IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: A90/2013

In matter between:

S. B. B. Appellant

and

THE STATE Respondent

CORAM: JORDAAN, J *et* PIENAAR, AJ

JUDGMENT BY: PIENAAR, AJ

HEARD ON: 7 MARCH 2016

DELIVERED ON: 12 MAY 2016

INTRODUCTION

[1] The appellant was convicted on the 1st of September 2011 in the Regional Court, Bloemfontein on a count of rape and two counts of indecent assault of his 10-year old cousin. The offences were taken together for the purpose of sentencing, for which the appellant was sentenced on the 19th of December 2011 to 12 (twelve) years imprisonment in terms of section

276(1)(b) of the Criminal Procedure Act, 51 of 1977 (*"the CPA"*).

[2] The court *a quo* also declared the appellant unfit to possess a firearm in terms of the Firearms Control Act, 60 of 2000 and further ordered that the appellant's name be included in the register for sex offenders in terms of section 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

[3] The appellant appeals against his convictions and sentence pursuant to leave being granted to the appellant by this Division in terms of section 309C of the CPA.

[4] The essence of the appellant's attack against his convictions is threefold. Firstly, that the court *a quo* erred in finding that the complainant was a reliable and credible witness despite certain contradictions in her evidence, the fact she could not recall certain matters during cross-examination and due to certain contradictions between her evidence and her first report. Secondly, that the court *a quo* erred in finding that the complainant was raped despite the fact that the medical evidence was unreliable and, thirdly, that the court *a quo* erred in rejecting the appellant's version.

[5] The appellant furthermore seeks the reconsideration of his sentence because it is shockingly inappropriate.

[6] The State opposed the appellant's appeal against his convictions, but conceded that the sentence is shockingly inappropriate and should be considered afresh as the court *a quo* did not give sufficient weight to the appellant's age at the time when he was convicted.

[7] In terms of the annexures to the charge sheet, the appellant committed the offence of rape ("*the rape offence*") during the year 2000 and one of the indecent assault offences on or about the 14th of May 2005 ("*the indecent assault offence*"). It is however evident from the record of the proceedings that the incident in respect of the rape charge took place during 2004 and not 2000 as stated in the charge sheet. The record of the proceedings is furthermore incomplete as it does not contain a copy of the annexure to the charge sheet in respect of the third count, being that of indecent assault which was allegedly committed during the period 2000 to 2005 ("*the other indecent assault offences*").

[8] The appellant was born on the [.....] 1986 and was between 17 and 18 years old at the time when the incidents occurred for which he was convicted. As stated above, the complainant is a cousin of the appellant. She was born on the [.....] 1994 and was only 10 years old when the incidents occurred.

[9] The fathers of the complainant and the appellant are brothers. The appellant therefore knew the complainant since her birth. When the incidents occurred, the appellant resided with his

father, stepmother and some of his stepbrothers and sisters. The two families had a good relationship and were also staying near each other.

COURT *A QUO'S* FINDINGS

[10] The complainant was the only State witness that testified about the unlawful and indecent conduct towards her because it was not witnessed by any other person.

[11] The appellant pleaded not guilty to the counts and in evidence denied that he made himself guilty of any unlawful or indecent conduct of a sexual nature towards the complainant.

[12] The court *a quo* was therefore faced with two irreconcilable versions.

[13] After having had the advantage of seeing and hearing the witnesses, the court *a quo* found the State's witnesses, save for the evidence of Ms A Coetzee, to be reliable and particularly held that the complainant was a credible and reliable witness, that her version was corroborated by her reports and that her version was highly probable. To the contrary, the appellant's version was found to be improbable and inherently false and was therefore rejected by the court *a quo*.

[14] The appellant's appeal in respect of his convictions can therefore only succeed if the court *a quo*'s findings were vitiated by material misdirections or if it is shown from the record to be clearly wrong. (See **Rex v Dhlumayo and Another** 1948 (2) SA 677 (A) at 698.)

THE SAILENT FACTS

The State's case

[15] The complainant was 11 years old when the trial commenced on the 23rd of January 2006 and therefore testified through an intermediary.

[16] The complainant testified that, during her grade 1 school year, the appellant asked her to accompany him to Tokkie Park. She could, however, not recall the exact date or day of the week on which the incident occurred. After having asked permission from her mother, she, her cousin Daryl and her sister Theresa accompanied the appellant to Tokkie Park where the appellant was, as she put it, 'jumping'. It is apparent from the evidence that Tokkie Park is a sports field where the appellant practised his athletics.

