [7]

[35] The use of the words “bepalinge van artikel 51 wet 105 van 1997 met betrekking tot minimum vonnisse” in the plural lends itself to no other interpretation than an explanation of the minimum sentences. Section 51 includes life imprisonment. The duty of the presiding judicial officer is to satisfy himself that the accused has been appraised of the minimum sentences. Mr Mickeljohn as an officer of the court confirmed to the learned acting regional magistrate that he had explained the minimum sentences to the appellant which he understood. It is accordingly my view that the learned acting regional magistrate complied with his duty to satisfy himself that the minimum sentences had been explained.

[36] I accordingly find that the appellant had been apprised of the sentence of life imprisonment. We are thus at large to consider sentence afresh subject to the sentencing jurisdiction applicable to the regional court in terms of section 51(1) read with subsection 3(a)[19] of Act 105 of 1997.

THE SUBMISSIONS ON SENTENCE

[36] The respondent (appellant on sentence) submits that:

[36.1] The offence is serious.

[36.2] The attack by the appellant must have had a significant impact on the victim.

[36.3] The appellant showed no remorse for his actions.

[36.4] The appellant violated a position of trust.

[36.5] The appellant has a previous conviction for assault with allegations of abuse of his family.

[36.6] The appeal against sentence should be upheld and replaced with a sentence of life imprisonment.

[37] The appellant(respondent on sentence) submits that:

[37.1] The sentence of life imprisonment would be disproportionate to the crime, the offender and the interests of society.

[37.2] The following should be found to be substantial and compelling circumstances having a cumulative effect.

[37.2.1] The appellant is the primary caregiver of his family;

[37.2.2] There were no serious physical injuries suffered by the complainant;

[37.2.3] The appellant at the age of 42 has had no serious brushes with the law and his stable employment and family life are not indicative of an inherently lawless character;

[37.2.4] The only feature that aggravated what is a serious crime is the complainant’s age. The complainant’s age being close on 16, would not justify the sentence of life imprisonment when 10 years imprisonment would otherwise have been applicable;

[37.2.5] The appellant is a first offender.

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[19] Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to in Part I of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years."

THE PERSONAL CIRCUMSTANCES OF THE APPELLANT

[38] The personal circumstances of the appellant are relevant in determining any mitigating factors and their impact on sentence. The only mitigating factors which stand out are that the appellant is employed, is the sole breadwinner and not primary caregiver of his family and a first offender. The personal circumstances of an offender are important factors when the likelihood of rehabilitation is considered. The appellant elected to exercise his right to remain silent at trial, as a constitutional right. At most it is clear that he denies any involvement in the crime. The appellant within his prerogative and right verbalizes no remorseful.

THE OFFENCE

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[39] In S v Rabie Holmes JA said “one should guard against allowing the heinousness of the crime to exclude all other relevant considerations. What is needed is a balanced and judicial assessment of all the relevant factors".

[40] The appellant abused the relationship of trust of an uncle over his niece. He callously and unperturbed by the presence of his sons and family members in the house, satisfied his sexual desires with the young complainant. He violated the innocence of the complainant both physically as she was a virgin; and emotionally by telling her he would be imprisoned if she spoke out, perpetuating this by taking her cellphone number and phoning her to remind her. The complainant’s injuries it is submitted by the appellant are such that they were not serious. In Mudau v The State[20] Salduker JA said: “In respect of the severity of the rape, referred to in the preceding paragraph, it is plain from the medical report that the doctor did not find any serious physical injuries (see para 6 above). And there was no further violence in addition to the rape. Similarly in S v Nkawu 2009 (2) SACR 407 (ECG) the complainant had not suffered any serious injuries as a consequence of being raped. In considering whether substantial and compelling circumstances exist justifying departure from the prescribed sentence, Plasket J was called upon to consider the provisions contained in s 51(3)(‹a>4›)(‘>) °f the Criminal Law Amendment Act, 105 of 1997, as far as the absence of serious physical injuries to the complainant was concerned. That subsection provides that when a court sentences for rape ‘an apparent lack of physical injury to the complainant’ shall not be regarded as a substantial and compelling circumstance. Plasket J, expressed the view, correctly as I see the matter, that a literal interpretation of that provision would render it unconstitutional, since it would require judges to ignore factors relevant to sentence in crimes of rape which could lead to the imposition of unjust sentences. I agree with the learned Judge that ‘to the extent that the provision restricts the discretion to deviate from a prescribed sentence in order to ensure a proportional and just sentence it would infringe the fair trial right of accused persons against whom the provision was applied’. He correctly in my view concluded that the proper interpretation of the provision does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along

[20] (764/12) [2012] ZASCA 56 (9 May 2013) [26]

with other relevant factors, to arrive at a just and proportionate sentence. To this one must add that it is settled law that such factors need to be considered cumulatively, and not individually."

