



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: A 448/2016

In the matter between:

BALO HONONO

Appellant

and

THE STATE

Respondent

Coram: Boqwana J et Kose AJ

Delivered: 05 May 2017

JUDGMENT

BOQWANA J

Introduction

[1] The accused appeared before the Wynberg Regional Court for two counts of rape. He pleaded not guilty and was convicted in respect of both counts. He was

sentenced to 20 years imprisonment, with the two counts taken together. He appeals against both conviction and sentence, with the leave of the magistrate.

Facts

[2] The facts giving rise to the conviction are that on 08 September 2014, and at or near Philippi, New Cross Roads, the appellant raped the complainant, who was 13 years old at the time, vaginally and anally. The complainant testified that she knew the appellant just by seeing him passing in the street. She initially stated that she had never spoken to him, but then later testified that at one point the appellant had asked her and her friends which alcoholic beverages they drank, to which they stated that they did not drink. She testified that on the day of the incident she was sent by her grandmother, with whom she lived, to the market after 4 p.m. She went there with her three friends, M, W and S, who are all boys. As they were about to reach the gate of the market, she heard someone calling her name. She stood still and turned around, but she did not see the person that was calling her.

[3] M (one of her friends) told her that someone was calling her. She responded by saying that this person must leave her alone, because she was sent to the market to buy sausage and potatoes. As they were about to reach the stands someone tapped her on her shoulder and said: *“didn’t I call you”*. She answered: *“yes you did call but I am sent here to buy these things and they are waiting for these things at home.”* This person asked her if she remembered when he had been attacked by the community, to which she said yes. He then said that the complainant’s mother and father had been there when he was being attacked. The complainant told him that her parents had not been there. During the time of the said attack her father was out of town and she and her mother were sleeping at home. He then said that the complainant must not take her family’s side otherwise he will do something bad to her. He said he had ‘wanted’ her for a long time (suggesting that he was interested in her). She told him that she was scared of him. He was too old for

her. He took the plastic bag containing the sausage and potatoes that she had bought and said if she wanted it back she would have to follow him.

[4] She was scared that if she went back home without the items that she had gone to buy, her grandmother would get cross and ask her where the items were, so she followed him. Her friends had left when the man tapped her on the shoulder and started speaking to her.

[5] She followed this man to New Cross Roads and went to a house that had a yard and a gate. They went through the gate and around the house. At the back of the house there was a toilet-like place which was 'unfinished'. This man said she must kiss him and she asked him why. He said if she did not want to kiss him he was going to do something bad to her. The complainant kissed him as she was scared. She knew that the man was a '*skollie*' or a thug. At that time she had her school uniform tracksuit on. She wore a shirt underneath the tracksuit top. He then said she must take off one side of her tracksuit pants. She refused and he said he would do something bad to her if she did not do it. She got scared because he was always threatening her. She took off one side of her pants as instructed. He then said she must lie down on her back on the ground and she did. He took off his pants and underpants down to his knees. He then lay on top of her and took his penis out. He put it inside her vagina and made up and down movements on top of her. He thereafter took his penis out and said she must turn around. He then put it in her "bums" [anus]. She started to cry because what he was doing in her "bums" was sore. He then said if she started crying and people heard what they were doing then he would really do something bad to her. She then stayed quiet because he was a thug and she did not know what he was going to do to her. When he finished making the up and down movements, he told her to put her clothes on. She put on the one side of her pants that she had taken off and he also put his underpants and pants on. The ground where she lay was made of cement.

[6] She was not in a relationship with this man. She was anxious to go home because her grandmother would be asking where she came from. After he finished

what he was doing he accompanied her to the gate and said he did not care if she told her family what he had done to her as he did not even stay there, he stayed in Mitchell's Plain. He gave her the plastic bag that he had taken from her. When he was about to leave after he had accompanied her home, he said he was going to spoil her and buy her nice things, to which she did not respond. After that she crossed the road and ran home.