[17] Whilst being at Tokkie Park, the complainant and Theresa went to the bathroom. The bathrooms were situated to the far end of the sports field. When they approached the bathrooms, Theresa went to search for toilet paper. As the complainant

entered the bathroom, she suddenly saw the appellant entering it with her. She initially thought it was Theresa who returned after having searched for toilet paper.

[18] The appellant got seated, closed the door and pulled down her trousers. He lied on top of her and then, as the complainant testified, “he put his wrong thing into my wrong place and then stood down”. After the appellant penetrated her, they washed their hands and returned to where the other children were playing. As Theresa already left Tokkie Park, the complainant also returned home. The appellant stayed behind.

[19] The complainant was wearing underpants, short pants and a short sleeve shirt on the day in question. Before the appellant penetrated her, he pulled down her trousers as well as her underwear.

[20] She saw the appellant’s penis when he penetrated her vagina. Whilst being penetrated, she felt pain in and around her vagina but did not say anything to the appellant. She further explained that when the appellant penetrated her, he laid on top of her and made certain movements, which she described by moving sideways.

[21] The complainant did not report the incident as she was afraid that her mother will be annoyed with her about what happened. She also did not receive any medical treatment as a result of the incident.

[22] According to the complainant, this was the only time that she was penetrated by the appellant.

[23] The complainant indeed reported the incident to her mother after the indecent assault offence that occurred during May 2005.

[24] With regard to the latter incident, the complainant testified that she, the appellant, their uncle known as Gregory and the complainant's other siblings were spending time together at her parental home while her parents were at work. The appellant mentioned to her that he has a pair of athletic shoes that she can have and therefore asked her to accompany him to his parental home. She initially insisted that they should be accompanied by Theresa, but was persuaded by the appellant's offer to give her a packet of chips if she accompanied him alone. It needs to be mentioned that the complainant mentioned in her evidence that she was also offered some money by the appellant. Nonetheless, it is common cause that she accompanied him alone to his parental home.

[25] On their arrival, the appellant went to the bathroom while she (complainant) was watching television in the lounge.

[26] After having been to the bathroom, the appellant approached the complainant and requested her to rub his back as he had

some pain in his back. She accompanied him to his bedroom, where the appellant showed her how to rub his back. She had to lay on her stomach in order for him to demonstrate it to her, which she did. She was thereafter asked to turn around and, as she was then laying on her back, the appellant got on top of her, pulled down her trousers and placed his fingers on her vagina. She felt some pain at her vagina and told the appellant that it “was not nice”.

[27] It needs to be mentioned that the complainant testified during cross-examination that the appellant only laid on top of her and did not make mention of the fact that he placed his fingers on or in her vagina.

[28] At that stage, she heard someone calling for the appellant from outside the house. She also heard the sound of stones being thrown on the roof of the house. He then stood up and left the room. She pulled up her underwear and trousers, followed him and left the house through the front door.

[29] As she left, she met her sister’s friend, Annika, in front of the house, being the person that called for the appellant. When the appellant approached and spoke to Annika, the complainant left and returned to her parental home.

[30] Upon her arrival, she met her uncle. Her parents were not yet at home. She did not report the incident to her uncle or anybody else at that stage.

[31] Later that day, her father requested her to return to the appellant's house to fetch her uncle, which she refused. When confronted about her refusal, she informed her father that it is because of the appellant's indecent conduct towards her. She then reported the incident to both her father and mother. She also informed them about the Tokkie Park incident and the other indecent assault incidents that formed the subject of count three.

[32] It is common cause that the complainant's mother thereafter approached and confronted the appellant about the incidents during the afternoon of the said Saturday when the indecent assault incident occurred. The appellant denied the allegations and also informed her that his parents are away for the weekend. She decided to discuss the matter with them upon their return.

[33] Apart from the aforementioned two incidents, the complainant also testified that she was indecently assaulted by the appellant on numerous other occasions. According to her, the appellant used to throw a blanket over them when they were watching television together. He would then either insert his fingers into her vagina or press his fingers between her legs or against her vagina. According to her, it happened more than once.

[34] The complainant's mother, her then teacher Ms L Prinsloo and Ms A Coetzee, a social worker employed by the Free State

Child Welfare, testified about the respective reports that the complainant made to them during May 2005.

[35] Although there were certain contradictions between what was reported to them and the complainant's evidence about the incidents, these contradictions were not material. In actual fact, it is clear that certain detailed aspects of the complainant's evidence in respect of the incidents were not conveyed to all of them, which does not mean that the reports do not serve as corroboration of the complainant's evidence.

[36] The complainant reported the incidents to Ms Prinsloo on the 19th of May 2005, being after the indecent assault incident occurred. She was, at that stage, the complainant's class teacher and also knew her from athletics.

