SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 084/13

Not Reportable

In the matter between:

IAIN CAMERON MCLAGGAN **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *McLaggan v The State* (084/13) [2013] ZACSA 92 (June 2013)

Coram: Mthiyane DP, Majiedt, Pillay JJA et Willis, Saldulker AJJA

Heard: **17 May 2013**

Delivered: **03 June 2013**

Summary: Rape – evidence - complainant single witness – sufficient corroboration - all evidence, not only parts of it, to be taken into account when determining the guilt of accused – accused's version not reasonably possibly true - appeal against conviction dismissed.

Sentence – Prescribed sentence in terms of Criminal Law Amendment Act 105 of 1997 – appeal by State against sentence - finding of existence of substantial and compelling circumstances as envisaged in subsection 52(3) attacked by State – court below misdirected itself in finding substantial and compelling circumstances – appeal upheld.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Goosen J sitting as court of first instance)

1 The appeal against conviction is dismissed.

2 The appeal against sentence is upheld.

3 The sentence imposed by the court below is set aside and substituted with the following:

'The accused is sentenced to 10 years' imprisonment.'

JUDGMENT

PILLAY JA (MTHIYANE DP, MAJIEDT JA ET WILLIS, SALDULKER AJJA CONCURRING)

[1] This is an appeal against conviction. The appellant, Iain Cameron McLaggan, was convicted in the High Court, Grahamstown (Goosen J) of one count of rape in the contravention of s 3, read with s 1, 56(1), 57(1), 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He was sentenced to a term of 8 years' imprisonment.

[2] Leave to this court was granted by the court below, which also granted the Director of Prosecutions leave to appeal against the sentence. In order to avoid any confusion, I will hereinafter refer to the appellant (on the merits) and the Director of Prosecutions as they were referred to in the court below viz accused and the State.

The following are facts which are common cause or undisputed:

[3] At the age of 7 years old, the complainant was diagnosed with a brain tumour behind the left eye. Her condition was not treated by way of surgery but with vigorous radiation over a number of years. This treatment affected her control hormone levels which made her prone to stress and its consequences: It also had an effect on her bodily sugar levels. At the age of 18, she undertook a trip to South Africa under the auspices of Worldwide Experiences, a British institution, in order to enhance her chances for admission to a university in the United Kingdom to persue studies in Veterinary Science. Worldwide Experiences had established a working relationship with Shamwari Game Reserve ('Shamwari') which is located near Grahamstown. The complainant was placed there with some fourteen other foreigners to complete courses which, inter alia, included dealing with large animals.

[4] The group was entrusted to the accused and one Conrad Muller both of whom seemed to be experienced in working at Shamwari and were to co-ordinate the course. The complainant and the other international students started the program on 30 August 2010. Some of these students had been at Shamwari for about a week before then. Towards the end of that week a social outing was arranged at a tavern in Paterson. Because she felt tired, she was reluctant to go on this outing, but felt in necessary to socialise with the others. The group went to the tavern where they enjoyed some drinks. The complainant bought a glass of red wine which she was sipping in front of the fire place with some of the members of the group. When one of the girls remarked that she was drinking her wine very slowly the complainant finished her glass of wine and purchased another. She then continued to consume the wine and joined other members of the group in playing pool. By the time she started to drink the third glass of wine, she had also consumed a single shot of Sambuca which the accused had bought. She then started to feel hot and removed the long sleeved top which she was wearing over another top.

[5] She then became emotional because she started to think of her failure in obtaining university entrance while some of her friends had succeeded in doing so. She did not feel too well and went outside with Ms Laura Sloan, her older roommate and with whom she had struck up a good sisterly relationship, to get some fresh air. Once outside, she started to vomit a few times. So violent was the vomiting that she soiled her hair and part of her clothing. She could not remember for how long she was outside. She was unable to get up from where she was sitting and had to be carried to the taxi commissioned to convey them back to the lodge. She has vague memories of the trip back to the lodge. Thereagain, she had to be carried from the taxi to her bed by the accused. As soon as she had been placed on the bed, she suffered a seizure. She was gasping for air, her head was jerking and her back was arched. Amidst this trauma however the complainant remembers that the accused asked some of the girls to put her to bed and make her comfortable as he 'does not want a lawsuit'. She was put into bed after two of her female friends had taken off some of her clothes and made her comfortable in bed wearing only a top and her panties. The complainant then again suffered another seizure which lasted a bit longer. The accused told the others to bring him a spoon and to leave the room while he attended to the complainant. He emerged from the room shortly thereafter reporting to the others that she was fine. Later, at about 2h30, the group discovered that she had fallen out of bed and she was helped back into it. She was then left alone in the room so that she could rest. At the time the complainant could hear the voices of members of the group including that of the accused, but she could not make out everything that was being said. She however remembers him saying that he did not want a law suit. At about 3 am the accused sent one of the students to go check on her and it was reported that she was sleeping peacefully.