[7] When she got home it was starting to get dark. Her grandmother asked her where she had been and she told her that some man got her and raped her. Her grandmother called her mother, who hurried to the grandmother's house. Her mother also called her uncle. The uncle came with his wife and kids. Her grandmother told her to wash herself, because she did not know what to do. Her uncle said she must not go to school the following day, but to the police station with her mother. She testified that she told the whole family what had happened. At the police station she spoke to a lady by the name of Plato (the Investigating Officer). Plato asked if the complainant could take her to the house where the rape incident happened. When they got there they found an old lady, the person who raped her was not there. The complainant pointed out the person who raped her, at the police station, the following day of 10 September 2014. On 09 September (2014) after coming back from pointing out the suspect she was taken to Thuthuzela Clinic where she was examined by a doctor. She confirmed in court that the accused was the man that had raped her.

[8] In cross-examination she was asked why she did not cry when he put his penis in her vagina. She said that she was scared, but when she turned around and he put his penis in her bum it was "really really" sore. She did not tell the appellant that she did not want him to do these things to her, because she was scared. She had told him when he turned her around that she did not want what he was doing and told him that she wanted to go home. She looked at him, and he told her that she must look away. When challenged about why she did not say that in her evidence in chief, she stated that it was because she did not know that she

had to say all the “*little things*” when asked by the prosecutor. She stated that this person did not assault her before – or during – the rape. She repeated that when he said she must take off one side of her pants, she told him that she did not want to and he threatened her and said he was going to do something bad to her. She was scared because she did not know what weapons he had on him; in her mind he could take a knife and stab her. At the time when they were passing the church, they were on the side that was hidden from the people and there were no people at the church.

[9] She did not know he would rape her, when he ordered her to follow him. She thought he would give her the plastic bag back. When asked why in her police statement she did not mention a third friend, S, she testified that Plato did not go to the third friend’s place. She thought Plato did not include the third friend on purpose because she did not go to this friend’s house for a statement, whilst she went to the other two. She knew about that because at the time Plato went to her other friends’ houses she was there. She did not ask why Plato did not include the third friend because she did not know how the procedure worked.

[10] She testified that she did not mention in her testimony, as she did in her police statement, that her friends did not wait for her because they said they were scared of this person, because she had forgotten about it. She was also challenged about the fact that she did not mention that she put down the packet and that this man picked it up. She was also challenged for stating in the police statement that he had sex but mentioned in her testimony that he made up and down movements. To this she testified that she thought Plato was writing the statement the way she was supposed to.

[11] She was further challenged that she did not say that she pushed him off. She stated that she did not know that she had to mention every detail. When asked about not mentioning a condom, she stated that the prosecutor never asked her about that. She did not know that she did not have to wash her panty. Nobody told her not to wash it. She also did not look to see whether there was blood on it.

[12] She testified that it is not correct that she said he was kissing her the whole time and she told the prosecutor about that. She did not know she had to mention that he gave her something to wipe herself with - she did not know that that was an important part. She did not read the statement before she came to Court. It was not her grandmother that said she must go and wash but her uncle (different from her evidence in chief). It was put to her that she pressed rape charges because she came home late and had to have an excuse as to why she was late, or else she was going to get a beating. She came up with the story for that reason. She said that was not true.

[13] The next witness, Dr Ashima Narula, testified that she examined the complainant, who was brought to her by Sergeant Plato, on 09 September 2014. At the time of examination, the complainant was 13 years old. The complainant had an Implanon contraceptive in place since 20 June 2014. There was no history of illnesses, but she had not had her menses since May 2014. She had changed her panty and there was no sign of external bodily injuries relating to the incident. She experienced menarche at the age of 9. There was a tear between the labia majora and minora and it measured about five millimetres.

[14] The complainant had last been sexually active in April 2014, and had had no consensual intercourse in the last seven days prior to the incident. She did use a condom with her partner. The fossa navicularis had some redness. Bruising of the hymen was noted. No bleeding and tearing of the vagina was noted, but there was a whitish fluid oozing from the vaginal orifice. The hymen had an annular configuration, and no swelling or fresh tears were noted. There were bumps and deep clefts noted. Bumps and clefts were compatible with the complainant being sexually active. Dr Narula testified in her conclusion that the absence of severe injuries on gynaecological examination in a sexually active female did not exclude the possibility of forcible vaginal penetration with a penis or an object.

