IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION. BLOEMFONTEIN

Case No: A59/2014

In the matter between

S[...] K[...] M[...] Appellant

and

THE STATE Respondent

CORAM: RAMPAI, AJP *et* TSATSI, AJ

JUDGMENT BY: TSATSI, AJ

HEARD ON: 18 AUGUST 2014

DELIVERED ON: 27 NOVEMBER 2014

INTRODUCTION

[1] This is an appeal against conviction and sentence of the regional court in Bloemfontein (court *a quo).* The appellant was charged with rape in terms of section 3 of Act 32 of 2007, the Sexual Offences and Related Matters Amendment Act. It was alleged that the appellant unlawfully and intentionally committed an act of sexual penetration with the 8 year old complainant by inserting his penis into her vagina without the consent of the complainant. In terms of section 309(1) of the Criminal Procedure Act, Act 51 of 1977 as amended the appellant has an automatic right to appeal.

1.1 The appellant pleaded not guilty to the charge put against him;

1.2 The regional court found no substantial and compelling circumstances that warranted a sentence less than life imprisonment.

1.3 The respondent supported the conviction and the sentence imposed on the appellant.

[2] The testimony of the complainant was conveyed through the CCTV in terms of section 158(3) of Act 51 of 1977. The court informed the appellant that his name will be listed in the National Register of Persons who have sexually abused children and mentally retarded women.

[3] The appellant is the biological father to the complainant. The mother passed away during 2013. The appellant has a live - in girlfriend. The appellant lived with the complainant and her brother on a farm. The appellant was employed as a gardener on this farm. In addition, he was employed to do other types of jobs. He was a handyman.

[4] "As regards conviction the grounds of appeal were that

"*The court erred in finding that the state has proved its case beyond reasonable doubt on the following terms:*

1. The court erred by overlooking the contradiction in the state case. There was a material contradiction between the evidence of the complainant (N[...] M[...]) and the evidence of the said state witness (P[...] B[...])."

1. 1. Complainant in evidence in chief testified that on the day in question the appellants picked her up and he put her on the bed where the rape took place. Complainant clearly indicated that at the time of rape nobody was in the house. Evidence of the 2nd state witness contradicted the evidence of the complainant on the following grounds: Complainant said during the rape nobody was in the house whereas the 2nd state witness said he was in the house and he witnesses the aforesaid rape. Complainant's evidence did not corroborate the evidence of the 2nd state witness who testified to the effect that they were offered liquor by the applicant. Secondly she did not corroborate the evidence of the second state witness who testified to the effect that during the rape he stabbed the appellant with a knife.

1.2 The court erred by relying on the evidence of the 2nd state witness. 2nd state

witness during the examination in chief he maintained that he witness the rape incident. During cross examination he was crumbling and he did not stick to his version. During cross examination he changed and he said he did not witness the rape incident but he heard from the complainant.

1.3 The court erred by not making a finding that the probabilities does not favour the state case. Complainant and second state witness both testified that the appellant after the rape he was hit by the brother of Anton with a hammer. It is appellant submission that if he was hit with a hammer he was supposed to sustain injuries and the fact that he did not sustain injuries, it is a clear indication that he was not hit with a hammer and both state witnesses are lying.

1.4 The court further erred by not rejecting the version of the complainant and the 2nd state witness. It is the appellant submission that, the evidence was supposed to be related because that evidence was not corroborated by the evidence of Anton and his mother. It is appellant's submission that the improbabilities and the contradictions highlighted above they cast doubt as to whether the rape took place.

2. The complainant as a single witness the court has failed to treat the evidence of the complainant with a degree of caution. The court when evaluating the evidence of the complainant the court further erred by not taking into consideration the fact that the complainant is a child.

The court erred by not approaching the evidence of the complainant with a degree of caution. The court erred by finding that the evidence of the complainant, as single witness, was satisfactory in every material respect, and the court failed to warn itself that the evidence of the complainant, as a single witness and child witness, had to be approached with caution.

3. The court further erred by not taking into account the fact that after the rape the complainant was examined and the forensic examiner did not find any genital injuries. The fact that the forensic examiner did not find genital injuries it is clear indication that the rape did not take place.