[37] During the morning of the 19th of May 2015, the complainant got involved in a fight with other learners. The witness intervened. When she showed interest in the complainant and enquired about her well-being, the complainant told her about the incidents. She firstly made mention of the indecent assault incident. The complainant told her that the appellant requested her to go to his house and offered her chips. She wanted to take her sister with, which he refused. At their arrival at his parental home, the appellant requested her to scratch his back. She also informed her that when she and the appellant used to watch television together while sitting under a blanket on the sofa, the appellant places his fingers on her vagina. She further

told the witness that the appellant at some stage pulled down her underpants and trousers, that he touched her and also ‘put his fingers on her private part’.

[38] Ms Prinsloo immediately reported the matter to Inspector van Lingen of the Child Protection Unit. She accompanied the complainant to the inspector’s office. The complainant reported the incidents to the inspector in the presence of Ms Prinsloo. She also reported the Tokkie Park incident to them. The complainant confirmed that the appellant penetrated her during that incident.

[39] Ms Prinsloo also accompanied the complainant to the National Hospital where she was medically examined.

[40] Ms Prinsloo further testified that the complainant’s behaviour changed after she reported the incidents to her. She became aggressive, was crying a lot and fought with other learners. She also neglected her homework.

[41] Ms Coetzee, a qualified social worker, compiled an assessment report pursuant to her evaluation and assessment of the complainant in respect of the incidents. Ms Coetzee repeated the contents of her report during evidence and also gave her opinion in respect of issues relating to the complainant’s behaviour as well as the manner in which the events were reported and experienced by the complainant.

[42] It is not necessary to deal comprehensively with the contents of her report and evidence because it was rejected by the court *a quo* on the basis that it was not reliable as it was not supported by any of the authorities which she relied on for the assumptions that she made or the opinions that she formed. The court *a quo* also held that her evidence in respect of the charges is irrelevant. Although I do not agree with the court *a quo's* findings in this regard, it needs to be mentioned that her evidence has no bearing on the court *a quo's* evaluation of the evidence against which the appeal lays.

[43] The State also relied on the medical evidence of Ms M J Thlabang. She conducted the medical examination of the complainant and compiled a J88 report in which her findings were recorded. Ms Thlabang obtained a degree in nursing during 2002 from the University of the Free State. She also did a dissertation in forensics at the University of the Free State during 2004. During May 2005, she was employed as a forensic nurse examiner by the Department of Health at the Tshepong Victim Centre, National Hospital, Bloemfontein.

[44] She examined the complainant on the 25th of May 2005. The complainant reported to her that her cousin, being the appellant, assaulted her sexually and indecently from 2004 to May 2005. During the gynaecological examination she established that the complainant had a cleft at the 6 o'clock position. According to Ms Thlabang, the cleft indicates a

previous torn hymen. The complainant had no other visible physical injuries.

[45] According to Ms Thlabang, the cleft was caused as a result of a previous penetration or indecent assault as there was no history of previous accidents, for example that the complainant fell from a tree or had an accident when riding a bicycle that could have caused the cleft. She further explained that a cleft is formed by a previously torn hymen that has healed. She testified that a torn hymen could be caused by the digital penetration of a 10 year old female. However, the injuries to the hymen will depend on the nature of the finger, being whether the nails were sharp or long.

The Appellant's case

[46] Although the accused denied that he ever raped or sexually assaulted the complainant, his evidence corroborated that of the complainant in respect of certain essential circumstantial aspects.

[47] During his grade 11 school year, being during 2004, he practised his athletics at Tokkie Park. The complainant, her sister and his brother accompanied him from time to time to Tokkie Park. He does not have knowledge of the fact that the complainant attended to the bathroom during one of these occasions and also denied that he had any sexual intercourse with her at the bathrooms at Tokkie Park.

[48] With regard to the indecent assault incident of May 2005, the appellant denied that he had any sexual interaction or conduct of such a nature towards the complainant. However, he did to a large extent corroborate the complainant's evidence in respect of the events of the day in question. He testified that he accompanied his uncle, Gregory, on the said Saturday morning to look after the complainant and her siblings as their parents were at work. He had homework to do and took it with. As the children were noisy, he informed Gregory that he is going to do his homework at his parental home. When he left, he met the complainant outside the house. She asked him to give her R1 because she wanted to buy matches. He offered to help her, but informed her that his money was at his house. On their way to his house, they met the complainant's sister who also asked for some money from him. He explained to them that he has to use his money to buy food because his parents were not at home and could therefore not give any money to the complainant's sister. The complainant's sister stayed behind, whereafter he and the complainant went to his house. At their arrival, he went to his bedroom to put down his bag and to fetch the money for the complainant. The complainant remained in the lounge and watched television. On his way to the lounge, his father phoned. Whilst talking on the phone, he heard someone shouting from outside. When he went outside, he met Annika, who was looking for Gregory. Whilst talking to Annika, the complainant came from the house, passed them and went to her house. Later that afternoon, the complainant's

mother came to his house and accused him of doing “things” to the complainant, which he denied.

