IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: A552/11

In the appeal of:

VUSUMZI MAZONGOLO Appellant

and

THE STATE Respondent

PROVISIONAL DETERMINATION DATED 7 AUGUST 2012

BLIGNAULT J, YEKISO J and STEYN J:

[1] This provisional determination concerns the question whether an appeal against appellant's conviction in this court can be considered in the absence of leave to appeal against the conviction.

Introduction

[2] Appellant was indicted in the Regional Court at Paarl on a charge that he had raped a six year old girl on 3 June 1999. He was arrested

on 9 September 1999, shortly thereafter. He was 18 years old at the time. His trial commenced on 12 July 2000. On 2 February 2001 the magistrate convicted appellant as charged and referred the matter to this court for sentencing in terms of the provisions of s 52(3) of the Criminal Law Amendment Act 105 of 1997.

[3] On 4 July 2002 Fourie J confirmed the conviction of appellant in this court in terms of s 52(3) of Act 105 of 1997 and sentenced him to 23 years' imprisonment.

[4] On 11 August 2011, almost 9 years later, an application for leave to appeal against appellant's conviction and sentence was launched on behalf of appellant. We deal hereunder with the reasons for this inordinate delay.

[5] On 12 September 2011 Fourie J dismissed appellant's application for leave to appeal against his conviction but granted him leave to appeal against his sentence to a Full Bench of this court. We heard the appeal against sentence on 27 July 2012.

[6] Upon a perusal of the record of the proceedings in the regional court we formed the view that appellant's conviction might not have been justified on the evidence before the magistrate. We accordingly

requested counsel to address us on the question whether the conviction of appellant was in order and, if not, what procedure, if any, this court could follow in this regard. Counsel on both sides provided us with helpful submissions.

[7] Appellant has not applied to the President of the Supreme Court of Appeal in terms of section 316(8) of the Criminal Procedure Act 51 of 1977 for leave to appeal against his conviction. In the light of *S v Gentle* 2005(1) SACR 420 (SCA) counsel were *ad idem* that this court does not have the jurisdiction to determine an appeal against appellant's conviction. We agree.

[8] Counsel for appellant attacked the magistrate's judgment on various grounds. As to the procedure that may be followed by this court he referred us to the judgment of the Supreme Court of Appeal in *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA). In the course of this judgment Harms JA referred to a number of cases in which an appeal was heard and considered without the requisite leave to appeal. In para [26] he summarised the position as follows:

'[26] In Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 608E - G, Trollip JA summed up the position when he said that

> *'(w)here the necessary leave to appeal is lacking this Court may, in appropriate circumstances, defer the hearing or determination of the appeal to enable the appellant to obtain such leave . . .'*

It should be emphasised that either the hearing or the determination (judgment) can be deferred and, secondly, that the circumstances should be appropriate before this extraordinary procedure may be adopted.'

[9] The judgment of the Appellate Division in *Sita and Another v Olivier NO and Another* 1967 (2) SA 442 (AD), approved in the *Pharmaceutical Society* case is particularly instructive. At 450F-H of the report the court dealt with this issue as follows:

'Both counsel are however anxious to have an authoritative decision on the question of law in issue as soon as legally possible in order that the prosecution against the appellants may in the public interest be proceeded with and concluded without further delay. We have heard full argument on the merits of the appeal, and there can be no point in having the matter re-argued at some future stage if the appellants should succeed in obtaining the necessary leave to appeal. In all these circumstances I propose to follow the course adopted by this Court in Blaauwbosch Diamonds Limited v Union Government (Minister of Finance), 1915 AD 599; De Beer v Minister of Posts and Telegraphs, 1922 AD 175, and Oliff v Minnie, 1952 (4) SA 369 (AD).

Judgment on the merits of the appeal will therefore stand over to enable the appellants to apply, within twenty-one days of this judgment, to the Court a quo for the necessary condonation and leave to appeal. If that Court grants such leave and the order granting leave is lodged with the Registrar of this Court, we will be in a position to deliver judgment on the merits and to make an appropriate order as to costs. If the Court a quo refuses leave to appeal and the order refusing such leave is lodged with the Registrar of this Court, this matter will, without any further order of this Court, be deemed to have been struck off the roll with costs.'