[6] At 5h00, when all the students had gone to sleep, including her roommate, who had gone to sleep with another student in light of the circumstances, the accused decided to go to the complainant's room himself. He entered and at some stage, he had sexual intercourse with her. She thereafter went to the bathroom and cleaned herself of the semen and blood which was a result of her hymen being ruptured. She went back into the bedroom and saw him dressing. He left the room soon thereafter – at about 5h30 am. She then went back to bed and fell asleep. She was later woken up by Laura Sloan, the complainant's erstwhile roommate, and reminded they were scheduled to go to the

Addo Elephant Park. The complainant did this and the group were taken to the Elephant Park in two groups. She rode with Conrad Muller. During the lunch break at the Elephant Park she had a conversation with Sloan and asked her for information relating to what had happened to her the previous night and in particular what she was wearing when she was put to bed. She then told Sloan that she had been raped by the accused. After a brief discussion between them, it became apparent that the complainant was especially concerned about whether the accused had used a condom when he had raped her and was focussed on getting to a hospital to get treatment to contend with any virus or germ she might have been contaminated with during the rape.

[7] The group was taken back to the lodge and the complainant took the rest of the day to consider ways to get medical attention. On the Sunday morning she eventually approached Nadia Muller, a permanent employee at Shamwari and told her what had happened. Nadia then immediately reported the event to Conrad Muller. Upon hearing about the complaint, he called his supervisor, Qiunton Gillson. As a result of what was explained to him, he decided to conduct a preliminary investigation for purposes of reporting to his employers. Upon his request, the complainant penned a statement of what had occurred to her. On considering the content of the statement, he called upon the accused and informed him that the complainant had alleged that he had raped her. The accused first responded that he knew ‘it would come to this’. In order to equip himself to report to his employers and probably to cover himself, he asked the accused to make a written statement in response to the allegations in terms of company policy regarding complaints by a student guest. After the complainant had completed her statement, she was taken to a private doctor who said he was unable to treat her properly. She was then referred to the Greenacres Private hospital in Port Elizabeth to which she was then taken. There she was examined by Dr Conradie who recorded his finding on the customary medico-legal form. She then went to the police station in Port Elizabeth to lay a charge of rape. She was referred to the Paterson Police Station because it had jurisdiction over the area where the alleged offence occurred. She was taken to the Paterson Police Station where she laid a charge of rape against the accused. As a result the accused was arrested and this culminated in his appearance in the High Court in Grahamstown.

The Trial

[8] The accused pleaded not guilty and explained that he indeed engaged in sexual intercourse with the complainant but it was consensual. During the trial the State sought to admit the statement made by the accused to Gillson, even though it was exculpatory. It turned out that Gillson had told the accused that no charges had been laid – indeed none had been laid at that time. Its admissibility was contested and this resulted in a trial-within-a-trial. In the end the statement was admitted into evidence. It afforded the State a tool to cross examine the accused. The statement was indeed used to cross-examine the accused but fortunately the judge in the court below chose to ignore the contents of the statement and, it seems, all that flowed from cross-examination regarding the statement. It is just as well that this was ignored in assessing the evidence because I have serious reservations as to the correctness of the admissibility of that statement into evidence. A number of other exhibits were admitted by agreement and included a photograph album and the medico-legal report.

[9] The State lead the evidence of Laura Sloan. The evidence was essentially common cause and it basically related to the events of the night of 3 to 4 September 2010 at the lodge prior to the alleged rape. Her evidence was not seriously challenged and was correctly accepted as the truth.

[10] The complainant also testified at the trial. She confirmed the evidence about her trip to South Africa and her placement at Shamwari. She also confirmed the evidence of what occurred on the Friday night – early Saturday morning – as far as she could remember. She also testified about her illness regarding the brain tumour, the treatment and the effects thereof. She explained that at times she would become susceptible to stress and consequently, had been granted special allowances during school hours and additional time to complete examinations. She also said that during her short period at Shamwari, she found the physical activities exhausting but had nonetheless enjoyed them.

