FORM A
FILING SHEET FOR TRANSKEI DIVISION JUDGMENT

PARTIES**:**
MXOLISI ERICK DANO **Appellant**
and
THE STATE **Respondent**

- Case Number**: CA & R 202/08**
- High Court**: EASTERN CAPE DIVISION**

DATE HEARD: **29 October 2008**

DATE DELIVERED: **6 November 2008**

JUDGE(S): **Chetty and Pillay JJ**

LEGAL REPRESENTATIVES –

Appearances:
- For the Appellants(s): **Adv Geldenhuys**
- for the Respondent(s): **Adv Gounden**

Instructing attorneys:
- Appellant(s):
- Respondent(s):

CASE INFORMATION -
- *Nature of proceedings*: ***Criminal Appeal***
- *Topic:* ***Rape***
- *Key Words:* ***Rape – evidence of young child –approach to evidence by appellate tribunal – sentence of life imprisonment – ether interference warranted***

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

In the matter between: **Case No: CA & R 202/08**

MXOLISI ERICK DANO **Appellant**

and

THE STATE **Respondent**

Coram: **Chetty and Pillay JJ**

Date Heard: **29 October 2008**

Date Delivered: **6 November 2008**

Summary: *Rape – evidence of young child –approach to evidence by appellate tribunal – sentence of life imprisonment – whether interference warranted*

JUDGMENT

CHETTY, J

[1] The appellant, Mr *Mxolisi Dano*, was convicted in the regional court, Humansdorp, on a charge of rape and sentenced to a mandatory sentence of life imprisonment, the offence falling within the purview of Part I of Schedule 2 to the **Criminal Law Amendment Act 105 of 1997** the victim being a young child aged six at the time of the

commission of the offence. The appellant, who was legally represented in the court below, duly noted an appeal against both the conviction and the resultant sentence in terms of the provisions of s 309 (i) (a) of the **Criminal Procedure Act 51 of 1977**.

[2] The notice of appeal lists a number of grounds in which it is alleged the trial magistrate erred in concluding that the state had discharged the onus of proving that the guilt of the appellant had been established beyond reasonable doubt. It is not suggested that the trial court misdirected itself in any way. The principal submission advanced, on appeal, is that the trial court erred in its factual findings.

[3] An appellate tribunal's approach in an appeal where the trial court's factual findings are sought to be assailed has repeatedly been emphasized to be that such court's factual findings are presumed to be correct and will only be disregarded by the appellate tribunal if the transcript of the evidence compels the opposite conclusion.

[4] In order thus to test the validity of the submissions advanced on behalf of the appellant it becomes necessary to consider the evidence adduced holistically and not piece meal. It is not in issue that the complainant was six years old at the time of the commission of the offence. The latter's biological mother and the appellant had cohabited with each other as man and wife for approximately 4 years between

1999 and 2003. On 31 March 2000, the complainant was born. It is common cause that the appellant is not the latter's father. He is however the biological father of the complainant's brother, born during their period of cohabitation. The relationship between the appellant and the complainant's mother became strained to such an extent that the latter moved out of the communal home and took up residence with her uncle. She however left the complainant in the care of the appellant because she was unable to support both her children.

[5] Although there would appear to be no clarity concerning the duration of the complainant's stay with the appellant the evidence discloses that shortly after the separation Mrs *Virginia Mnquma*, the appellant's sister, concerned for the complainant's wellbeing, fetched her from the appellant's home and henceforth cared for her as her own child. It is furthermore common cause that during the complainant's stay with Mrs *Mnquma* the complainant's mother seldom visited her and by the time of the commission of the offence had last seen her approximately two years previously.

[6] Mrs *Mnquma* testified that because of her work schedule she did the laundry over weekend. On washing the complainant's panty she noticed a brown discharge thereon and became concerned bearing in mind the tender age of the complainant. Her concern became heightened when, during further washing, other panties exhibited

similar signs. Alarmed hereby she sought advice from an elderly neighbour who, on examining the panty, shared her disquiet. On Saturday, 31 March 2007, Mrs *Mnquma,* whilst washing the clothes noticed a similar discharge on the complainant's panty and finally decided to investigate. She searched for the complainant among the local children the latter normally played with but to no avail. The complainant could not be found. During her further search she came across her sister (the appellant's other sister), Mrs *Nziba*. On enquiry by the latter as to why she appeared agitated Mrs *Mnquma* disclosed her findings to Mrs *Nziba* and appraised her that she suspected that the complainant may have been sexually abused.