[10] In our view a similar procedure may be followed in a criminal appeal. The provisions of section 316 (8) of the Criminal Procedure Act do not differ in substance from those of section 20(4) of the Supreme Court Act 59 of 1959. We are of the opinion that the circumstances in this matter render it an *appropriate* case for this court to follow a similar procedure. The adoption of such a procedure would be in the best interests of appellant as it might expedite the finalisation of the appeal. The matter has furthermore been fully argued before us and we have formed the view that there is merit in an appeal against appellant's conviction. As in the *Sita* matter there would be no point in having the matter re-argued before us. This provisional determination (which we assume will be submitted to the President of the Supreme Court of Appeal with the petition) might moreover be of assistance to the judges

considering the petition as well as the parties' representatives in drafting their respective affidavits.

[11] We accordingly intend to make a provisional determination pending the outcome of an application by appellant in terms of the provisions of section 316 of the Criminal Procedure Act to the President of the Supreme Court of Appeal for leave to appeal against his conviction. Counsel for appellant assured us that if such determination is made in appellant's favour, such an application would be brought as a matter of urgency. If leave to appeal is then granted by the Supreme Court of Appeal we will deliver a final judgment in the appeal against conviction on the basis of this provisional determination. If leave to appeal is refused we will proceed to deal with appellant's appeal against his sentence.

The inordinate delay

[12] Before discussing the merits of appellant's conviction we propose to deal with the reasons for the delay of 9 years between the date of appellant's conviction and the date upon which his application for leave to appeal against that conviction was heard in this court. These reasons might be of assistance to the judges considering the appeal in deciding whether the delay should be condoned. It is also a factor which justifies

the unusual procedure adopted by us. In our view, finally, we believe that appellant is entitled to a recordal of these unfortunate events.

[13] Judgment in appellant's application for leave to appeal against his conviction and sentence was delivered on 12 September 2011, almost 9 years after his conviction and sentence. A number of relevant documents, forming part of the record, were placed before us for purposes of hearing the appeal. A perusal of these documents provides one with a fair amount of information in regard to the reasons for the delay. They paint a dismal picture.

[14] Appellant was incarcerated during the entire period. On 16 September 2004 he submitted an application for leave to appeal against his conviction and sentence and for condonation of his delay in bringing the application. Although drafted by a layman it was in proper form. Appellant explained that the reason for bringing the application late was that he was not a lawyer and knew nothing about legal procedures. His application was sent to the Registrar of this court ('the Registrar') under cover of a note dated 16 September 2004 by the head of Pollsmoor Prison.

[15] On 29 June 2006, ie almost two years later, Mr William Bale, writing on behalf of the Registrar, acknowledged receipt of the

application of 16 September 2004. He advised appellant that he could engage the services of a legal advisor or deal with the matter in person or apply for legal aid. Apart from giving this advice, Mr Bale did nothing about the application.

[16] On 12 June 2007 appellant wrote to the South African Human Rights Commission Western Cape Province ('the SAHRC'), asking for its assistance with his application for leave to appeal. He said that after receiving the advice from the Registrar, he had written three times to the Legal Aid Board for legal assistance. He had not received a response from the Legal Aid Board to any one of these letters.

[17] On 19 July 2007 the SAHRC wrote to the Legal Aid Board in regard to appellant's complaint. A copy of the complaint was attached to its letter. The SAHRC requested the Legal Aid Board to advise it as to the status of appellant's application. In the event that his application had been unsuccessful, the SACHR requested reasons for the refusal to be supplied to them before 3 August 2007.

[18] There is in the court record a copy of a power of attorney signed by appellant on 27 August 2007, authorising the Legal Aid Board to act on his behalf. It bears a stamp of the Legal Aid Board indicating that it was received by it on 21 January 2008.

[19] On 11 October 2007 the Registrar received a further letter from appellant. He said that following Mr Bale's advice he had written several times to the Legal Aid Board requesting a legal representative but he had not received any answer from it. He had also filled in the LA1 form which was faxed to the Legal Aid Board's office by an official of Correctional Services. He had not received any response to these communications.