[11] She confirmed that during the outing she became ill after consuming some alcohol and as far as she could remember, she experienced the symptoms of seizure. In particular she testified about the period when she was alone in bed at about 5h00 on the Saturday morning. She said that she woke up when she became aware that her panties were being pulled down her legs and that when she opened her eyes, she saw that it was the accused who was doing it. He was alone with her in the bedroom. She pulled her legs up but he pulled them down by pulling at her ankles. She blacked out again. She was then again awoken by a pain in the region of her lower stomach. She opened her eyes and she discovered the accused on top of her and he was rocking back and forth. His mouth was on one of her breasts. She realised that she was completely naked. As he lifted his body – probably when she felt less pressure of his body on her – she tried to fight him off by pushing him away. He pushed her hands away from him. She stated that she said 'no, no, no'. The accused told her to stop that and put his hand over her mouth. He told her to put her arms around him and moved one of her arms onto his shoulder. When she removed it, he slapped her lightly on the cheek. He then told her to kiss him. When he moved his lips towards her mouth, she turned her head to the side. She then managed to pull some of the bedding over her face. She realised that she was being raped. She lay still in that position until he stopped. When he got off her, she immediately sat on the side of the bed and faced the window. She explained that she was extremely confused and that she remembers that she was concerned about whether he had used a condom or not. She started looking for it on the floor and in the bin.

[12] She remembers that the accused asked her what was wrong. She did not respond. In looking for the condom, she saw her brassiere on Sloan's bed, and put it on. She then went to the bathroom in order to clean herself. She did so with toilet paper and discovered a white mucous on the toilet paper. On emerging from the bathroom again, she went to sit on the bed. The accused was still in the room. According to her, she had difficulty in conceptualising why and how this rape occurred. She asked him what just happened. In response, the accused asked her what had happened a few times. She described how the accused then sat down next to her on the bed when she started to shake. He put his arm around her and told her to lean her head on his shoulder. She did not do so and he then tilted her head against his shoulder with his hand. He then asked her if she wanted him to leave and invited her to say whatever she wanted to about him

and call him whatever she wanted to call him. She in fact referred to him by a crude slang reference to a penis to which he just laughed. She then told him that she could not believe that he had just 'taken advantage' of her. The accused responded by saying that it was a harsh accusation to make and became angry. At the same time he told her how he had looked after her the whole night, how he had saved her life by putting a spoon in her mouth to prevent her swallowing her tongue during the seizures. He asked sarcastically if that was the gratitude she had for all that he had done for her. As he left she sarcastically said to him 'thanks for the spoon'.

[13] The State also called Dr Conradie to testify. He had noted in the medico-legal report general redness around the labia of the vagina of the complainant, generalised redness and swelling in the entire fossa navicularis in the area of where the hymen is expected to be found as well as two small superficial tears on the posterior of the fourchette, from which there was bleeding. Further internal gynaecological examination was not done because the complainant was experiencing pain and discomfort in the area which required examinations. He concluded that full sexual intercourse with full penetration had occurred with the complainant. He prescribed anti-retroviral treatment as a precaution as well as antibiotics. Pregnancy and what is known as Human Immunodeficiency Virus (HIV) tests were also conducted by way of blood tests. He conceded that from his findings, he could not exclude the possibility that the injuries and symptoms which he noted could also have been caused during consensual sexual intercourse.

[14] Quinton Gillson also testified. His evidence was unchallenged and was essentially as set out above. It was correctly accepted as the truth in the court below.

[15] The State also lead the evidence of Detective Warrant Officer Marshall, the commanding officer of the Paterson detective unit, who had arrested the accused. The State sought to rely on his evidence as to what transpired between him and the accused. The court below rejected his evidence and did not rely on anything he testified to. Nothing more need be said about his evidence.

[16] The State sought to lead the evidence of Dr Helen Spoudeas a medical specialist paediatrician and endocrinologist who focuses on brain tumours. She holds a doctorate in the diagnosis and treatment of children with brain tumours. She is recognised internationally and is a European expert in the field particularly on the late effects of brain tumours and the related treatment as well as the long term assessment and treatment of children who have survived brain tumours. She is involved in research with about 200 child patients. Her credentials were not questioned in the court below nor on appeal. However because Dr Spoudeas was very much sought after and is so committed that she was unable to travel to South Africa to testify, an application to lead her evidence by way of what is referred to as a video-conference was launched by the State in terms of s 158 of the Criminal Procedure Act 51 of 1977. The application was opposed on various grounds. After argument, the application was granted and the evidence of Dr Spoudeas was received by video-conference. On appeal the ruling to receive her evidence was not attacked and there is no reason to deal with this aspect any further.