[15] As regards anal examination there was faecal soiling noted, hypopigmentation in the peri-anal region and some fissures and cracks. There were also

fresh abrasions, swelling, redness and bruising in the peri-anal region. On the orifice examination one could see a deep, gaping hole and could visualise the faecal matter in the rectum. The orifice had tears, swelling, thickening and funnelling. The reflex annotation was less than fifteen seconds and there was also shortening and inversion of the anal canal. There was also cupping, twitchiness and winking noted. No faeces were noted in the rectum and there was laxity on pressure on the anal orifice. There was no thickening of the anal verge and the sphincter tone or grip was markedly decreased. She testified that her findings were compatible with relevant forcible anal penetration with a penis or an object. The deep gaping hole in the anus could be caused by a penis or an object.

[16] Dr Narula further testified that the approximate timeframe of injury could be 72 hours. In cross-examination she testified that extreme force had been applied to the anus, to the point that it tore the complainant's internal sphincters. According to the doctor the injuries on anal examination proved that there had been penetration.

[17] The next witness was S M Nz ('Nz'), the complainant's grandmother. The complainant lived with her. On 08 September 2014 she sent the complainant to buy sausage and potatoes at the market. She noticed that time was passing and the complainant was not coming back home. She looked through the window and even phoned the complainant's mother.

[18] The complainant came back at approximately 17.30, put the plastic bag she had on the table and went straight to her room. Nz went to the room and asked her where she had been; the complainant answered back with teary eyes and was crying. She told her that this other man had raped her. Nz immediately phoned the complainant's mother. When the complainant's mother arrived, Nz told her what the complainant had said. They asked the complainant where this had happened and she told them that this man had taken her to some place in Gugulethu and had raped her in the toilet. She thought that the complainant's mother had taken her to the police station the following day, but she (Nz) did not go.

[19] She testified that the complainant came in in a hurry, put the stuff on the table, went to her room and closed the door. When she entered the room she did not see the complainant crying, but she looked like someone who did not want to talk. The complainant mentioned that she had gone to the market with M and W, her male friends. She told her that the boys had left her because they were also scared of this man and that she had told them to wait for her.

[20] She testified further that the market is busy and there is a Universal Church in the area. The complainant did not mention the name of the person who raped her; she had only referred to him as ‘this other man’. The complainant told her that this man told her that “*one day I was going to get you, one by one*”. Nz was shocked about what had happened to the complainant as she had not encountered anything like this before.

[21] The next witness was Abigail Adil Plato (‘Plato’). She testified that she was a detective working at Nyanga Family Violence, Child Protection and Sexual Offences. She was the investigating officer in this case. She had been taken by the victim (the complainant) to the crime scene. The complainant had been accompanied by her mother. They found an old lady at the house, who said that she knew the appellant (he did paintwork there) and had also seen him with the complainant the previous day, but did not ask anything (from the appellant) because she thought it was one of his friends. The appellant had not been there when Plato and the complainant went to the scene.

[22] After the complainant came to report the incident, she took her to the doctor and from the doctor they went to do a ‘pointing out’. The complainant pointed out to her a toilet-like structure, which she said was where the appellant had taken her. She left her phone number with the old lady they found at the premises, and with her son. Not long after she had dropped off the complainant and her mother the old lady’s son called, informing her that the appellant was at the old lady’s house. She asked Sergeant Sakopha to go with her. The old lady said that the appellant was the one who had been with the complainant the previous day at her house. They

arrested the appellant and also told the complainant that they had the suspect. Plato took the complainant to the holding cells. As they were walking the appellant called her by name. At that moment the complainant identified the appellant as the man who had raped her.

[23] The complainant told her that she had been with W and M. She obtained statements from them, but while preparing subpoenas for them to testify in court, their parents indicated that they were not prepared to have their children come into the Court environment and testify as they were minors.

[24] The appellant testified that he knew the complainant. She was in a relationship with his friend Ms who was about 25 or 24 years old. According to him the complainant was lying when she said Ms was 16 or 17, as he had already gone to initiation school. He testified that he (the appellant) had been painting by a certain house. While waiting for the paint to dry he went to the market in order to kill time. While standing there he saw the complainant. He called her, and she said she was coming back, because she was quickly buying something at the market. He greeted and asked her how she was and that he had not seen her for a long time. He asked her when last she had seen Ms, as he had not seen him in a long time. He told her that Ms was a troublemaker and that he had been taken back to the Eastern Cape because of that. He then told the complainant that he (the appellant) would now proceed with his advances towards her for them to have a relationship, as Ms was no longer there. The complainant had said that it was fine, they could continue having a relationship because it was not like Ms was going to come back and that there was no relationship between them anymore. He asked her if she did not want to see where he (the appellant) lived. The complainant called the boys she was with, but they did not notice her, they kept on walking.