4. *The court erred by rejecting Appellant's version as not reasonably and possibly true. Appellants still maintain that he did not rape the complainant.*

[5] The events giving rise to the charges upon which the appellant was convicted and sentenced are

summarized thus: It was alleged that during November 2009 at Bloemspruit the appellant committed an act of sexual penetration, with the complainant who was eight years old at the time. The complainant also told the court that such acts occurred on more than one occasion at different times. She narrated her version through an intermediary where she demonstrated the alleged act by using a female and a male doll. She told the court that, on one occasion, she was lying on the floor and the appellant picked her up. The appellant put her on the bed. By using the dolls, she put the doll lying facing up, lifted the doll's pants and showed the male doll lying face down onto the female one, showing the penis touching the female's vagina. The complainant showed the male doll making up and down movements whilst lying on top of the female doll. The prosecutor asked the complainant what was she doing when the appellant made the up and down movements on top of her. She told the court that the appellant closed her mouth, with his hand. She then said that she screamed out loud and the appellant left her alone.

The complainant then ran away. She said that there was nobody at the house at the time.

[6] The complainant told the court that this was not the only time that such an incident happened. A similar incident happened in 2008 or 2009. This time the complainant's brother was in the house. She told the court that she was asleep. The appellant came in the room and picked her up. He put her on the bed, lifted her dress, and undressed her of her panties. The prosecutor asked the complainant to demonstrate to court what happened on the day by using female and male dolls. The complainant repeated almost the same demonstration that she did before, confirming an act of sexual penetration. The complainant screamed and whereupon the appellant left her alone. She then went out through the window. She ran to the owner ("Ms M[...]") of the farm house. She told Ms M[...] and his son, A[...], of what the appellant did to her.

[7] A[...] and Ms M[...], told A[...]'s brother ("the brother") who then came to the appellant's house with a hammer. The brother hit the appellant with a hammer on his back. The police were called and the appellant was arrested.

[8] Subsequently the complainant went to her friend's place where she told her friend's mother, called S[...] M[...] ("Ms M[...]"). Her elbow was swollen because the appellant hit her with a sjambok. Ms M[...] then used warm water to treat the complainant's elbow. The prosecutor asked the complainant if anybody took her to a doctor or hospital. The answer was in the negative. Under cross examination it was put to the complainant that when she was asked if her father raped her once she said no. This corroborated the complainant's evidence in chief and she clearly stated that he was raped by the appellant more than once. She was further asked under cross examination if she continued to live with her appellant after the first rape. She testified that she went and lived with her friend M[...], whose mother's name was A[...] L[...] (Ms L[...]"). She indicated that at the time of the trial she was staying with Ms L[...] again. She only stayed with Ms M[...] for five days. She further testified that she did not want to stay with the appellant after her mother's death.

The reason being, that the appellant did not want her and her brother to visit their friends.

[9] The complainant further stated under cross examination that she visited her friend M[...]. The complainant admitted that she did not tell M[...]'s mother because M[...] promised the complainant that she would inform her mother (M[...]) about the rape. The complainant was confronted under cross examination about why Ms L[...] fetched her and her brother from Ms M[...]'s house. She told the court that Ms L[...] fetched them because she saw the appellant buying them alcohol at a tavern. Under cross examination it was put to the complainant that she told the court in her examination in chief that when her father raped her the first time there was nobody in the house. She explained that, she meant that there was nobody because her mother passed away. Her brother was busy playing with his toy cars next to the door of the room where the rape occurred. Her brother was aware that she was being raped because she told him.

[10] I should interpose at this stage to mention that after lunch adjournment, the intermediary told the court that an incident happened during lunch. Apparently the appellant saw the complainant and pointed a finger at her. The complainant got scared, clung to the intermediary and started crying. The complainant told the court that she was scared of the appellant because the appellant threatened to hit her.

[11] It was put to the complainant during cross examination that the reason she lied about the fact that the appellant raped her was because she did not want to stay with the appellant. She has already told the court that she hated the appellant. During re-examination the complainant told the court that one of the reasons why she did not want to stay with the appellant was because the appellant hit her on the cheek and her cheek was swollen on one of the days of the rape. She testified that when the appellant raped her, he put something like a "balloon" on his "thing". His "thing" meant his penis as the complainant demonstrated to court by using the male doll. The "balloon" meant a condom. She confirmed her testimony during examination in chief.