[17] Dr Spoudeas testified that she was very familiar with the situation of the complainant and had been treating her since she was 7 or 8 years old. She was accordingly also familiar with the pathology experienced by the complainant.

[18] It is perhaps prudent to deal with her evidence relating to endocrinology. She explained that endocrinology is the study of hormones. In particular she explained that hormones which originate from the central pituitary axes, (the central area of the brain which controls the essential rhythms relating to one’s conscious cycles - sleeping patterns and also body responses to certain stimuli) convey vital information from the central pituitary axes to certain parts of the body and facilitate body reactions to various conditions and stimuli. She went further to explain that these hormones control body rhythms and accordingly permit the habits of waking up and going to sleep. Many of these functions are vital and any imbalance or deficiency in regard thereto would cause abnormality which could be life threatening. She said that children who are treated for cancer, in particular brain tumours are prone to develop pituitary axes deficiencies as a result of the treatment they receive to deal with the tumours. This, in turn, affects the

glands which produce the hormones and, as I understand this evidence, results in imbalances in these important hormonal requirements.

[19] Dr Spoudeas testified that in 2000, the complainant presented with an optic glaucoma which required high dose radiation therapy. As a result of receiving this treatment she suffered from a permanent growth hormone deficiency. Tests have also shown that the complainant has a marginal response in her cortisol, the stress hormone. She explained that cortisol, an important life saving hormone, is essential for one's daily rhythm. Cortisol levels also play an important role in dealing with stress. She testified that the complainant's cortisol level tested at 480 while the normal level should read between 500 and 550. She further testified that both the aforementioned hormones affect the production of blood sugar. The effect of the medical regime (as was required by the complainant), is that if confronted with a stressful situation, she would be unable call on sufficient cortisol to respond to the stress and this would in turn induce a low blood sugar level. The deficiencies would restrict any reversal of the low blood sugar level which would occur in normal circumstances. According to Dr Spoudeas, low blood sugar level could lead to fitting or epilepsy or seizures and if left untreated, could lead to deep coma and even death.

[20] Dr Spoudeas took into consideration that prior to the seizures, the complainant had (a) consumed some liquor – intoxication occurs more readily and quicker in females than in males (this she said, was based on clinical evidence) and (b) had not eaten very much – her glucose levels would already be low and the intake of alcohol would have stunted the production of body glucose and concluded that the complainant's pathology regarding the brain tumour, were alcohol related. She described a seizure where the person's limbs move involuntarily and where the head jerks as a clonic tonic seizure. She said that in such an event, it was to be expected that the person would be in a post-ictal state – state of mind of a person just after suffering a seizure. She explained that a person in a post-ictal state would be conscious of having experienced the seizure and may typically have a blurred memory of what had occurred. She further describes that in a post-ictal state, the person may be in a deep sleep and may appear not fully conscious though such a person may become aware of some sensation such as touch or pain and

could respond to this. However the person would still be in a state of confusion during the recovery period though the effects of the alcohol would be wearing off. She stated that given the history of the intake of alcohol late the Friday night, and the seizures at approximately 2h30, it was to be expected that by 5h30, the complainant would be in the latter stages of a post-ictal state. The reaction to pain and touch would be greater, her memory would be less blurred and her confusion would be less obvious than it was during its peak period of the pathology.

[21] Dr Spoudeas said the account of the complainant that she was slipping in and out of consciousness and that she was not aware of certain events she was told of is consistent with a person, having suffered a series of seizures, in a post-ictal state. In response to being asked to comment on certain aspects which were raised with the complainant on behalf of the accused, she explained that the sensation the complainant felt when her panties were being removed is suggestive of her being in a post-ictal state but more conscious than earlier after the seizures (clearly in a state of recovery). She also explained that in the post-ictal state, even during a state of recovery, a measure of confusion is to be expected. As I understand her evidence the confusion would diminish in the process of recovery and simultaneously her reaction to pain would also improve.

[22] The accused also testified and essentially confirmed the evidence about the occurrences that night and early morning as already set out, save for what occurred in the complainant's room when he was alone with her at about 5h00. He stated that at about 4h30 that morning, he went outside from the lounge of the lodge where he was sitting with some of the students listening to music to smoke and relieve himself. When he returned, he found that the students had all gone to sleep. He packed up and went to his room. It then dawned on him that he should again go and check on the complainant for his own peace of mind. When he opened her bedroom door, he found her awake and sitting up on the edge of the bed. The bedside light was on and she had wrapped the duvet around herself. He enquired about her health. She said she was feeling better but wanted to know what had happened. He then went to sit next to her on the bed and briefly explained that she had become heavily intoxicated and he had carried her to her bed and asked some of the girls to make her comfortable.