[49] He further denied that he indecently assaulted the complainant during the period 2003 to 2004. He also denied that he indecently assaulted her on the 14th of May 2005, as she testified.

[50] The appellant testified that he had a good relationship with the complainant and therefore do not know why the complainant will falsely implicate him or why she will lie about the incidents. Although the complainant’s mother had some issues with the Brooks family, their families had a good relationship.

[51] The appellant further testified that when the families met after the May 2005 incident, the complainant’s parents indicated that they wanted to resolve the matter. However, according him, the complainant informed them during that meeting that nothing has happened.

[52] The appellant’s case was concluded with the evidence of his stepmother, Ms J G Brooks. She was present when the families met during May 2005. At this meeting, she informed the complainant’s mother that the appellant already telephonically informed her on the said Saturday that he is being accused of indecent conduct towards the complainant. When the complainant’s mother asked her to tell them what happened, the complainant told them that nothing happened

and that her mother insisted that they must come over to the appellant's house to talk to the appellant's parents. Ms Brooks requested the complainant's mother to take the complainant to a doctor in order to determine whether she was indeed injured or treated indecently. The complainant and her parents left and never returned.

CONVICTIONS

[53] On appeal, the appellant contended that the court *a quo* erred in not approaching the complainant's evidence with caution and that because of certain contradictions between her evidence and the reports that she made to her mother and Ms Prinsloo, the Court *a quo* erred in finding that she was a credible, reliable and trustworthy witness.

[54] It is trite that a court of appeal is not at liberty to depart from a trial court's findings of fact and credibility unless they are vitiated by irregularity or if the findings are wrong. This principle is equally applicable in cases involving the application of a cautionary rule. (See **S v Leve**, 2011 (1) SACR 87, para [8]; **S v Hadebe and Others** 1997 (2) SACR 641 (SCA) at 645) Thus, if the trial court did not misdirect itself on the facts or the law in relation to the application of the cautionary rule and indeed approached and scrutinised the evidence with caution, this Court will not readily depart from its conclusions.

[55] In terms of the provisions of section 208 of the CPA, an accused may be convicted of any offence on the single evidence of any competent witness. However, the evidence of a single witness must be approached with caution and his or her merits as witness must be weighed against factors which militate against his or her credibility. (See **Stevens v S** 2005 (1) All SA 1 (SCA) at para [17].)

[56] The correct approach to the application of the cautionary rule was authoritatively stated in **S v Sauls and Other** 1981 (3) SA 172 (A) at 180 E-G as follows:

> "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPFF JA in S v Webber 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but it does not mean
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> "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded"
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> (Per SCHREINER JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[57] It is trite that a court should not easily convict upon the evidence of a single witness unless it is substantially satisfactory in all material respects or unless it is corroborated. (See **S v Ganie** 1967 (4) SA 203 (N) at 206H; **S v Artman** 1968 (3) SA 339 (A) at 341 C.)

[58] The evidence can be satisfactory even if it is open to a degree of criticism. All the particular facts of the case must be considered in order to determine whether the single witness is credible. (See **S v Jones** 2004 (1) SACR 420 (C) at 427.) It is ultimately required that the State must proof the accused's guilt beyond reasonable doubt. (See **S v Artman** *supra* at 341 C.)

[59] The application of the cautionary rule to the evidence of a complainant in proceedings involving a sexual offence was abolished by the Supreme Court of Appeal in **S v Jackson** (1998 (1) SACR 470 (A)), which has also been legislated in section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, which 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".

However, it does not mean that a court is allowed to convict in an indiscriminate and reckless manner where a charge is of a

sexual nature. (See **S v Van der Ross** 2002 (2) SACR 362 (C).)

[60] The evidence of small children must also be treated with caution. (See **Rex v Manda** 1951 (3) SA 158 (A) at 162E – 163E.) The need for treating the evidence of a single child witness with caution was as follows summarised in **S v Dyira** (2010 (1) SACR 78 (ECG) para [6]):

> "The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness, as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity."

(Also see **S v MG** 2010 (2) SACR 66 (SCA)).