[12] The complainant's brother, ("I[...]") corroborated the version of the complainant, including the fact that the appellant made them consume alcohol. Itumeleng, testified that he was inside the same room when the appellant raped his sister. He even used the dolls to demonstrate an act of rape. He then changed and said that he did not witness the rape but his sister told him about the rape. During cross examination he was not sure when it was put to him that the complainant told the court that he was outside. He told the court that he did not like the appellant because the latter raped and abused his sister. He said that the appellant raped the complainant "every day". He prefers to live with Ms L[...] not with the appellant.

[13] Ms M[...] testified that on 10 November 2009 whilst at home the complainant and her brother came to her house. It was very late at night. The complainant looked sad, she was not the child she knew. Her cheek was swollen. Ms M[...] enquired to find out what was going on. The complainant started crying without

saying anything. She went inside with Ms M[...]'s daughter, M[...]. She told M[...] that the appellant "did strange things" to her. She said that the appellant slept with her. On 11 November 2011 Ms M[...] told the court that she took the two minor children to Mr B[...] ("Mr B[...]") who is the minor children's paternal grandfather. She told Mr B[...] about the rape incidents and the abuse of the minor children by the appellant. Mr B[...] could not take care of the children because they are still young and he is elderly. Ms M[...] confirmed her version under cross examination. On 12 November 2009, when she came back home after collecting her grant, she was told that a woman (Ms L[...]) fetched the minor children from her home.

[14] Ms L[...] testified that on 11 November 2009, she was approached by an old man called Mr B[...]. Mr B[...] told Ms L[...] that it had been reported to him that the appellant abused the complainant sexually. Mr B[...] asked Ms L[...] to keep the minor children safe. Ms L[...] felt that the correct thing to do was to report the matter to the relevant authorities. She corroborated her version about fetching the minor children on 12 November 2011 from Ms M[...]'s house. Ms L[...] and the social workers then went to the appellant's house to inform him that the minor children had been removed from Ms M[...]'s home. The purpose of the visit to the appellant's house was to inform the appellant about his visitation results. Ms L[...] testified that the complainant told her that she reported the rape to Ms M[...]. Ms L[...] testified that she was the foster mother of the complainant and her brother.

[15] Ms L[...] told the court that she took the complainant and her brother to hospital for a check-up. The complainant was diagnosed with some undisclosed ailment. The complainant was given medication to treat the said ailment. Ms L[...] took the complainant on several occasions to the hospital for treatment. After two months the complainant was said to have been cured of whatever ailment troubled her.

[16] I should interpose once again to indicate that the medical report was handed in court. The said medical report did not indicate injuries fresh or healed on the complainant's genitals. The report indicated that the complainant had an offensive smelling vaginal discharge. This was said to be in line with a person who has contracted sexually transmitted disease or infection, (record, page 189).

[17] The appellant testified that he was in good terms with his children. He denied that he raped the complainant. He further denied that he hit her with a sjambok. He even denied that he was hit with a hammer and that he was arrested on the day. He denied I[...]'s version that, I[...] hit and stabbed him. He denied that he abused the children and that he gave them alcohol. His version was that he was arrested on 16 November 2006, which was not the day when he was allegedly hit with the hammer. He told the court that the first week of November the complainant went to church with her brother and they never returned to the appellant. He was of the opinion that Ms L[....] was a bad influence on his children. He said that somebody told him to be careful of Ms L[...], the reason being that Ms L[...] had an intention of taking his children away from him

[18] He told the court that Ms L[...] took his children from the neighbour when he was not there. He told the court that Ms L[...] did not like his live-in girlfriend. Ms L[...] wanted the appellant to leave his girlfriend and marry one of her daughters. The appellant refused because Ms L[...]'s children are younger than him. Ms L[...] wanted the appellant to maintain her family as there was no breadwinner at her house. During cross examination the appellant told the court that Ms L[...] was the one who told the complainant not to return to her home because the appellant would rape her. The prosecutor challenged the appellant and asked him if Ms L[...] was the sole reason why the complainant accused him of rape, he could not give the exact reason. Also when he was asked during cross examination of what did Ms L[....] do to influence his children, he could not answer. The prosecutor challenged the appellant and asked him why did he not challenge the testimony of Ms L[...] when she told the court that there was no bad blood between him and Ms L[...]. The appellant told the court that the "bad blood" came after he fought with Ms L[...]'s son. He told the court that his attorney never asked him about that. He told the court that he loves his children very much and they love him.