[23] He further explained that after informing her of what had happened, she leaned her head against his shoulder and he placed his arm around her shoulder. They remained sitting like that until the complainant turned her head towards him and kissed him passionately. He reacted positively to this by kissing her with equal passion. As he put it, as this developed both of them continued kissing each other while laying on the bed and that the passion then heigtened to the extent that they started caressing each other. He testified that she then loosened his belt. This led to him removing his trousers. The kissing and caressing then intensified. At some point he rolled onto her and started having sexual intercourse with her. She did not object to or protest against this. The import of his testimony in this regard is that she was an active participant and was not a dispassionate partner. He added that she asked him not to ejaculate inside her, a request he adhered to. Afterwards, they lay next to each other until he noticed that the sun was beginning to rise. He then decided to leave and got up. When he began to dress the complainant covered herself with the duvet and went to the bathroom. By the time she returned, he had already put on his clothes he kissed her on the forehead and then left.

[24] Another significant part of his evidence was that when he was confronted by Gillson with the complaint, he thought it related to having sexual intercourse with a student guest and it was in response to that notion that he prefaced his response with the exclamation that ‘he expected it to come to this’. He explained that he felt obliged to make a statement (in regard to his employment status) and did not mention the sexual intercourse with the complainant as he did not want to risk his occupation or his marriage. In addition he testified that he did not want to say too much as it might be used to his prejudice. He therefore made an exculpatory statement.

On Appeal

[25] As is apparent from the above, the version of the accused is substantially different from that of the complainant’s. The issue on the merits is therefore whether there was consensual sexual intercourse between the complainant and the accused. In other words whether the State has discharged the onus resting upon it to prove beyond a reasonable doubt that the accused had raped the complainant.

[26] Mr Price who appeared for the accused submitted that the court below had misdirected itself firstly, by ignoring the many inconsistencies in the complainant's testimony when measured against her statement to the police and also her statement to Gillson and secondly, by relying on the evidence of Dr Spoudeas who had not examined the complainant after the alleged rape and was therefore not in a position to testify about her condition at the time it occurred or shortly thereafter. He submitted that if these aspects had properly been considered by the court below, it would have concluded that the State had not discharged the onus of proving the accused's guilt or that the version of the accused was reasonably possibly true in the circumstances and therefore entitled to be acquitted of the charge.

[27] As was pointed out in the judgment of the court below that earlier the accused was wary that he should be cautious in his dealing with the complainant so as to avoid any suggestion of impropriety on his part. Quite apart from the legal problems he might face, he was also mindful of company policy prohibiting any relationship with students. The accused had nevertheless gone to the complainant’s room alone in the early hours of the morning. He chose to go and sit next to her on the bed when, if he was only interested in her health, he need not have entered the bedroom as if he thought he should, he could have sat on the stool which is clearly depicted in one of the photographs of the inside of her room. His version that it was the complainant who had initiated the kissing, that she had loosened his belt and that she was a willing participant in this occurrence which culminated in sexual intercourse is improbable. It is so because it is hardly likely that a person that had just been through multiple seizures and had vomited on herself, and in particular her hair, would have developed an urge to engage in sexual intercourse in those circumstances.

[28] Mr Price submitted further that it was improbable that the accused would have raped the complainant with the bedroom light on and the door unlocked and consequently his version should be accepted as reasonably possibly true. The flaw in this argument is that it is common cause that sexual intercourse occurred between them while the light was on and the door unlocked. Yet he knew that even on his version he was transgressing company policy in those circumstances. The probabilities in this

regard therefore do not detract from the complainant's version and consequently this factor does not enhance his version at all since if this event was consensual, the ever mindful accused would have taken the trouble of locking the door at heart when he took off his trousers. Furthermore, his evidence that he did not have a conversation about how he saved her life with the spoon cannot be true. Her knowledge of the significance of the spoon, which she saw in her room, begs the question as to how she got to know why it was in her room. His explanation that he thought that Gillson was referring to consensual intercourse with the complainant is disingenuous simply because he was confronted with the complaint of rape. If he had not committed rape then he could hardly have 'expected' to be confronted with such allegations. The accused was a poor witness. The rejection of his evidence as being improbable and not being reasonably possibly true cannot be faulted. There was no misdirection in arriving at that conclusion.