[20] The High Court Unit Manager, Cape Town of the Legal Aid Board replied on 15 February 2008 to the letter of the SAHRC dated 19 July 2007 (ie almost 7 months later). I quote this letter in full:

> *'I apologise for the late response.*
>
> *I have been out of office for some months serving as an Acting Judge of the High Court and these letters were only brought to my attention recently.*
>
> *Both matters above have been receiving attention and are part of numerous requests received for legal aid in out of time appeals. In all instances the complete High Court record must be obtained before an application for leave to appeal and condonation can be lodged in the High Court. The process of obtaining these records from the Registrar of the High Court has proved to be slow and we have had numerous meetings with the Chief Registrar and the Judge President in this regard and continue to attempt to speed up the process. Once the record has*

been received the application will be made in accordance with the High Court rules.

The complainants have been informed of the reasons for the delay'.

[21] On 15 July 2009 the Chief: Legal Research in the Ministry of Justice and Constitutional Development wrote to the Legal Aid Board in Cape Town in regard to appellant's application. The letter reads as follows:

'Thank you for your letter dated 9 June 2009 which arrived in our offices on 10 June 2009.

I am not sure what the "regional court proceedings" entail since it seems to have been a High Court matter. Be that as it may, I am also from my side in the process of liaising with Mr Bale asking him to expedite. As indicated, this matter has been outstanding since 2006.'

[22] Appellant's next letter was received by the Registrar on 18 August 2009. Appellant said, *inter alia,* that a Correctional Services' official had been informed telephonically on 9 March 2009 by a Mr Ndila of the office of the Legal Aid Board that they were waiting for the court record to be referred to them by the Registrar. The same official then telephoned the Registrar. He was informed by a Ms Vuyo that the record of the proceedings that was required by appellant, had been sent to the Legal Aid Board on 30 June 2008, within about 5 weeks after it had been requested.

[23] On 14 September 2009 the Registrar received a similar letter from appellant in which he again asked to be informed about the progress in regard to the preparation of the record. On 17 September 2009 the Registrar replied, informing appellant that *'your matter is in the process of being dealt with by the Legal Aid Board'*.

[24] On 11 January 2010 and again on 1 March 2010 appellant wrote letters to the Registrar. In both letters he asked for information in regard to the progress of the matter. On 26 April 2010 Mr Bale of the office of the Registrar replied to the letter of 1 March 2010 as follows:

> *'We regret to inform you that your application cannot be processed because you do not have a legal representative. Please find out form the legal aid board what has happened to your applications for a legal representative'.*

[25] On 5 April 2010 appellant again wrote to the registrar. He expressed his frustration caused by the fact that the Registrar referred him to the Legal Aid Board which did not answer his letters. Mr Bale of the Registrar's office replied to this letter on 5 November 2010, ie seven months later. It reads as follows:

> *Hereby, acknowledge receipt of your letter dated 05 April 2010.*
>
> *We regret to inform you that this application for leave to appeal cannot be processed because you do not have a legal representative Kindly let*

us know if you intend to engage the services of a private legal representative. If you cannot afford a private one you can still apply to the LEGAL AID BOARD for the appointment of one at the state expenses.

Should you wish to apply for legal aid, we have attached the forms for you. You should fill them up and send them to THE LEGAL AID BOARD, 85 NEDBANK BUILDING, ST GEORGES MALL, CAPE TOWN, 8001. ONLY if you are refused legal aid you can apply to the Judge that Sentenced you to deal with your application in person. Your application should be accompanied by the legal aid board letter refusing to assist you.

In future please forward your queries to Legal Aid South Africa'.

[26] On 18 October 2010 appellant again wrote to the Registrar, complaining about the lack of progress with his application. It appears from this letter that appellant had made various further attempts to find out from the Legal Aid Board what was happening with his application but without any success.

[27] On 11 August 2011 (almost one year later) an application for leave to appeal was launched by the Legal Aid Board on behalf of appellant. Judgment in this application was given on 12 September 2011.

[28] We propose to comment briefly on this delay. The documentation before us may not contain a full record of all the relevant events. It is at least clear, however, that appellant wished to appeal against his

conviction and sentence. It is also clear that, powerless and vulnerable as he was, appellant was badly let down by the system of administration of justice.