[61] However, it needs to be emphasised that there is not a statutory requirement that a child's evidence must be corroborated. (See **Viveiros v S** 2000 (2) All SA 86 (SCA) para [2].)

[62] It is evident from the court *a quo*'s judgment that the court *a quo* was mindful of the fact that the complainant was a single witness in respect of the charges and that her evidence had to be treated with caution, which the court *a quo* did.

[63] The appellant however contends that the complainant was not a reliable witness and that her evidence was not satisfactory in all material respects. In support of these contentions, the appellant relied on certain contradictions between her evidence and that of the other witnesses.

[64] The complainant testified that she was raped in one of the bathrooms at Tokkie Park. However her mother testified that she reported to her that she, accompanied by the others, wanted to make use of the ladies bathroom but that it was closed. They approached the caretaker who directed them to another toilet. After having been to the toilet, the appellant sent the other children away and then pressed her down on the ground, whereafter he penetrated her. The complainant indeed did not make mention in her evidence about the caretaker and also did not say whether the incident occurred within a toilet cubicle or the bathrooms.

[65] In the report to Ms Prinsloo, the complainant only informed her that she was raped in the toilets but did not make mention of the fact that the other children accompanied them.

[66] Although the court *a quo* rejected Ms Coetzee evidence, the appellant contends that when the matter was reported to Ms Coetzee, the complainant could not recall whether she was penetrated.

[67] With regard to the May 2005 incident, the complainant testified that she was offered athletic shoes and later on a packet of chips to accompany the appellant to his house. During cross-examination, she however testified that he also offered her some money. She made mention of the fact that they had to collect her bag from his house, but later testified that it was indeed the appellant's bag. In her evidence in chief, she mentioned that the appellant penetrated her vagina with his fingers but during cross-examination she only mentioned that the appellant laid on top of her.

[68] According to the complainant's mother, she only told her that the appellant forced her to lie on her back whereafter he pulled down her pants. As they heard someone calling for him, he stood up and left the house. She did not make mention of any digital penetration. In her report to Ms Prinsloo, the complainant made mention of the packet of chips that was offered to her and that, in the house, the appellant pulled down her underwear and touched her. The complainant indeed also informed Ms Coetzee that she was digitally penetrated during this incident.

[69] Apart from the aforesaid contradictions, the appellant also contends that the evidence of Ms Thlabang was not reliably as

the cleft to the hymen could have been caused by other injuries, which she did not exclude. During cross-examination, the witness confirmed that she did not obtain information in respect of any other injuries that could have caused the cleft. Therefore, according to her, it could have been caused as a result of the penetration.

[70] The State contends that although it must have been a traumatic experience for the complainant, she provided clear and detailed answers in response to simple questions put to her during cross-examination. Once the cross-examination switched to compound and negative questions, she was unable to deal with it effectively, which could be attributable to her age as she was only about 12 years old when she testified.

[71] The State further contends that the considerable lapse of time between her evidence in chief and the cross-examination must be taken into consideration when her evidence is evaluated. It was therefore contended that, having regard to the said time lapse, the mere fact that she could not remember some aspects of her evidence in chief in detail during cross-examination does not give an indication that she fabricated her evidence.

[72] Lastly, the State also contends that the manner in which the complainant made the first report dispels any notion of conspiracy to falsely implicate the appellant and that the general probabilities also favour the complainant's version.

[73] It is indeed correct that the complainant's age at the time when the offences were committed and that when she testified, as well as the lapse of time since the offences were committed, has to be taking into account in order to properly assess the reasonableness of any contradictions or omissions in her evidence. (See **Mocumi v The State** (2015) ZASCA 201 at para [20].)

[74] When the complainant gave evidence, she was only 11 years old. Her evidence commenced on the 23rd of January 2006, approximately 8 months after she reported the incidents to her mother and Ms Prinsloo and was only concluded on the 27th of February 2007, more than a year after the trial commenced.

[75] At the end of the first day of her evidence, the matter was postponed to the 3[.....] 2006 when she continued with her evidence. Yet again, her evidence was not concluded and the matter was again postponed to the 27th of February 2007 when she concluded her evidence in chief and was put to cross-examination.

[76] The complainant testified about the rape offence on the 23rd of January 2006 and the 31 of August 2006; about the indecent assault offence on the 3[.....] 2006; and about the other indecent assaults on the 27 of February 2007. She was therefore only cross-examined about the rape offence more than a year after she gave evidence about it and, in respect of the indecent assault offence, six months after she testified

about it. Of more importance is the fact that the complainant was only cross-examined about the incidents approximately 2 to 3 years after the respective incidents occurred.

[77] These delays would undoubtedly have a negative impact on any witness' memory, more so on a child that was only 10 years old when the incidents occurred.