[19] Ms M[...] and her son, A[...] testified. They both denied any knowledge of what the complainant and her brother told the court. They denied any knowledge of the rape and abuse.

[20] The main issue in this regard is whether the complainant is credible with regard to her version that she was raped and secondly whether it was the appellant who raped her. The second issue is whether or not the court *a quo* erred and thus misdirected itself in finding that no substantial and compelling circumstances existed to deviate from minimum sentence.

[21] The submissions on behalf of the appellant were as follows: It was submitted on behalf of the appellant that the complainant was a single witness. The cautionary rule applying to a single witness must be applied together with the residual cautionary rule relating to sexual offences. The court must properly and critically evaluate the complainant's evidence as a single witness and warn itself against the uncritical acceptance of her evidence. The trial court should not have treated the evidence of the complainant as if it was not evidence of a single witness. There were contradictions in the complainant's evidence. At the time of the incident the complainant was 8 years old. Her younger brother was 5 years old. The court must be cautious when evaluating evidence of young children. There was suspicion that the evidence itself was not enough to convict the appellant. The appellant was arrested on 16 November 2009, when the complainant was not staying with the appellant. The complainant conceded that she was not staying with the appellant when the latter was arrested. The state did not proof its case beyond a reasonable doubt. Therefore the appeal must succeed.

[22] Counsel for the respondent submitted that it was difficult to compel the court to intervene. The fact remains that the complainant was raped. The question is, did the state prove its case beyond a reasonable doubt. In his heads of argument, counsel for the respondent submitted that the appellant was convicted of

rape based on evidence of a single witness. The cautionary rule regarding evidence of a single witness should be taken into account. However, it has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense **(S v Webber** 1971 (3) SA 754 (A) at 758). It was submitted on behalf of the respondent that this court should bear in mind the provisions of section 208 of the Criminal Procedure Act, which provides that an accused may be convicted of any offence on the single evidence of any competent witness. Counsel for the respondent further submitted that in the absence of an irregularity or misdirection, a court of appeal is bound by the credibility findings of the trial court unless it is convinced that such findings are clearly incorrect **(J v S (2)** ALL SA 267 1998 (SCA)).

[23] The state bears the onus of proving the guilt of an accused person beyond a reasonable doubt. Every accused person is presumed innocent until proven guilty **(R v Difford** 1937 (AD) 370). Section 35 (3) (h) of the Constitution of the Republic of South Africa 1996, provides that:

> "Every accused person has a right to a fair trial which includes the right - (h) to be presumed innocent..."

There is no onus which rests on the accused to prove his innocence **(S v Kombela** 1966 (4) SA 358 (ALL). The onus never shifts, it remains squarely on the shoulders of the prosecution throughout the criminal trial **(S v Moleko** 1955 (2) SA 401 (AD). It is trite that the accused person is entitled to be acquitted if it is reasonably possible that his version might be true **(S v Van der Mevden** 1999 (1) SACR 447 (W) at 448F. This onus of proof was expressed as follows in the case of **S v Shackell** 2001 (4) SA 1 (SCA) at para [30]:

> "It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

[24] The cautionary rule generally means that the court is obliged to consciously remind itself to be careful in considering evidence which practice has taught should be viewed with suspicion. In addition the court should seek other safeguard of reducing the risk of a wrong finding based on suspect evidence (Schwikkard and Van der Merwe, **Principles of Evidence**. 3rd ed) **2005.** In **J v S 1998 (4)BCLR 424 (SCA).** the court dismissed the appeal by reasoning that a case might call for a cautionary rule approach only where there was some evidential basis for suggesting that the evidence of the witness may be unreliable and not simply because the

witness was a complainant of a sexual offence.