[25] He had walked with her to where he lived, which was opposite to where he worked. They were having a conversation as they were walking. When the complainant was with Ms the appellant proposed his love to her but at the time she said she was with Ms.

[26] He and the complainant went to the house where he was working. The door had been open and the lady who owned the house, named Nomathemba, was there. He showed her where he lived opposite the house where he worked. He introduced the complainant to Mama Nomathemba, because that is what he always did. He confirmed that there was a “bathroom-like” structure outside the house, which according to him was quite visible. He testified that when the complainant came back from the market she had a plastic bag with her. He stated that he was not a ‘skollie’, that he had never asked the complainant to kiss him on that day and he had never threatened her. He testified further that he had never asked her to take her pants off, and that he had not put his penis in her vagina or “bums”. He confirmed that she never cried whilst in his presence and he had never told her that he would spoil her and buy her nice things. When he left her past four there was still light. The sun was still there. He does not know where she was after he left her. He further stated that he did not know he would get into trouble just by talking to someone.

[27] In cross-examination he testified that he did not know how old the complainant was, but that she had told him she was going to be eighteen. He wanted to have a relationship with her first and that as time went on they would eventually have sex, ‘*it will happen by itself*’. The complainant had told him that she loved him back. He confirmed that the two of them were in each other’s company on 08 September 2014.

Grounds of appeal

[28] The grounds of appeal raised on behalf of the appellant are that:

- (a) The magistrate did not test the complainant’s ability to understand the import of the oath before she proceeded to admonish her to speak the truth;
- (b) The magistrate erred by not attending the inspection *in loco* so as to allow the court to place her observations on record;

- (c) The magistrate erred by stating that the only point in dispute between the state and the defence was whether these two acts of penetration took place without consent;
- (d) The court erred by finding that Dr Narula's evidence acted as a guarantee for the trustworthiness of the complainant's evidence or version;
- (e) The court erred in finding that it was improbable for the complainant to sustain injuries on her way home in quite a short space of time, as it did not attend the inspection *in loco*. So it would not know the distance travelled by the complainant and how much time was needed to inflict such injuries;
- (f) The court erred by finding that it was highly unlikely that a 13 year old, even if sexually active, would consent to anal penetration that led to severe anal injuries, as observed by Dr Narula;
- (g) The court erred by suggesting that the defence of the appellant was that of consensual sexual intercourse, even though the appellant was adamant throughout the trial that he did not have sexual intercourse with the complainant;
- (h) A number of inconsistencies and improbabilities were evident from the complainant's evidence, particularly the suggestion that she followed an unknown person when she appeared to be in danger and that she did not call for help or alert her friends or community members;
- (i) As regards sentence, it is submitted that the court was unduly harsh and failed to accord sufficient weight to the appellant's personal circumstances (which called for imposition of a sentence lesser than 20 years).

The issue of taking of oath and admonition to speak the truth

[29] In terms of s162 (1) of the Criminal Procedure Act 51 of 1977 ('the Criminal Procedure Act'): "*Subject to the provisions of sections 163 and 164, no*

person shall be examined as a witness in criminal proceedings unless he is under oath, ...”.

[30] In terms of s 164 (1): *“Any person who, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.”* (Own emphasis)

[31] In *S v B* 2003(1) SACR 52 (SCA), the Court found that the notion that a finding was required to be preceded by an investigation is too narrow of an interpretation of the section. The Court held that the section did not expressly require that a formal enquiry be held and an investigation was not required in all circumstances in order to make such a finding. For example it could happen that when an attempt is made to administer the oath or to obtain the affirmation it came to light that the person involved did not understand the nature and import of the oath or affirmation. The mere youthfulness of a child could justify such a finding. Nothing was required more than that a presiding judicial officer had to form an opinion that the witness did not understand the nature and import of the oath or the affirmation due to ignorance arising from youth, defective education or other cause. Although preferred a formally noted finding is not required.