[78] Having regard to the complainant's age, both when the incidents occurred and when she testified about it, as well as the lapse of time before she was cross-examined about it at the time she testified, it definitely affords some excuse for the discrepancies in her evidence during cross-examination as well as the fact that she seemed to be confused about some of the events during cross-examination. (See **S v V** 2000 (1) SACR 453 (SCA) at 455*j*; **Mocumi v The State**, *supra*, para [20].)

[79] Nevertheless, it must be determined from the evidence as a whole, having regard to the circumstances and any contradictions, whether the court *a quo* correctly found that the evidence has been clear and satisfactory in every material respect.

[80] Having considered all the aforesaid circumstances, I am of the view that the complainant's evidence in respect of the rape offence was clear and satisfactory. Although there are certain differences between her evidence and that of her mother in respect of the report to her, I am of the view that it does not

justify the rejection of the complainant's version. During the complainant's first report to her parents, as well as the report to Ms Prinsloo a couple of days later, she persisted that the appellant penetrated her with his penis at the bathroom at Tokkie Park. Although she was not clear about whether it occurred in the toilet cubicle or the bathroom, she was clear about the fact that the appellant raped her during that incident.

[81] The identity of the appellant was also not doubted or disputed. It is also common cause that the complainant and the other children accompanied the appellant from time to time to Tokkie Park.

[82] The fact that she was penetrated or indecently assaulted was also corroborated by Ms Thlabang's evidence as well as her findings based on the medical examination of the complainant. The appellant's attack against her evidence and conclusion is without merit. There is no evidence that shows that the cleft could have been caused by any other incident or injury.

[83] With regard to the indecent assault offence, there are indeed certain discrepancies between her evidence and the reports that she made to her mother and Ms Prinsloo, in particular whether she was offered money or a packet of chips and whether the appellant penetrated her with his fingers or only laid on top of her.

[84] It is common cause that the appellant and the complainant went to his parental home on the said Saturday, that she watched television while being there and that, at some stage while they were still inside the house, Annika called the appellant from outside the house.

[85] The complainant was persistent during her evidence that the appellant pulled down her trousers, laid on top of her and placed his fingers on her vagina. She told him that it was not nice. Her evidence materially corresponded with what she has reported to her mother and Ms Prinsloo. Whether digital penetration occurred or whether the appellant only lied on top of the complainant after having pulled down her trousers does not detract from the fact that both constitutes indecent assault, for which the appellant was convicted.

[86] According to the appellant, he does not know of any reason why the complainant would falsely implicate him or fabricate her version. It is therefore highly improbable that the complainant would have fabricated her version for no apparent reason. The manner in which she reported the incidents to her parents also clearly shows that she did not to do so to falsely implicate the appellant. She did not spontaneously report it to her parents at the first available opportunity, but only after her father confronted her. If her version was indeed fabricated and if she intended to falsely implicate the appellant, she would have done so immediately upon her parents' return.

[87] I therefore find it improbable that, as the complainant's evidence about their visit to Tokkie Park and the events leading up to the May 2005 incident are corroborated to a large extent by the appellant and as she had no reason to false implicate him, she would have fabricated her version in respect of the indecent conduct towards her.

[88] I can also find no reason to interfere with the court *a quo*'s findings in respect of the complainant's credibility. The court *a quo* had the benefit of observing the complainant and the other witnesses during their testimony.

[89] I am therefore of the view that the court *a quo*'s findings and decision in respect of these counts were not vitiated by any misdirection nor has it been showed to be wrong. I therefore agree that, if all the evidence is considered, there is no reasonable doubt that the appellant raped and indecently assaulted the complainant and that the court *a quo* therefore correctly convicted him of the aforesaid counts.

[90] The same can however not be said about the court *a quo*'s finding in respect of the other indecent assault offences, being count 3. The complainant's evidence in respect of this count was vague and not clear and satisfactory. No evidence was led about the time when the incidents occurred, save for mentioning that it was before and after the Tokkie Park incident.

She also did not give any particular detail of the incidents to Ms Prinsloo and Ms Coetzee.

[91] It is trite that it is not necessary to reject the State's evidence before an accused can be acquitted. The test to be applied is whether the accused's version is reasonably possibly true. As the evidence in respect of count 3 was unsatisfactory, the court *a quo* ought to have found that the State did not proof the appellant's guilt beyond reasonable doubt and had to acquit the appellant on this count.

[92] I am accordingly of the view that the appellant's appeal in respect of his convictions on count 1 and 2 must fail, but should be upheld in respect of count 3.