[29] The actions of the Registrar, in the person of Mr Bale, were most unfortunate. He took two years to answer appellant's first letter and then continued to deflect appellant's application and his complaints to the Legal Aid Board, despite appellant's repeated complaints that the Legal Aid Board was not responding to his application. Mr Bale also gave palpably wrong legal advice to appellant with disastrous consequences. The Registrar has no power to refuse to accept an application for leave to appeal simply because the applicant is not legally represented or has not received legal aid. Apart from the possibility of appellant handling his application in person the Cape Bar has a *pro bono* system which might well have provided counsel to assist appellant in the circumstances. The actual refusal by the Legal Aid Board to assist a litigant, furthermore, is not a pre-requisite for the prosecution of the matter by an applicant.

[30] The letter written by the Cape Town Unit Manager of the Legal Aid Board to the SAHRC dated 15 February 2008 (see para [20] above), did not assist appellant at all. It seems in fact to be symptomatic of the Legal Aid Board's conduct in this matter. The letter was written about

seven months after receipt of that of the SAHRC. The excuse for the delay is, in our view, not acceptable. If the Cape Town Unit Manager of the Legal Aid Board elected to take a position as an acting judge his duties should have been delegated to others. His letter was moreover vague and evasive. It failed to deal specifically with any of applicant's complaints. The letter appears to have had little effect. Appellant's problems were not addressed and no progress was made with his application for legal aid.

[31] The Cape Town Unit Manager of the Legal Aid Board claimed that they were waiting for the record to be typed. If this was the reason for the delay in appellant's case one would have expected that he would have been properly informed about this. Judging from his letters it seems that he was not. We find it difficult, in any event, to accept that it could have taken some five years to obtain a transcript of the proceedings in appellant's case.

[32] The SAHRC's intervention, at the request of applicant, was unfortunately not effective. Upon receipt of the unsatisfactory letter from the Legal Aid Board, the very body about which appellant was complaining, the SAHRC seems to have lost interest in the matter.

[33] The letter from the Ministry, despite the request to the Legal Aid Board to *expedite* the matter, appears to have had very little practical effect. It is not clear what happened after the receipt of this letter but we know that the application for leave to appeal was only launched two years later.

[34] In the circumstances we are of the view that appellant's failure to bring a timeous application for leave to appeal against his conviction to the President of the Supreme Court of Appeal might well be condoned. We are also of the view that the reasons for this delay is one of the *appropriate circumstances* justifying the procedure of preparing this provisional determination before the Supreme Court of Appeal had given or refused leave to appellant to appeal against his conviction.

The merits of appellant's conviction

[35] Three witnesses testified for the state. The complainant, Nombolela Masiza, her friend, Asepie Boois and her mother, Nonjamiso Masiza. The complainant was born on 1 June 1993. She had just turned 6 when the alleged incident occurred. Her testimony in court was presented through an intermediary and the services of an interpreter were used. The complainant was treated with sympathy and

sensitivity by the magistrate, the prosecutor and the legal representative of appellant.

[36] The complainant testified that on the day in question her mother sent her and Asepie to fetch paraffin from a shop. She was then forcefully taken away by appellant while she was waiting in front of the shop for Asepie. Asepie was inside the shop to have the paraffin decanted into a container. There were people outside the shop, children and adults, who saw what happened. Asepie looked at her from inside the shop and she shouted at her to tell her (the complainant's) mother. She was then taken away by appellant, whom she did not know and had never seen before. He dragged her by the arm to his home in the presence of other people. She called out for help but she was ignored. The complainant was adamant that Asepie and appellant never spoke to each other.

[37] The complainant testified that appellant told her his name. He undressed her, lay on top of her and inserted his penis into her vagina. She said it was painful. She did not testify as to the length of the period that she was in the house with appellant, neither did she testify that the appellant removed his own clothes or that she resisted, cried or shouted for help. She mentioned that at one stage appellant placed an axe next

to her head and threatened that if she told her parents what had happened, he would kill her.