[29] That however is not the end of the matter. It still remains for the State to discharge the onus it carries. As Maya JA stated at para [14] of *Monageng v S* [2009] I All SA 237 (SCA) –

'[14] But whilst it is entirely permissible for a court to test an accused's evidence against the probabilities, it is improper to determine his or her guilt on a balance of probabilities. The standard of proof remains proof beyond reasonable doubt, ie evidence with such a high degree of probability that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime.'

[30] In assessing whether the State has discharged the onus of proving its case against the accused beyond a reasonable doubt, it must consider all the evidence in arriving at a conclusion whether to convict or acquit an accused. In *S v Van der Meyden* 1999 (1) SACR 447 (WLD) at 449h – 450b, Nugent J said the following:

'A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence. Although the *dictum* of Van der Spuy AJ was cited without comment in *S v Jaffer* 1988 (2) SA 84 (C), it is apparent from the reasoning in that case that the Court did not weigh the 'defence case' in isolation. It was only by accepting that the prosecution witness might have been mistaken (see especially at 89J - 90B) that the Court was able to conclude that the accused's evidence might be true.

I am not sure that elaboration upon a well-established test is necessarily helpful. On the contrary, it might at times contribute to confusion by diverting the focus of the test. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

This approach was followed and approved in *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15. It was stated therein as follows:

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.'[1]

[31] Mr Price argued that the complainant was a single witness in regard to the material aspects involved in this event. He argued that the circumstances are such that the evidence of the complainant requires to be examined very carefully before it can be accepted so as to form a foundation by which the State could discharge the onus of proving the guilt of the accused beyond a reasonable doubt. He submitted that her evidence required to be corroborated. He correctly did not argue that this was more so because the matter at hand was one involving an alleged sexual violation (See: *S v Jackson* 1998 (1) SACR 470 (SCA)).

[1] See also: *S v Van Aswegen* 2001 (2) SACR 97 (SCA)

[32] Mr Price referred to inconsistencies in the complainant's evidence when measured against the contents of the two statements she had previously made. He attacked her evidence on the basis that she resorted to an alleged confused state of mind at the material time in attempting to explain away these discrepancies. His submission in this regard is consistent with the version of the accused that the complainant was in fact conscious at the time and was alert to what she was doing and what was happening.

[33] Save to say that absent an acceptable explanation for the discrepencies, the State might very well have had difficulty in discharging the required onus. The discrepencies referred to by Mr Price included matters such as her failure to mention certain aspects in either of her statements, such as where her panties were, where her brassiere was found, and so forth. In what follows, it is unnecessary to deal with the details of the contradictions referred to by Mr Price.

[34] Mr Price also argued that if the complainant was indeed in a state of confusion, how is it possible that she able to remember certain aspects of what occurred to her that morning viz that it was the accused who was raping her, that she was unable to scream; how in this confused state she had the presence of mind to look for a condom; that she put on a brassiere just after being raped and that she had the presence of mind to check the time.

[35] The explanation for her inability to testify about certain details is to be found in the evidence of Dr Spoudeas. Immediately prior to Dr Spoudeas' evidence being lead, Mr Price objected to it being taken by way of video transmission. The court below ruled that application to do so be granted. He wisely did not raise that objection on appeal. What he did submit however is that the court below misdirected itself in having regard to her evidence because she had not examined the complainant after the incident. This submission is clearly wrong as it misconstrues the nature of the evidence of Dr Spoudeas. Dr Spoudeas did not suggest that her testimony was complainant specific about the rape. Her evidence was indeed of a clinical nature explaining the chemical reactions to the treatment of a brain tumour. Furthermore she testified to the effects of

such treatment in particular the effects of essential hormones which generally control human life eg. sleeping and waking up. Of note is her evidence that the effects of alcohol intake by a person presenting with the ailment the complainant was treated for, was that the already dangerous levels of these important hormones and also the sugar levels, was exactly as the complainant described – experiencing violent vomiting and seizures, falling in and out of a conscious state, improving with time and after approximately 5 hours she would have been more alert than earlier, capable of better bodily feeling than earlier and capable of sporadic memory. Her memory would be blurry in regard to certain aspects of her experience while in regard to others, it would be non-existent and even further it would be quite clear.