[25] In **S v J 1998 (1)** SACR **470** (SCA), it was stated that the cautionary rule in sexual assault cases was based on an irrational and outdated perceptions. It unjustly stereotyped complainants in general cases, most of whom are women, as being unreliable. The cautionary rule was abolished in South African Law in **1998** by the Supreme Court of Appeal's decision in **S v Jackson** *(supra).* This decision brought South African Law in line with comparable foreign jurisdictions like Canada, England, New Zealand and California. The rule has also been abolished in Namibia and Zimbabwe **(S v Banana 2000 (2)** SACR **1** (ZS). Statutory confirmation of the abolition of the cautionary rule is found in section **60** of the Criminal Law (Sexual Offences and Related Matters) Amendment Act **32** of **2007.** It provides that:

> "Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence."

[26] In **S v Sauls 1981 (3)** SA **172** (A) **180,** the court held that there is no rule or test or formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and second consider the merits and demerits, having done so, should decide whether it is satisfied that the truth has been told despite shortcomings or defects or contradictions in the evidence.

[27] The appellant was convicted of rape of his 8 year old daughter. I have had particular regard to the decision referred to by counsel for the appellant, **S v Shackell** *(supra)* that the principle in criminal proceedings is that the prosecution must prove its case beyond a reasonable doubt and that a mere preponderance of probabilities is not enough. It follows that the onus rests on the state to prove every element of the crime alleged, including that the appellant is the perpetrator, that he had the required intention and the crime in question was unlawful (Schwikkard and Van der Merwe: **Principles of Evidence (3rd** ed) at paragraph **31.3.1.** In order to be acquitted, the version of the appellant has to be reasonably possibly true **(S v Van der Meyden 1999 (1)** SACR 447 W). Nugent J in **S v Van der Meyden** *(supra)* said that:

> "... These are not separate and independent test, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are being inseparable, each being the logical corollary of the other."

[28] The correct approach is to weigh up all the evidence which points towards the guilt of the accused

against all those which are indicative of his innocence. Proper account of inherent strengths and weaknesses, probabilities and improbabilities should be taken into account, on both sides and having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as a failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence." **(S v Chabalala 2003 (1)** SACR **134** para **[15-1**8],

[29] In **S v M 2006 1** SACR **135** (SCA) at **272,** Cameron J criticized the cautionary rule as it stood prior to **S v Jackson** *(supra)* and said:

> "The recent radical reason of the so-called cautionary rule in sexual assault cases ... is a reminder that today's perceived wisdom regarding human behaviour and the ability of the lay person to correctly interpret it, may tomorrow be discarded as irrational and out of date."

> **[34]** In *casu* the complainant gave a detailed and logical account of the rape incidents, even though she could not remember the dates. This is not unusual for an 8 year old girl. She may not have appreciated the seriousness of the offence at the time when it happened. She would not have known that she was supposed to keep a diary of the dates of the rape incidents. She may not have known that one day she will be called to testify against her father and expected to give exact dates of when the incidents happened. The complainant cannot be punished for not remembering the dates albeit the fact that she was raped by her father. An 8 year old girl cannot fantasize over things that were beyond her own direct and indirect experience **(S v S 1995 (1)** SACR **50** ZD). The details were too graphic and precise to be fabricated by an 8 year old girl. Such details are beyond the comprehension of an 8 year old. The complainant had never heard of the word "condom" that is why she described a condom as a "balloon". She does not know the term of the complainant's private part but called it a "thing". There is no rule of law requiring corroborations in criminal law. If some safeguard reducing the risk of conviction is required, the safeguard must not consist of corroboration but if corroboration is relied upon as the safeguard, it must go the length of implicating the accused in the commission of the crime **(S v Artman and Another 1968 (3)** SA **339** (AD). In light of the preceding, the evidence in a particular case may call for the application of a cautionary rule. It will depend on the facts and circumstances of such case as to whether such an approach was necessary. I am of the view that this case does not call for the application of such a rule due to the facts and circumstances under which the rapes were committed. The learned magistrate was free to "proceed to consider the evidence without the restraints imposed by the cautionary rule." (This is what Mclunsky AJA observed in **S v M**