[7] These two witnesses then jointly searched for the complainant but to no avail and Mrs *Nziba* left for her home. Mrs *Mnquma* recounted that the complainant arrived home at approximately 8 p.m. and appeared frightened. The complainant refused to eat and retired to her room. She followed and examined the complainant's private parts. She observed some bruising, a reddish discharge and blood flecks on her panty. She immediately summoned her elderly neighbour who confirmed her earlier suspicions. Their repeated questioning of the complainant produced no answers whatsoever. Exasperated by the latter's stubbornness, Mrs *Mnquma* retired for the evening. Early the following morning Mrs *Nziba* arrived to enquire about the complainant and Mrs *Mnquma*, thinking that the complainant may not wish to

divulge information in her presence, left the room. Mrs *Nziba's* initial questioning of the complainant likewise yielded no results. She then took a belt and proceeded to beat the complainant who then divulged the culprit to be one *Butana,* whom, it is common cause is the appellant. That revelation led to the complainant being taken to the police station and thence to the local hospital where she was examined by Dr *Theron*. I should add that although the complainant was not called into the courtroom from the confines of the anteroom from where she testified through close circuit television appellant's attorney admitted that the person to whom the complainant referred to in evidence as *Butana* was in fact the appellant.

[8] Gynaecological examination of the complainant conclusively established that the latter had been penetrated to some degree and there is no question that the offence of rape had not been proved. The crucial issue the court a quo was called upon to determine was whether the complainant's identification of the appellant as the perpetrator was truthful and reliable. The trial court delivered a well reasoned judgment. The trial magistrate recognised that as regards the offence itself the complainant was not only a child but moreover a single witness. Although the complainant testified through an intermediary through the medium of close circuit television the magistrate was in a position to observe her throughout. The transcript of the proceedings reinforces the trial court's assessment of her demeanour and confirms

it's finding that the complainant's version remained consistent throughout.

[9] It is therefore not surprising that on appeal before us, Mr *Geldenhuys's* criticism of the complainant's evidence was limited to an attack upon the circumstances under which she divulged the name of the perpetrator. The submission advanced was that the complainant's identification of the appellant as the perpetrator was not only untruthful but unreliable in view of the fact that she was under duress to reveal the name of the perpetrator. There is no merit in this submission. It is no doubt correct that the complainant only mentioned the appellant by name when she was beaten by Mrs *Nziba*, but there is not a tittle of evidence that any of the witnesses suggested the appellant's name to her. On the appellant's own version he had last seen the complainant almost three years prior to March 2007. It is improbable in the extreme that the complainant would deliberately conceal the name of the actual perpetrator and falsely accuse the appellant. Furthermore the undisputed evidence of the complainant and the other witnesses show that the complainant pointed out the appellant's home as the place where the incident occurred shortly after the incident. The appellant's evidence that he had let the premises was rightly rejected by the trial court and the finding that his evidence was untrue is fully supported by the record. In my view, the magistrate's finding that the appellant was the perpetrator is unassailable and in

the circumstances the appeal against the conviction must accordingly fail.

[10] The trial court was obliged to impose the mandatory sentence of life imprisonment on the appellant absent a finding of substantial and compelling circumstances as envisaged by s 51 (3) of the **Criminal Law Amendment Act 105 of 1997**. Relying principally on the decision in the Supreme Court of Appeal in **S v Mahomotsa**[1] appellant's counsel submitted that the sentence imposed is disproportionate to the crime, the appellant and the legitimate interests of society perforce warranted interference. The facts of this case are however clearly distinguishable from those in *Mahomotsa*. The complainant in this case was barely seven years old and from the magistrate's observations a mere wisp (tengerig) of a child. Although the complainant's evidence of at least one other occasion where she had been sexually abused was never explored, the overwhelming weight of the evidence is that the complainant had been abused on more than one occasion for Mrs *Mnquma* had noticed a discharge on several of the complainant's panties over a period of time. The inescapable inference is that it was the appellant who was the perpetrator.

[1] 2002 (2) SACR 435 SCA

[11] There is the added factor that the appellant's admonishment that the complainant refrain from divulging details of the incident which had occurred had a profound affect on her. It appears from her evidence that not only did he threaten her with death but also made reference to ghosts. To any child, let alone one of such a tender age as the complainant, the threats would be taken to heart and be believed. That the complainant understood its full import is apparent from her unwillingness of disclose the appellant's identity until a beating compelled her to do so.

[12] The trial court considered the cumulative effect of the appellant's personal circumstances *viz*. his lack of previous convictions and the fact that he had been gainfully employed in conjunction with the mitigating circumstances. Having embarked on that exercise it concluded that there were no substantial and compelling circumstances. Theoretically, the possibility that an offender may be rehabilitated is ever present but the systematic abuse of a little child over a period compels the conclusion that the appellant is a danger to children particularly when seen against the background of an admitted relationship with his girlfriend. In my judgment, a sentence of life imprisonment, in the circumstances of this case, is neither inappropriate nor unjust and its imposition by the trial court cannot be faulted. There is no proper basis warranting interference in the sentence imposed.

[13] In the result the appeal is dismissed.

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D. CHETTY
JUDGE OF THE HIGH COURT

Pillay J

I agree.

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R. PILLAY
JUDGE OF THE HIGH COURT

Obo the Appellant**: Adv Geldenhuys**

Obo the Respondent**: Adv Gounden**