[36] The evidence of Dr Spoudeas was accepted as providing an understanding of the condition of the complainant and explains her reactions to the intake of alcohol. The court below was correct in accepting the evidence of Dr Spoudeas. Consequently, taking into consideration her evidence, it becomes clear that the complainant was still suffering from the effects of the intake of alcohol and in particular the seizures. She was clearly not in a condition to realise everything that was happening to her and hence her inability to give a clear account of events. She readily conceded that in the circumstances she had, in trying to understand what had happened to her, resorted to some reconstruction of events. However, what is significant is that from the time she felt the pain in her lower stomach until the time when the sexual intercourse ended and the accused left, she was awake and alert. While her memory might be blurred, she was not unconscious at the material time. Her version of the evening's events prior to her being raped is corroborated by Sloan. Her inability to give a cohesive account of certain insignificant details when she was raped gels with the evidence of Dr Spoudeas. The court below who saw the complainant when she testified, found her to be a candid and truthful witness and the record certainly lends itself to that conclusion. There is no reason to conclude that her evidence is false or incorrect on the material aspects. Her evidence can therefore be relied upon as being satisfactory in all material respects. Taking a holistic view of all the evidence, it is clear that the State proved the guilt of the accused beyond a reasonable doubt and the appeal against the conviction falls to be dismissed.

[37] I come now to the State's appeal against the sentence. At the commencement of the trial, the accused was aware that in the event of a conviction, the State would seek to invoke s 51(2) of the Criminal Law Amendment Act 105 of 1997. The sub-section provides for the imposition of a minimum sentence of 10 years' imprisonment if no substantial and compelling circumstances as envisaged in subsection 51(3), which would otherwise allow for a deviation of the prescribed sentence, are found to exist.

[38] The evidence of State witness, Ms Smit, Neuro-Psychologist attached to the University College, London College, was also received by way of video-conference in terms of s 158 of Act 51 of 1977. Her evidence is relevant because Ms Smit was part of the team which treated the complainant in respect of her brain tumour. It seems that after the accused was convicted, Ms Smit was requested by the State to prepare and submit an updated report focussing on the rape of the complainant. Such evidence is undoubtedly relevant in considering whether substantial and compelling circumstances exists and, if so, in considering an appropriate sentence.

[39] The personal circumstances of the accused which were taken into account by the court below are the following. At the time of sentencing he was a 30 year old male with a clean record. He is a university graduate having read for a Bachelors degree in Media Studies. He was married and his family and social circumstances were accepted as good. He was a high achiever at school both academically and in sport. He was a talented musician and is evidently an able leader. When he was employed at the Philharmonic Society in Port Elizabeth he was involved in teaching music in underprivileged communities. It also seems that he apologised for his indiscretion of having sexual intercourse with the complainant. The court below accepted that to this extent he had taken responsibility for the situation he finds himself in.

[40] On the other hand, the accused was employed at the material time as a student co-ordinator and the 18 year old complainant, together with the other students, was placed in his trust and care.

[41] Ms Smit having examined the complainant, testified that the complainant will suffer negatively from the rape, both on a long and short-term basis. She concluded that the complainant is putting up a veil of defence to protect herself against the full impact of the rape on her by repressing her emotional responses thereto and to an extent, was in a state of denial. According to Ms Smit, these protection techniques allow her to function with apparent ease in her day to day life but they stunt her ability to process the effect of the rape. She states that in repressing her emotions, the complainant becomes self-critical and has negative thoughts about herself. This is consistent with a cognitive response to her trauma and while they assist her on a day to day basis, they are destructive and have the distinct capability of affecting her negatively in the long-term. Ms Smit testified that the complainant regards this rape as a serious setback in her quest to build an independent life as a survivor of a life threatening illness.

[42] Ms Smit stated that generally, the state of mind of victims of rape are not fully restored. Therapy and counselling may ameliorate the effect of the rape trauma but it cannot be completely undone. The complainant, she suggested, would require such therapy but added that she will continue to have long-term traumatic consequences.

[43] It seems that the court below found that, (a) the accused had the ability to contribute to society; (b) that he was not an obvious threat to society; (c) the rape was not accompanied by additional violence; (d) there was no threat of violence during or after the rape and (e) this kind of conduct was not expected of a person of the character and background of the accused, taken cumulatively, constituted mitigation which would render the imposition of the minimum sentence of 10 years' imprisonment an injustice, destructive of his person and would defeat the overriding interest of society to rehabilitate the offender back into society. In light hereof and the fact that the learned judge in the court below deviated from the prescribed minimum sentence, it is obvious that he found substantial and compelling circumstances to exist. There are two other factors which the learned judge in the court below mentioned viz that he was a first offender and that he had expressed some remorse to his mother in regard to his conduct. The court accepted that he took responsibility for the situation he found himself in. I will assume in his favour that these two factors were also considered as mitigating.