[38] Immediately after the incident complainant dressed herself and left. In response to a leading question she said she had difficulty walking. She initially testified that she went home and immediately told her mother what had happened. Later she said that she went home but that she did not tell her mother what had happened. At a later stage she testified that she went to Asepie's home to play directly after the incident and that she cried when Asepie asked her what had happened. The complainant testified that she noticed after the incident that her panties were stained. Her mother saw this a few days later when she wanted to wash the panties. The complainant did not testify that she had complained to her mother of pain in her genital area or problems with a discharge or rash in this area. She said that she identified appellant when he came to ask for matches at their house.

[39] Asepie's evidence was that she and the complainant collected the paraffin. After they had left the shop appellant, who was quite well known to her, appeared and first caught her (Asepie), the bearer of the paraffin. Then he let her go and grabbed the complainant. He asked her if the complainant's parents were at home, to which Asepie replied that they were not. It was shown during her testimony that she knew

that complainant's mother was at home and accordingly this statement was untrue. According to Asepie appellant threatened to kill her if she told the complainant's mother what happened.

[40] At one stage of her evidence Asepie was testifying as to how the complainant was caught and taken away by appellant. She was asked whether she saw it with her own eyes or heard it from someone else. Asepie answered that she had heard about it from the complainant. The magistrate admonished her then to testify only about things that she saw with her own eyes and then asked her how far they were from the shop. Asepie repeated that she had not seen it with her own eyes. The magistrate said that they heard it *('goed, ons hoor dit')* but she promptly pursued her questioning. Asepie denied that complainant shouted to her in the shop. She also denied that there were other people or children in the area.

[41] Asepie took the paraffin to complainant's mother without telling her what had happened to complainant. According to her the complainant's mother did not enquire about her daughter. According to the mother she did enquire and Asepie told her that the complainant was playing. Asepie testified that the complainant later came to her (Asepie's) home and cried when she was asked what had happened, without telling her what it was. When appellant's legal representative tried to question

Asepie about these events he was stopped by the magistrate who told him he was splitting hairs and that it was just the way a child expresses herself.

[42] The complainant's mother testified that she did not know appellant and had never seen him before. She had sent Asepie and the complainant to fetch paraffin from a nearby shop. Asepie returned with the paraffin but without the complainant. Contrary to the evidence of Asepie she said that she asked her where the complainant was and that Asepie replied that she, (the complainant) was playing. According to her the complainant returned a little bit later. She and her husband saw the complainant taking toilet paper that she rolled up to put in her panty in the area of her vagina. She said that the complainant complained about pain in the area below her stomach, but that she and her husband did nothing about it.

[43] The mother testified that it was a few days later when she realised that something was wrong. The complainant was crying and said she was suffering pain in the area below her stomach. She then called the neighbours. They looked at complainant's genital area and confirmed that she had been *'raped'*. This was after she had looked herself and seen that the complainant was red in her genital area. She went to the hospital and the police were contacted from the hospital. She was

asked whether the complainant told her what happened and she said yes. When she wanted to relate what was said to her, the magistrate stopped her reply. It was never established what the complainant told her mother about the incident.

[44] When the mother was asked how it happened that the police knew who to arrest she said that appellant came to their home to ask for matches. The complainant saw him and hid. After appellant had left she told them that he was the person who had assaulted her. The mother contacted members of the community and told them that it was appellant who had raped her daughter. Members of the community caught appellant and brought him to their home. The police was then contacted.

[45] The prosecutor apparently wanted to call the doctor who had examined the complainant. He had however left the hospital. The report of his examination was later handed up by agreement. The examination took place at the Stellenbosch Hospital during the evening of 8 June 1999, the day before the arrest of the appellant. The doctor noted that the complainant was 6 years old and that she had no bruises or abrasions or wounds or injuries. The physical and mental condition of the complainant was good. The doctor noted that the examination took place after an alleged incident, without mentioning what the *'incident'*

was and that the incident took place a certain number of days before the examination. The number is not clear but it could be 5 days. It was also noted that the hymen of the complainant was intact, that there was no bleeding, but that there was a yellow / white discharge. A swab was taken of the discharge but no evidence was presented in this regard. There was also redness around the hymen. The report concluded that the possibility of sexual molestation could not be excluded *('die moontlikheid van seksuele molestering kan nie uitgesluit word nie').*