[32] In my view the inquiry suggested in decisions that discussed the provisions of s164 do not necessarily require a formal inquiry of a clinical nature, which would advocate for form over substance. In my view, what is required in the relevant section is an indication that the presiding judicial officer enquired from a witness whether he or she understood the import of the oath.

[33] In the present case the presiding officer asked the complainant as follows:

“COURT: L. tell me how old are you now?

WITNESS: I’m 14 Your worship

COURT: And in which grade are you?

WITNESS: Grade 9.

COURT: And who do you live with?

WITNESS: With my mother and father and grandmother.

COURT: L. do you know what it is to take the prescribed oath? If you do not know you can just tell me.

WITNESS: I don't know Your Worship." (Own emphasis)

[34] It is clear in my mind that the presiding officer's questioning at this stage was directed at finding out whether the witness understood what a prescribed oath is, and she answered in the negative. It seems to me, what is envisaged by case law which suggests that an enquiry should be first held to establish whether the witness understands the nature and import of the oath, was established in the present matter.

[35] In *S v Matshivha* 2014 (1) SACR 29 (SCA) at para 11, Zondi AJA (as he then was) held that *"...If the judicial officer should find after such an enquiry that the witness does not possess the required capacity to understand the nature and import of the oath, he or she should establish whether the witness can distinguish between truth and lies and, if the enquiry yields a positive outcome, admonish the witness to speak the truth."*

[36] In the present matter, after establishing that the complainant did not understand what taking a prescribed oath means, the presiding judicial officer carried on and asked the complainant the following questions:

"COURT: Do you know what it is to tell the truth?

WITNESS: Yes, Your Worship I know.

COURT: And to tell lies do you know what that is?

WITNESS: Yes, Your Worship

COURT: And who taught you about truth and lies and what the difference is between them?

WITNESS: My grandmother taught me Your Worship. When you are telling the truth Your Worship if you're telling something that you know that happened and if you tell a lie Your Worship then you are telling something that didn't happen Your Worship, something that didn't exist.

COURT: And if you tell your grandmother a lie and she finds out that you lied to her what will your grandmother do to you?

WITNESS: She gives me a hiding Your Worship or she shouts at me.

COURT: So if you tell lies you will be punished?

WITNESS: Yes, Your Worship.

COURT: So would it be the right thing or the wrong thing to tell lies?

WITNESS: It would be a wrong thing Your Worship.

COURT: And if you tell the truth would that be the right thing or the wrong thing to do?

WITNESS: It would be a right thing Your Worship.

COURT: L. today is Thursday is that right?

WITNESS: Yes, Your Worship

COURT: If I (sic) L. it is the weekend today would that be a truth or a lie?

WITNESS: It's a lie.

COURT: And if I say L. you are 30 years old would that be a truth or a lie?

WITNESS: It's a lie.

COURT: L. do you understand that if you tell the Court lies that you will be punished?

WITNESS: Yes, Your Worship.

COURT: Court is satisfied that the witness is competent Court is just going to warn her in terms of Section 164. L. the Court is going to warn you when you testify that you must tell us the truth. Do you understand that?

WITNESS: Okay Your Worship.

COURT: Do you understand?

WITNESS: Yes, Your Worship

COURT: L. the prosecutor is first going to ask you some questions now. If there is anything that bothers you, if you're tired you want to take a bathroom break you can tell the Court, do you understand? --- Okay Your Worship.

L. M.: (warned) (through interpreter)"

[37] I am satisfied that there was compliance with the provisions of both s162 read with s164 in this matter. Whilst the magistrate did not ask many questions to establish if witness understood the import of taking the oath, she asked the witness as a starting point if she understood the taking of a prescribed oath and the witness did not know and the magistrate then proceeded to the second inquiry to ascertain whether the witness knew the difference between telling the truth and telling lies and after she was satisfied she went on to admonish the witness to tell the truth.

[38] Turning to the issue of the non-attendance by the court at an inspection *in loco*. I do agree with Mr Mtini who appears for the appellant that the magistrate should have attended the inspection *in loco*, so as to place the court's observation on record appropriately, as per *Kruger v Ludick* 1947 (3) SA 23 (A) at page 31. This makes sense because it is the court ultimately that must make a decision based on what it has observed.