SENTENCE

[93] The court *a quo* took the counts together for purposes of sentencing and sentenced the appellant to 12 years imprisonment.

[94] During argument, the State conceded that the sentence is shockingly inappropriate. I agree.

[95] The State did not proof any previous convictions against the appellant.

[96] The appellant was respectively 17 and 18 years old when the offences were committed and when sentenced, 25 years old. When sentenced, he was employed as a security guard for a period of 4 years and earned a salary of R7 200,00 per month. He was further engaged for about 6 years and has a child with his fiancé. He resided with his grandparents.

[97] The Court *a quo* was provided with a pre-sentence report for correctional supervision compiled by S M Mew in which it was recommended that correctional supervision could be a suitable sentence based on the following reasons:

> "This office has found that the accused stability factor's in the community does abide by the conditions and that a sentence of Correctional Supervision can be considered as a sentence.
>
> It is possible to administer a sentence of correctional supervision in terms of section 276(1)(h) of the Criminal Procedures Act, 1977 (Act 51 of 1977) upon the accused and this does not mean that a sentence of correctional supervision is the best sentence. It just means that such a sentence can be considered if the court is of the opinion that it can be a suitable sentence.
>
> The maximum sentence for Correctional supervision was 36 months, but has been changed to 60 months for sexual offenders. If the court considers correctional supervision it would be positive if the accused can be sentenced to 60 months Correctional Supervision".

[98] However, in the report that was submitted to the court *a quo* by the Department of Social Development, the probation officer recommended direct imprisonment based on the following:

> "Offences of these nature are serious in that they have an everlasting traumatic impact on the victims and create generally a bad image to men in general. It can be argued that the victim was very young and vulnerable. It could be that the victim was, manipulated and may be lured at some point. A cause of concern is that the accused maintain his innocence and vehemently denial he ever omitted this offence. Therefore, it would be difficult for a worker to provide a compressive assessment about this offence.
>
> The accused is working and earns a good salary. In addition to this he has support from his parents. The worker remains uninformed about the contributing factors of this offence.
>
> Among other serious aggravating factors are that the victim was very young and vulnerable. The victim is a closed family member. This offence, if not, has created animosity in the family and a lever of trust has been broken.
>
> The court will be aware that offences of this nature warrant an imprisonment".

[99] The purpose of imprisonment are mainly threefold, namely to punish the offender, to prevent further crime and to rehabilitate the offender. It is trite that imprisonment should only be employed if the need for removing the offender from society justifies the price.

[100] Correctional supervision is not necessarily inappropriate because the case is one which excites the moral indignation of the community. The question to be answered is a wider one –

whether the particular offender should, having regard to his personal circumstances, the nature of the crime and the interest of society, be removed from the community. (**S v Romer** 2011 (2) SACR 153 (SCA) paras [27] – [30].)

[101] The offences of rape and indecent assault are indeed regarded as serious offences, even more so where the victims are young children. (See **Carmichele v Minister of Safety and Security** 2001 (1) BCLR 995 (CC); **S v Swarts and Another** 1999 (2) SACR 380 (C)).

[102] The complainant was very young when the offences were committed. It is evident from the victim impact report compiled during September 2011 that, shortly after the incidents, her school work deteriorated and she became withdrawn from her peers. However, it is further reported that she attended counselling and that she 'perceive life with a positive light and does not believe that this incident will stop her from pursuing her dreams'. Although she has dealt and coped well with her situation, it remains a traumatic experience which impacted negatively on her life as well as her family.

[103] There is increasing pressure on the courts to impose harsher sentences in respect of rape offenders to exact retribution and to deter further criminal conduct. However, any sentence must still be a balanced and effective sentence which needs all the sentencing objectives. In **S v SMM** (2013 (2) SACR 292 (SCA) para [14]) the court held that:

> “It is trite that retribution is but one of the objectives of sentencing. It is also trite that in certain cases retribution will play a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge — the other sentencing objectives, including rehabilitation, can never be discarded altogether, in order to attain a balanced, effective sentence.”

And at para [26]:

> “In respect of the severity of the rape, referred to in the preceding paragraph, it is plain from the medical report that the doctor did not find any serious physical injuries. And there was no further violence in addition to the rape. Similarly in S v Nkawu the complainant had not suffered any serious injuries as a consequence of being raped. In considering whether substantial and compelling circumstances existed justifying departure from the prescribed sentence, Plasket J was called upon to consider the provisions contained in s 51(3)(aA)(ii) of the Criminal Law Amendment Act 105 of 1997, as far as the absence of serious physical injuries to the complainant was concerned. That subsection provides that when a court sentences for rape 'an apparent lack of physical injury to the complainant' shall not be regarded as a substantial and compelling circumstance. Plasket J expressed the view, correctly as I see the matter, that a literal interpretation of that provision would render it unconstitutional, since it would require judges to ignore factors relevant to sentence in crimes of rape, which could lead to the imposition of unjust sentences. I agree with the learned judge that 'to the extent that the provision restricts the discretion to deviate from a prescribed sentence in order to ensure a proportional and just sentence it would infringe the fair trial right of accused persons against whom the

> provision was applied'. He correctly in my view concluded that the proper interpretation of the provision does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate sentence. To this one must add that it is settled law that such factors need to be considered cumulatively, and not individually."