[46] Appellant himself testified. His defence was an alibi. On the face of it his version was not improbable or contradictory. On 3 June 1999, the alleged date of the incident, he was 18 years old. He testified that he was with friends, where they listened to music and watched videos. He went home after 17h00. He denied raping the complainant, whom he did not know and he saw for the first time the day when he was arrested by the community. According to him the complainant's family members asked him to accompany them to the complainant's home on 9 June 1999, where he was asked to speak the truth by the presiding member of a committee. The complainant's mother asked his name and then informed him of the charge against him. He denied any knowledge of the offence, but the complainant's brother said they should call the

complainant, who was playing outside. The complainant then related her version of the events.

[47] Appellant said that he knew Asepie and that she and her parents had visited his home. He admitted that he went to look for matches at the home of the complainant. He had been requested to do so by his friends, neighbours of the complainant, whom he was visiting. He did not see the complainant. He testified that when the members of the committee assaulted him, he admitted, under duress, that he had committed the crime of which he was charged. He denied that it was the truth, but he was bleeding so much that the complainant's mother wanted him to be removed. The complainant's father had a knife and threatened to cut out his testicles.

[48] The magistrate summarised the evidence in her judgment. The complainant, she said, made a good impression. She was thoroughly tested under cross-examination but in the main she adhered to her version. She remarked, however, that the complainant was a single witness and very young and that sufficient corroboration of her version would be required.

[49] In regard to the evidence of Asepie the magistrate said that her version of the incident differs to a great extent from that of the

complainant. Despite the differences and other aspects of her evidence that were not satisfactory, she did not get the impression that Asepie wanted to mislead the court. The witness, she said, made a good impression and there was no reason not to accept her evidence.

[50] The complainant's mother's evidence, she found, was also acceptable. There were differences between her version and that of the two other witnesses but these were not material. As with Asepie, there was no reason for rejecting her evidence.

[51] After summing up appellant's alibi evidence, she said that it is very easy for a person in appellant's position to deny that he was involved in the incident. It follows logically from this, she said, that, viewed in totality, appellant could not make a bad impression as a witness. Upon closer analysis of his evidence, however, cracks appear in his version. She proceeded to describe some of these cracks. On the basis thereof the magistrate found that appellant was not truthful. We revert to the issue of these cracks below.

[52] The magistrate then discussed the question whether the complainant was raped. This depended upon a finding that penetration took place. In view of the fact that the hymen was intact, she said, there is, judging on the medical report alone, doubt whether there had been penetration. The evidence of the complainant, she said, was, however,

clear and thoroughly tested. When it is considered together with the medical report, namely redness around the hymen, there are sufficient guarantees that a measure of penetration took place. She accordingly convicted appellant as charged.

[53] We have considered the evidence and the judgment of the magistrate. The magistrate correctly held that cogent corroboration of the complainant's version was required. Upon a careful analysis of the evidence we are, however, of the view that there is very little reliable evidence to corroborate the complainant's version that she was raped or that it was appellant that assaulted her. In coming to a contrary conclusion the magistrate indeed misdirected herself in certain material respects. We proceed to discuss them below.

[54] The magistrate's approach to the medical report was a major misdirection. In *MM v S* [2012] 2 All SA 401 (SCA) para [24] the Supreme Court of Appeal again emphasised that the handing in of medical reports without oral medical evidence is an unsatisfactory practice. In the present case, in the absence of oral medical evidence, the medical report had little evidentiary value regarding the question whether penetration in fact took place. The redness around the hymen and the discharge, in the absence of actual medical evidence, has no significance. Complainant's mother reported that complainant was still

suffering from a discharge a year after the incident. In his report the doctor himself did not go any further than stating that sexual molestation cannot be excluded. This statement has very little, if any, probative value. Despite these shortcomings the magistrate regarded herself as sufficiently qualified to state that the report provides corroboration of the complainant's evidence that penetration took place.