(supra) with reference to **S v Jackson** *(supra).*

[30] In **S v Webber 1971 (3)** SA **754** (A) the court said that the evidence of a single witness should be approached with caution and such evidence should not be rejected merely because the single witness happens to have bias towards the accused. In *casu* the complainant expressed her dislike of the appellant. This did not mean that because she did not like the appellant so she decided to falsely implicate him. The reverse is true. I am of the considered view that, the complainant disliked the appellant because of the fact that the appellant raped her. The complainant described the rape incidents to her friends and the state witnesses as the appellant doing "strange things" to her. The complainant's brother also said he disliked the appellant. In **Woii v Santam Insurance Co Ltd.** 1981 (1) SA 1020 (A) at 1028A-E, the learned Judge of Appeal Diemont JA state that:

> "The question which the trial Court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has "the capacity to understand the questions put, and to frame and express intelligent answers"."

[31] My view is that the complainant's evidence was trustworthy. I am of the considered view that the truth has been told by the complainant and Itumeleng. This was despite the shortcomings, defects and contradictions in their evidence. Even though there were contradictions between the complainant's evidence and that of Itumeleng, such contradictions were not material. It was clear that the complainant was not a privileged child who came from a sophisticated background. Her cognitive understanding and capacity cannot be measured against that of an educated adult.

There was no indication whether or not she attended school. Even if she did, it would be a school on the farm with no modernized technology and facilities. She cannot be compared with a child who grew up in a city, with a privileged and sophisticated background. She should not be compared with a child who attended a privileged school, like a private school and who is broad minded. The fact that she could not remember other details like dates when the rapes happened had nothing to do with the truthfulness or lack thereof of her version. It has got more to do with her unsophisticated and motherless background. I am satisfied that the complainant's evidence was credible and satisfactory. This was despite the fact that the submission on behalf of the appellant was that she should have been considered a single witness. The court *a quo* found that she was a competent witness. The court *a quo* simply omitted to mention that the evidence was satisfactory in

every material respect **(R v Mokoena** 1932 OPD79 at 80).

[32] In my view the conviction is in order. There is no merit in the appeal against the conviction. The learned magistrate correctly convicted the appellant of rape as charged. The appellant did not have a defence to put before the court a quo. Instead he presented different versions to court. The learned magistrate rightly said to the appellant,"... *your version is typical of that of a person who does not have a defence at all to the charge he is faced with, you are merely clutching at straws."* (See the record, page 192). Both the magistrate and the prosecutor were of the view that they did not know what the version of the appellant was. The prosecutor told the court that the appellant was evasive and he only tried to mislead the court (see record, page 162). I am of the view that the appellant's version was not reasonably possibly true. The appellant's different versions were indicative of inconsistency and lack of adequate defence.

[33] I agree with the learned magistrate that the appellant gave multiple versions. Firstly the appellant denied the allegations against him in their totality. The appellant then said that Ms Lebeoana wanted him to be his son in law. He also said that Ms Lebeoana wanted to take his children away from him. The appellant further indicated Ms Lebeoana once expressed to her boyfriend after the appellant fought with his son that she will see to it that the appellant got into trouble. As if that was not enough the appellant then said that his daughter fabricated the rape version so that she could stay with Ms Lebeoana. There is no need for this court to tamper with the conviction.

[34] I now turn to the sentence. As regards the sentence the grounds of appeal were stated as follows:

> "*AD SENTENCE*
>
> *As regards sentence grounds of appeal relied on were:*
>
> *6 The honourable court erred by finding that there are no substantial and compelling circumstances which justify the departure from the minimum sentence of life imprisonment.....The court erred by not finding as compelling and substantial circumstances the fact that the appellant was gainful employed and the fact that he is a first offender In this regard see the decision* ***ofSvVilakazi*** *(2008) JOL 22360 (SCA).*
>
> *7 The sentence of maximum sentence of life imprisonment imposed by the trial court is shockingly inappropriate and harsh.*
>
> *7.1 Is out of proportion to the totality of the alleged facts in mitigation.*
>
> *8 The court a quo erred by not imposing a shorter term of imprisonment coupled with*

community service and/or further suspended sentence, more particularly in view of the following factors:

8.1 the age and personal circumstances of the appellants;

8.2 the rehabilitation elements;

8.3 the mitigating factors inherent in facts found proved.