[39] It is noted that Mr Hartzenberg, who represented the appellant during the trial, applied for the inspection *in loco* to be undertaken before the close of the defence case, which was granted. The magistrate had initially agreed to attend the inspection *in loco*, but later changed her mind, and noted that it was not necessary for the court to do so at that stage. The parties went to view the crime scene and the areas observed were placed on record in detail by Mr Hartzenberg. Photos and video footage depicting the areas visited were handed in in court as exhibits. Mr Hartzenberg stated that it would be relatively easy for the court to follow, although it was windy on the day the inspection was conducted. Mr Hartzenberg stated that what he placed on record was what the appellant wanted to show the court, so as to have an idea of the location where the incident took place and the surroundings.

These observations were confirmed by Ms Uys, the prosecutor, who was present throughout the inspection *in loco*. Having placed those on record, the defence closed its case. The court did not seem to place much reliance on the photos and video footage or what was observed by the parties during the inspection. Its decision was mainly based on the evidence led in court. It does not appear to have been prejudicial to the parties, particularly the appellant, in my view, that the court did not place the inspection observations on record itself, because his legal representatives placed the defence's observations on record in great detail, which was agreed to by the state. This is not a case where the court's failure to attend the inspection *in loco* and place its observations on record would lead to unfairness that should vitiate the proceedings.

Assessment of evidence

[40] The complainant is a single witness in the occurrence of the actual rape incidents. The cautionary rule is therefore applicable. Its application in cases that involve single witnesses and minors is well established and need not be restated. The observations made by the Court in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180 E-G, have stood the test of time and are apt in this case as well. As observed in *Sauls* supra, the Court at the end of the day must be satisfied that despite the shortcomings in the testimony of a single witness the truth has been told.

[41] The complainant was 13 when the incidents occurred and 14 when she testified. She gave a sequential account of how she met the appellant at the market on the day of the incident, having been sent to buy sausages and potatoes by her grandmother, after school. The appellant called her, whilst she was walking with three of her friends. Much was made of whether there were two or three friends that accompanied her. Nothing much turns on that, in my view. The point is, she was with friends, who were boys, and who were more or less the same age as she. The presence of friends was confirmed by the appellant, although he mentioned two instead of three friends so did Plato and Nz who testified for the state. It is

possible that the complainant was mistaken when she mentioned three friends instead of two.

[42] Another issue was raised during her cross examination about whether she was called by the appellant before she entered the market or when she came back. This turned out not to be particularly an issue, as the appellant himself testified that he called her as she was going to the market and according to him she said she was going to quickly buy something and come back.

[43] It is common cause that the appellant and complainant were not friends. According to the accused he was friends with the complainant's then boyfriend, who was at that time living in the Eastern Cape. It is submitted on behalf of the appellant that the complainant initially stated that she knew the appellant by sight but later stated that he once spoke to her and her friends about beverages they liked. Even if that were so, there is no evidence that the complainant and appellant were close to each other or were friends before the day of the incident. Again, this discrepancy is not material, in my mind.

[44] An issue was raised about how improbable it is for a person to follow someone unknown to her, in full view of friends and people in the community, without alerting anyone that someone forcefully took her bag and eventually ending up at the place where the rape occurred.

[45] One has to read the complainant's evidence in context to understand why she followed the appellant. As I understand the complainant's evidence: someone called her name, and she did not see who it was. One of her friends alerted her to this person and she ignored him. Then as she came out of the market someone tapped her shoulder saying "*did I not call you*", she said "*yes, but I am sent to buy these things, and they are waiting for these things at home.*" The appellant then reminded her about the time the community attacked him alleging that the complainant's mother and father were amongst the people that attacked him. When she denied that he threatened to do something bad to her, if she took her family's side. Then he told her that he had wanted a relationship with her for a

long time, and that she never answered him. She said she was scared of him and he was too old for her.

[46] This then is what resulted in her following him. He took the plastic bag she was carrying and said if she wanted it back she must follow him. She followed him because she was scared to go home without the plastic bag. At that time she did not know she was going to be raped. She followed because she wanted the plastic bag back. There is therefore a plausible explanation as to why she did not cry out for help at the time he told her to follow him. She testified that she did not alert her friends because she thought the appellant was going to let her go. It is the taking of the plastic bag that resulted in her obliging by following him as she did not want to go home without it. She further testified that she did not know what the appellant would do to her and her family, as he was a thug. She was therefore clearly scared of him.