THE INTEREST OF SOCIETY OR PUBLIC INTEREST

[41] Societal interests in serious crimes involving the abuse of woman and children has been the subject of attention by the SCA on a regular basis. In Mashigo & another v The State[21], on a rape charge highlighting the status quo 21 years into our young democracy; Bosielo JA said:

"It is sad and a bad reflection on our society that 21 years into our nascent democracy underpinned by a Bill of Rights, which places a premium on the right to equality (s 9) and the right to human dignity (s 10), we are still grappling with what has now morphed into a scourge to our nation...Needless to state that courts across the country are dealing with instances of...abuse of women and children on a daily basis. Our media in general is replete with gruesome stories of ...women and child abuse on a daily basis"

[42] In S v Kekana[22] it was held: "Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished...Olivier JA held in S v P[23]: "The right of children are all too frequently and brutally trampled over in our society. Abuse of children is sadly an all too common phenomenon. Those guilty of violating the innocence of children must face the wrath of the courts"

[43] In R v Karg[24] the court held: "It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentence that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured parties may feel inclined to take the law into their own hands".

[44] Government and society are alive to the scourge of abuse of children. Despite all positive attempts, we are no closer to eradicating this evil in our society. Courts' operate in society and must through their sentencing discretion promote respect for the law. A message must be sent to others of like mindedness that "we are determined to protect the equality, dignity and freedom of all and we shall show no mercy to those seek to invade those rights"[25]

COMPARATIVE ANALYSIS

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[21] (20108/2014) [2015] ZASCA 65 (14 May 2015) at para [31]
[22] (629/2013) [2014] ZASCA 158 (1 October 2014) para [20]
[23] 2000(2) SA 656 (SCA) at 660D-E
[24] 1961 (1) SA 231 (A) at 236 .
[25] S v Chapman 1997 (3) SA 341 (SCA)

[45] The respondent relies on Kwanape v S as authority to urge this court to impose life imprisonment as mandated by the legislature. The appellant relies on S v Mahamotsa 2002 (2) SACR 436 (SCA) at 436c-d and S v Nkomo 2007 (2) SACR 198 (SCA) to deviate from life imprisonment. Marais JA said in Malgas at [21] “It

would be foolish of course, to refuse to acknowledge that there is an abiding reality which cannot be wished away, namely, an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust. To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting someone who has not been allowed to see the colour blue to appreciate and gauge the extent to which the colour dark blue differs from it. As long as it is appreciated that the mere existence of some discrepancy between them cannot be the sole criterion and that something more than that is needed to justify departure, no great harm will be done."

[46] Bosielo JA in S v PB[26], said: "Van den Heever JA put it more succinctly in S v D 1995 (1) SACR 259 (A) at 260e when she stated that: 'I agree that decided cases on sentence provide guidelines not straightjackets.' At par [18]: "Our everyday experience in the criminal courts proves that, save where multiple accused are charged as co-accused in one case for having committed the same offence, no two cases present exactly the same factual matrix. To compound the problem further, it is hard to imagine two accused persons who have exactly the same personal circumstances...Evidently, these are important matters which must be considered in the determination of an appropriate sentence as they have a direct bearing on what an appropriate sentence should be. It follows in my view, that the sentence in such matters will be different because of the variation in personal circumstances of the accused, the nature and gravity of the offence and all other factors germane to sentencing."(mv emphasis). Petse JA in Marota v The State[27] said: "And as this court made plain in S v Fraser 1987 (2) SA 859 (A)7 '. . . it is an idle exercise to match the colour of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence'. Ultimately each case must be decided in the light of its peculiar facts encompassing the personal circumstances of the convicted person."(my emphasis) Ultimately each matter must be considered on its own unique facts.