9 The court a quo erred in over-emphasizing the following factors:

9.1 seriousness of the offence;

9.2 prevalence of the offence;

9.3 interest of society".

[35] Section 51 of the Criminal Law Amendment Act 105 of 1997 provides that:

> "Notwithstanding any other law, but subject to subsections (3) and (6) a regional court or a high court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life."

Section 3 of the said Act provides that if any court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances in the record of the proceedings and must impose a lesser sentence. Whereas section 3(aA) of the said Act provides that:

> "when imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:
>
> (i) ….
>
> (ii) An apparent lack of physical injury to the complainant;
>
> (iii) ...
>
> (iv) ..."

[36] In **S v Lister 1993 (2)** SACR **228** (A) Nienaber said the following:

"To focus on the wellbeing of the accused at the expense of the other aims of sentencing such as the interests of the community, is too distant the process and to produce, in all likelihood, a warped sentence."

[37] In **S v Sinden 1995 (2)** SACR **704** (A) at **709** (b) the court stated as follows:

"A sentence does more than deal with a Particular Offender in respect of the offence of which he has been convicted. It constitutes a message to society in which the offence occurred."

[38] The court said in **S v Malqas 2001 (1)** SACR **469** SCA that:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it to do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the court vitiates its exercise of that discretion, an appellate court is of course entitled to considering the question of sentence afresh."

[39] The court *a quo* sentenced the appellant to life imprisonment and concluded that no substantial and compelling circumstances were proven. The allegation that lack of visible genital injuries on the complainant, meant that the complainant was not raped, was baseless and without substance. I am of the view that the court a *quo* correctly imposed a term of life imprisonment. I am not convinced that the sentence was shockingly inappropriate. In considering whether the sentence imposed upon the appellant was inappropriate, I must of course bear his personal circumstances in mind. The personal circumstances of the appellant were that he was 34 years old at the time of the commission of the offence. He only passed standard three and was raised by his grandmother. He was a first offender. He had a live- in girlfriend who was allegedly sick and pregnant. In contrast to the personal circumstances of the appellant, the aggravating factors were that he committed a serious crime of rape that was also premeditated. The complainant was only 8 years old at the time of the offense. He was the complainant's father. The rape incident happened more than once and over a period of time. There was evidence regarding emotional scars and it will be unrealistic to propose that there will be no psychological harm done by the incidents. The emotional scars and psychological harm are evident for instance in the incident that happened during lunch break after the court adjournment, on the day when the complainant testified, after the appellant pointed a finger at the complainant.

[40] In *casu*, it was common cause that the charge of rape fell within the ambit of section 51(1) of the Criminal Procedure Act and that the learned magistrate was obliged, subject to the provisions of section 51(3) to impose a sentence of life imprisonment. The learned magistrate after weighing and considering all the factors, including mitigating and aggravating circumstances concluded that, there were no substantial and

compelling circumstances justifying the imposition of a lesser sentence than the one prescribed. Taking into consideration all the circumstances and factors pertaining to sentence, including but not limited to the seriousness of the offence, the interests of the community, the personal circumstances of the appellant, I am in all circumstances satisfied that this court should not consider the sentencing of the court a quo afresh. Having considered all the aggravating factors, I am not convinced that there are compelling and substantial circumstances in this case. There is no merit in the appeal against the sentence. In my view there was no material misdirection by the court a *quo.* It is my view that the court a quo exercised its discretion judicially and properly. There is nothing that this court can add to the reasoning or the findings of the Court a quo. I am of the view that there was no need to tamper with the sentence of the court a *quo.*

[41] In the result the appeal against the conviction and sentence should fail.

ORDER

[42] The conviction and sentence imposed by the court *a quo* are confirmed.

E. K. TSATSI, AJ

I agree.

M. H. RAMPAI, AJP

On behalf of appellant: K. Pretorius

Instructed by:

Justice Centre

BLOEMFONTEIN

On behalf of respondent: Adv. F. Pienaar

Instructed by:

Director: Public Prosecutions

BLOEMFONTEIN