[55] In the course of the complainant's evidence a potentially serious irregularity occurred. When she was giving evidence about the attack on her, the interpreter failed to interpret certain evidence because she (the complainant) was confused *('deurmekaar')*. The magistrate proceeded with the trial without requesting the interpreter to translate every word spoken by her. Shortly thereafter the interpreter indicated that he was not translating her evidence because she was repeating the testimony that had already been placed before the court. The magistrate, again, simply proceeded with the trial. In our view it is clear that the interpreter thus became an arbiter to exclude what he regarded as irrelevant evidence. This might have had the result that evidence favourable to appellant was excluded.

[56] The magistrate found, correctly so, that there were material differences between the versions of complainant and Asepie, particularly in regard to the events immediately preceding the alleged removal of the

complainant by appellant. The magistrate said that they differed to a large extent. Despite these differences she found that there was no reason for not accepting Asepie's evidence and that she corroborated the complainant's version.

[57] In our view this approach is fallacious. If Asepie's version is accepted, which the magistrate said she did, then it contradicted the complainant's evidence and did not corroborate it. Despite these contradictions the magistrate proceeded on the basis that she accepted the complainant's evidence and ignored that of Asepie on this issue.

[58] The manner in which the magistrate ignored the possibility that Asepie was giving hearsay evidence (we referred to this above) also constituted an irregularity. We also find it difficult to accept Asepie's evidence as to the reason why she did not report the incident to the complainant's mother. She claimed that she had been threatened but on the complainant's version there would not have been any opportunity for appellant to threaten her.

[59] In discussing and accepting the evidence of the complainant's mother the magistrate appears to have given little weight to the contradictions and confusion as to what was said when Asepie and the complainant arrived at her home that afternoon.

[60] The magistrate's rejection of the evidence of appellant was not justified. She held, as stated above, that so-called cracks appeared in his evidence which destroyed the good impression that he had made as a witness. The cracks mentioned by her were (i) that the complainant hid herself when he arrived at her house to look for matches, (ii) the identification of him by Asepie and (iii) that his evidence about the confrontation with the members of the community fits in with that of the mother.

[61] The magistrate's reasoning in this regard is fallacious. As to the first *crack*: Appellant did not testify that he met or saw the complainant on the day that he fetched the matches. As to second *crack:* The lack of any probative force of Asepie's evidence was discussed above. As to the third *crack:* Appellant's evidence in regard to the confrontation does not contradict that of the mother.

[62] Before confirming appellant's conviction Fourie J submitted certain questions to the magistrate to which she replied. Her answers did not add anything of substance to her judgment. Fourie J did not provide reasons for his decision to confirm the conviction. He did, however, remark that it was common cause that a rape took place. This remark might have been prompted by a concession of counsel who represented appellant at that stage. Having regard to the evidence and the judgment

of the magistrate, however, it is quite clear that it was not common cause that a rape took place.

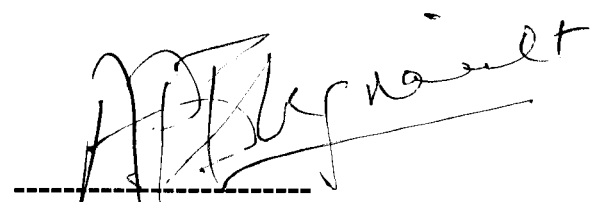
[63] We have much sympathy with the complainant and her family. She might well have been sexually molested by someone. The state has, however, failed to prove that she was raped or sexually molested or if she was, that it was appellant who raped or molested her.

[64] Having regard to the evidence in this case we conclude that there was no cogent corroboration of the complainant's version that she was raped by appellant. We are accordingly of the view that there is a reasonable prospect that the Supreme Court of Appeal might grant leave to appellant to appeal against his conviction.

[65] In the circumstances we make the following order:

1. **The appeal is postponed *sine die;***

2. **In the event of appellant applying to the President of the Supreme Court of Appeal for leave to appeal against his conviction, he is directed to include this provisional determination as part of his petition.**



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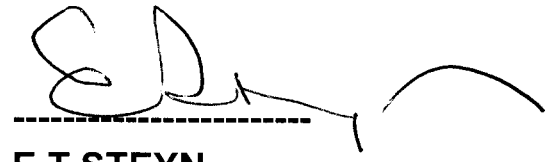

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