[47] It appears that the appellant had a reputation. The explanations given by the complainant as to why she followed him make perfect sense to me. She wanted the plastic bag back; she was threatened by him during their exchanges; she did not know what this man could do to her and her family; she did not know if he had a weapon in his possession or had friends that could hurt her, and further and most importantly, she did not know that she would end up being raped. She was scared that if she turned around he would try and attack her.

[48] When they were at the house where the incident took place, he demanded that she take one side of her pants off and threatened to do something bad to her if she did not do that. There is nothing strange about her relenting and not screaming for help then either. She was threatened not to cry when she did. She gave a clear account of how the rape occurred. She testified that he inserted his penis in her vagina and made up and down movements and then inserted it again inside her anus, which was interpreted as her bum. At this point she cried because it was painful. This reaction seems to be consistent with the findings of Dr Narula that the anal injuries were quite serious and suggestive of force used in penetrating her

anus, leaving a gaping hole. The examination by the doctor was conducted within 24 hours of the incident, with the doctor stating that the tears and injuries noted were still fresh, indicative of penetration that would have occurred within a period of 72 hours prior to the examination.

[49] The doctor testified that vaginal penetration could also not be ruled out, simply by virtue of the complainant being sexually active. Some redness was noted in the vaginal area although there were no serious injuries. It is trite that absence of injuries does not mean that rape did not occur.

[50] The complainant was extensively cross examined for over two days, and her evidence was consistent in material respects. Yes, there were discrepancies and omissions between her police statement and her testimony in court, which I have already alluded to in my summary of the evidence and some inconsistencies between her evidence in chief and her cross-examination. Those, to a great extent, she explained to have been either aspects she did not know were important for her to mention or she thought Plato took the statement in the manner she did because that is how it was supposed to be done. She also offered an explanation regarding the alleged discrepancies or omissions which did not sound far-fetched in my view. Whilst her testimony was imperfect it was consistent in material respects.

[51] It is common cause that the complainant was in the company of the appellant on the day of the incident. It is also common cause that they went to house (where the incident occurred) together. There are differences between the versions of the complainant and appellant on the issue of whether, inter alia, the two went inside the yard to the toilet-like structure. The appellant states that he did not go to the toilet-like structure with the complainant. He states that she stood at the gate. The appellant's evidence was vague on whether the complainant could see that there was a toilet or a bathroom-like structure from where she was standing. It is strange that the complainant could know that there was a toilet-like structure at the back of the house (which was unfinished) if she did not enter the yard. This could also be why his legal representative at the trial kept asking him to

confirm whether they had walked from the corner to the opposite side, so that they could see the structure, even without entering the premises.

[52] It appears to have been convenient for the appellant to state that the complainant stood at the gate and would not come in, as he would have had to explain why he went behind the house towards the toilet-like structure with her if the idea was simply to introduce her to the old lady of the house, Mama Nomathemba.

[53] It seems to me that he had to admit to having been at the old lady's house with the complainant, because he would not have been able to get around the fact that the old lady had seen him with the complainant on the day of the incident. He had to offer an explanation as to why she was in his company and why it was necessary for him to take her there. His justification that he wanted to introduce her to the old lady whom he worked for does not stand up to scrutiny, nor is it consistent with his evidence that the relationship was quite new, which is why he would not kiss her. If it was new, why was it important for her to be introduced to the lady whom he regarded as a mother?

[54] It is significant that a different version, as to why the complainant and appellant ended up going to the house where he was working, was put to the complainant. It was put to her that she had asked him to show her where he was working. He showed her where he was working and they never entered the gate because the old lady of the house was already at the gate. Then he introduced her to the old lady as his friend. He then told the old lady that he would be accompanying the complainant home. When he testified, however, he stated that he proposed love to the complainant at the market and he asked her if she did not want to see where he lived. She said it was fine. When they got there however, he did not go with her to where he lived. He alleges that the place where he lived was opposite where he worked so he simply pointed to her where he lived, and took her to where he worked. He then left the complainant at the gate and went in the house. This is contrary to what was put to her during her cross examination.