[44] Ms Turner for the State contended that the court below had misdirected itself in taking into account as mitigating factors that (a) there was a lack of additional violence other than that inherently involved in the rape (b) regarding his character and his background as a mitigating factor and (c) the remorse attributed to the accused was not related to the crime but more self pity.

[45] On the other hand Mr Price submitted that the court below had taken everything into account and that this court should be loathe to interfere therewith and punish the accused even more than he has already been.

[46] The approach to substantial and compelling circumstances was dealt with in *S v Malgas* 2001 (1) SACR 469 (SCA). At para 25 Marais JA, writing for the court set out what has essentially become a guideline approach to sentences for listed offences as follows:

'[25] What stands out quite clearly is that courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the preciously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary –

A. Section 51 has limited but eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part I of Schedule 2 (or imprisonment for other specified periods for offences listed in other part of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal

differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.
G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.
H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
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.
J. In so doing, 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 paying due regard to the bench mark which the Legislature has provided.'

[47] It is noteworthy that in part 'D', it is clearly stated that specified sentences should not be departed from lightly and for flimsy reasons. It further sets out which types of factors should be excluded from consideration. On the other hand, in part 'E', the approach also allows for all the factors traditionally considered in respect of sentence, to be included in the overall consideration in the sentencing process. The general approach as set out in *Malgas* found support and approval in *S v Fatyi* 2001 (1) SACR 485 (SCA) and has been followed since.

[48] In this case, the lack of evidence that the accused did not have a propensity for such conduct is of no moment. While the legislature has essentially left it for the courts to deal with sentence, is has ordained prescribed sentences. In particular, it has provided a sentence for first offenders and consequently, being a first offender does not justify taking

into account the fact that he may or may not have a propensity to commit a crime of this nature. Indeed sentence for second and subsequent offenders are specifically provided for in the subsection. The court below clearly misdirected itself in adopting this approach in regard to this factor. It similarly misdirected itself by concluding that the absence of additional violence constituted a mitigating factor. The fact of the matter is that rape is itself a violent intrusion of the rights of the victim. The lack of a threat of violence or aggression afterwards also does not favour the accused. Such factors if they existed, may well have lead to a harsher sentence. However their absence cannot serve to benefit the accused in deciding whether substantial and compelling circumstances exist.

[49] It is not clear from the judgment whether the learned judge in the court below actually put all the factors, both aggravating and mitigating, into the melting pot as suggested in *Malgas*.

[50] The accused, a stranger to the complainant, raped her soon after she had multiple seizures and when she was, at best for him, asleep. He did so when he was in a position of trust and indeed betrayed that trust. The complainant has been traumatised by the rape and is likely to have long-term residual effects as alluded to by Ms Smit.

[51] On the other hand, it is true that the accused had the potential to contribute to society and that he has a good family and social background. However, the accused's remorse was not directed at either the complainant or the actual crime itself. It was more a matter of apologising for being in the predicament. To the extent that it was used to favour the accused, it should not have been considered as a mitigating factor in the circumstances.

[52] The mitigating factors and the aggravating circumstances, especially the residual effects on the complainant as explained by Ms Smit, ought to have been balanced against each other in assessing whether substantial and compelling circumstances existed or not. Even if all the mitigating and aggravating factors were balanced by the

court below, measured against the guidelines as set out in *Malgas,* it was wrong to conclude that substantial and compelling circumstances do exist. Neither would the imposition of the prescribed minimum sentence be disproportionate to the offence itself and the circumstances in which this offence was committed. The court below therefore misdirected itself in concluding that substantial and compelling circumstances indeed exist and ought to have found that none existed.

[53] The effect of this is that the accused must be sentenced in terms of s 51(2) of Act 105 of 1997. The minimum period of imprisonment in the case of a first offender, as is the accused, is 10 years.

[54] The State contented itself with the minimum prescribed sentence of 10 years' imprisonment and did not suggest a harsher period of imprisonment. The appeal against sentence therefore succeeds.

[55] In the result, the following order is made:

1 The appeal against conviction is dismissed.

2 The appeal against sentence is upheld.

3 The sentence imposed by the court below is set aside and substituted with the following:

'The accused is sentenced to 10 years' imprisonment.'

R PILLAY
JUDGE OF APPEAL

Appearances:

For Appellant:	Mr T N Price (appearing pro bono)
	Instructed by
	Legal Aid South Africa, Grahamstown
	Legal Aid South Africa, Bloemfontein
For Respondent:	Ms N Turner
	Instructed by
	Director of Public Prosecutions, Grahamstown
	Director of Public Prosecutions, Bloemfontein