THE SUITABILITY OF THE SENTENCE OF LIFE IMPRISONMENT

[47] The sentence of life imprisonment is the ultimate sentence a judicial officer may in his or her discretion impose.[28] To understand its effect: section 73(1)(b) of the

[26] 2013 (2) SACR 533 (SCA) [16]-[18]
[27] (300/15) [2015] ZASCA 130 (28 September 2015)
[28] S v Bull 2001 (2) SACR 681 (SCA) [21]: "Since the abolition of the death penalty this Court has consistently recognised that life imprisonment is the most severe and onerous sentence which can be

Correctional Services Act 111 of 1998 relating to the length and form of sentences, provides as follows: “Subject to the provisions of this Act - (b) a prisoner sentenced to life imprisonment remains in prison for the rest of his or her life.” This is ameliorated only by section 73(6)(b)(iv) which provides: “(b) A person who has been sentenced to - (iv) life imprisonment, may not be placed on parole until he or she has served at least 25 years of the sentence but a prisoner on reaching the age of 65 years may be placed on parole if he or she has served at least 15 years of such sentence;”[29]

[48] On life imprisonment in the context of a 15 year old victim, it was said in Vilakazi[30] supra: “Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound...” “There comes a stage at which the maximum sentence is proportionate to an offence and the fact that the same sentence will be attracted by an even greater horror means only that the law can offer nothing more. Whether, and if so to what extent, the absence of other aggravating circumstances might diminish the offender’s culpability will naturally depend upon the particular circumstances. That their absence might have that effect is merely affirmation of the recurrent theme in Malgas that of the factors traditionally taken into account in sentencing, 'none is excluded at the outset from consideration in the sentencing process”...

[49] It is accepted that the complainant was a few months shy of 16 as submitted by the appellant. We are mindful of what Nugent JA said at paragraph [59] of Vilakazi: “Bearing in mind where the complainant’s age fits in the range between infancy and 16 I do not think that her age by itself justifies what would otherwise have been a sentence of 10 years imprisonment being raised to the maximum sentence permitted by law. A substantial sentence of 15 years’ imprisonment seems to me to be sufficient to bring home to the appellant the gravity of his offence and to exact sufficient retribution for his crime. To make him pay for it with the remainder of his life would seem to me to be grossly disproportionate.” We view this as a guideline and not straightjacket, in the context of the unique facts of this matter.

[50] After careful consideration of the totality of the facts, we find that the imposition of life imprisonment on all the factors cumulatively considered would be disproportionate.[31] We are of the view, however, that the facts of this matter justify a sentence at the higher scale of the deviation from the mandated sentence. See

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imposed and that it is the appropriate sentence to impose in those cases where the accused must effectively be removed from society”.

[29] S v Dodo 2001 (1) SACR 594 (CC):“[8]... in De Lange v Smuts...'A sentence of imprisonment for life, irrespective of the policies and procedures to which such sentence may be subjected by the Department of Correctional Services, must be regarded by the Court imposing it as having the potential consequence, at the very least, that the accused so sentenced will indeed be incarcerated until his death. It is an extreme sentence. It is the most severe sentence which may lawfully be imposed on an accused such as the one now before Court. It is a sentence which, in the ordinary course, requires a meticulous weighing of all relevant factors before a decision to impose it can be justified.”

[30] 2009 (1) SACR 552 (SCA) at [21], [54]

[31] Malgas supra para [25] I: If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

Malgas paragraph 25J: “In so doing(deviating - our addition), account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paving due regard to the bench mark which the legislature has provided, (our emphasis)

[51] In concluding Nugent JA said in Vilakazi at paragraph [58] “...In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of ‘flimsy’ grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment. In this case the appellant had reached the age of 30 without any serious brushes with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character.” Whilst we cannot predict if the appellant may re-offend again, his personal circumstances may assist. The appellant at the age of 43 is to be treated as a first offender. He is in stable employment and apparent stable family circumstances as a breadwinner. In respect of the offence, the rape occurred during a visit to the appellant’s home in what appears to be an isolated incident. Without derogating from the seriousness of the rape, save for the injuries caused during the course of the rape, the emotional impact on the victim is not to be overlooked. Whilst the victim had received counselling, at the time of sentence in 2013, she still suffered from the post-traumatic effects of the rape. It adversely affected her behaviour and interaction with older men. Her quality of life was affected. The current impact of the rape some 5 years on, however, is unknown.

CONCLUSION

[52] In the result:

[52.1] The appeal against conviction is dismissed.

[52.2] The cross appeal of the respondent on sentence is upheld. The appellant is sentenced to 22 years imprisonment.

[52.3] The appellant shall remain unfit to possess a firearm in terms of section 103(1)(g) of the Firearms Control Act 60 of 2000.

[52.4] The order including the name of the appellant in the National Register for Sexual Offenders stands.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

SS MPHAHLELE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

Appearances:

On behalf of the Appellant: Adv JJ Strijdom On behalf of the Respondent: Adv

Harmzen Director of Public Prosecutions Pretoria HEARD ON 18 April 2016

JUDGMENT DELIVERED ON 19 April 2016

[20] 1975 (4) SA 855 (A) at 863