[55] Crucially, it was never put to her that she had said she loved him back and from that day they had started a new relationship, so that she could comment. All this appears to have been contrived so as to offer an explanation about why he took the complainant with him to this house. He also stated that he hugged her before he left her at the robots when he testified. That was also not put to her.

[56] It is important to note that the complainant's grandmother noticed that something was wrong with her. She was not herself. She was teary. When asked what was the matter was she told her grandmother that she had been raped. The fact that she did not immediately break the news to her grandmother as she walked in the door is of no moment. People behave in different ways when they are hurt. That she was raped cannot be discounted purely because she did not burst out and tell her grandmother about the rape as she walked through the door.

[57] The complainant testified that the robots where he left her are not far from her house. When he left her she ran. There is no evidence that anything happened between the robots and reaching her house. It is highly improbable that she made up the rape charges simply because she came home late and had to offer an excuse. She would have taken things too far - by going to the police station, being examined by the doctor and testifying in Court - simply because she did not want to get into trouble for coming home late. Further there does not seem to have been any other male person in contact with her after she was with the appellant and before she was examined by the doctor.

[58] I am of the view that, whilst the magistrate may have appeared to mischaracterise the issues in dispute or may not have articulated them clearly, she was correct about the conviction. A weighing up of all the evidence, in my view, taking into account strengths and weaknesses and probabilities and improbabilities from both sides, the balance of evidence favoured the state so as to exclude any reasonable doubt that the appellant is guilty of the offences he was charged with. To that end the appeal against the conviction of the appellant must fail.

[59] Turning to sentence, the magistrate found that there were substantial and compelling circumstances warranting deviation from the life imprisonment ordained and imposed a sentence of 20 years imprisonment, taking both counts together. The magistrate wrote a comprehensive judgment in this regard.

[60] The approach by an appellate court in an appeal on sentence was outlined in the case of *S v Malgas* 2001 (1) SACR 469 (SCA) at 478 D-E as follows:

‘... 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...’

[61] The court went on further to state at p 478I – 479A that:

‘...The tests for interference with sentences on appeal were evolved in order to avoid subverting basic principles that are fundamental in our law of criminal procedure, namely, that the imposition of sentence is the prerogative of the trial court for good reason and that it is not for appellate courts to interfere with that exercise of discretion unless it is convincingly shown that it has not been properly exercised...’

[62] The disparity between the sentence imposed by the trial court and that this Court would have imposed must be sufficient so as to warrant interference by this Court.

[63] It is so that the appellant is a young man. It appears that there was a discrepancy about his age, which was initially given as 27 years old during the trial. Mr Hartzenberg corrected it during sentencing, stating that the appellant had told him that he was 29 years old. He was single, had no children, and had fixed employment and a standard 9 education with no serious health issues. He was a first offender on the rape counts. The appellant is relatively young and has the potential of being rehabilitated.

[64] The seriousness of rape cannot be understated on any account. Courts must at all times impose appropriate sentences and send correct messages that rape cannot be tolerated, no matter what. There is also the issue of the serious injuries

that have been inflicted on the complainant anally. Dr Narula gave a devastating account of how the penetration left a gaping hole in the complainant's anal canal. The victim impact report also records how the rape incidents impacted the complainant. She had difficulty using the bathroom for a long time, she struggled to associate with her peers, with sleeping and did not want to be alone. She fears men, does not trust them and feels anxious and fearful around them. She is irritable and fears going to the shops. Her mother and grandmother have a sense of guilt and blame themselves for what happened to their daughter and granddaughter.

[65] The magistrate took into account the appellant's personal circumstances and departed from the prescribed minimum sentence of life imprisonment. The court took into account the fact that, whilst the appellant ought to have been sentenced for two counts, the respective counts stemmed from the same incident and took them together for purposes of sentencing. The cumulative consideration of all the relevant factors indicate that the kind of sentence imposed by the magistrate is not one that can be characterised as being so far removed to what this court considers as appropriate.

[66] In the circumstances, I am not convinced that the magistrate exercised her discretion improperly even if she imposed a sentence that this court would not have preferred. Ultimately that is not the test. In the result the appeal should fail.

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

1. The appeal is dismissed and the conviction and sentence are confirmed.

N P BOQWANA
Judge of the High Court

I agree.

N KOSE
Acting Judge of the High Court