[104] Without over emphasising the fact that the complainant was only 10 years old when the offences were committed, it remains a factor to be taken into consideration in arriving at a just and appropriate sentence. Young children are vulnerable to abuse. As stated in **S v D** (1995 (1) SACR 259 (SCA) at 260*g*), 'They are usually abused by those who think they can get away with it, and all too often do'.

[105] The appellant did not show any remorse but protested to the end that he did not commit the offences. As emphasised in **S v Matyityi** (2011 (1) SACR 40 (SCA) para [13]) – 'Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error'. The fact that the appellant shows no remorse and does not accept responsibility for his actions is certainly aggravating.

[106] There is also nothing from the record that shows that the appellant was immature when the offences were committed or that his age reduced his moral blameworthiness. (See **S v Matyityi** 2011 (1) SACR 40 (SCA) para [14].)

[107] I am of the view that the aggravating factors therefore outweighs the mitigating factors.

[108] Courts have often been cautioned that the imposition of correctional supervision should be exercised with care and certainly not were the crime is too serious. (See **S v N** 2008 (2) SACR 135 (SCA) para [23] – [29] and [40].)

[109] Having regard to all the aforesaid factors and circumstances, I am of the view that the *ratio* of Cameron, JA in **S v N,** *supra,* para [40], is equally applicable here:

> "[40] … I do not think that prison can be avoided. We were urged to send the matter back for the regional court to impose correctional supervision under s 276(1)(h) of the Criminal Procedure Act 51 of 1977 (the Act). That would avoid prison altogether, and place the appellant (on good behaviour and under the threat of a suspended sentence) on a supervised community-related work scheme. I do not think we can. Every rape sentence sends a public message. This option would be so soft that its message would be misunderstood. It would enable the court's seriousness seeking to punish and deter rapes to be called into question.'

(Also see **S v D**, *supra,* at 260*f* – 261*d*)

[110] It is trite that, in determining a balanced and appropriate sentence, the court is required to have regard to the main purposes of punishment, namely the deterrent, preventive,

reformative and the retributive aspects thereof. (See **S v Khumalo and Others** 1994 (3) SA 327 A) at 330D.) By doing so, the court must have regard to the nature of the crime, the circumstances of the offender and the interests of society. (See **S v Zinn** 1969 (2) SA 537 (A); **Director Of Public Prosecutions, Kwazulu-Natal v P** 2006 (3) SA 515 (SCA) para [13].)

[111] Having done that, I am of the view that direct imprisonment will be the only appropriate sentence whereby the appellant could be appropriately punished, be prevented from committing further crimes and by which he could be rehabilitated. Having regard to the nature of the crime, such a sentence will simultaneously serve the interests of society. However, a sentence of 12 years as imposed by the court *a quo* does not constitute an appropriate balance between the crime, the offender and the society. In my view, a sentence of six years imprisonment imposed in terms of section 276(1)(b) of the CPA will be a just, balanced and appropriate sentence.

[112] There is no reason to interfere with the additional declaratory orders that were issued by the court *a quo.*

[113] Accordingly, I would make the following order:

ORDER:

1. The appellant's appeal against his convictions on counts 1 and 2 is dismissed and the convictions are confirmed.

2. The appellant's appeal against his conviction on count 3 is upheld and the conviction is set aside.

3. The appellant's appeal against his sentence is upheld and the court *a quo*'s sentence of 12 years imprisonment imposed in terms of section 276(1)(d) of the Criminal Procedure Act, Act 51 of 1977, imposed on the 19th of December 2011, is hereby set aside and replaced with the following:

   "Counts 1 and 2 are taken together for purposes of sentence, for which the accused is sentenced to 6 years imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act, Act 51 of 1977."

4. The sentence in paragraph 3 is to be regarded as being imposed on the 19th of December 2011.

5. The declaratory orders issued on the 19th of December 2011 in terms of the Firearms Control Act, 60 of 2000 and section 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 are confirmed.

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C. D. PIENAAR, AJ

I concur.

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A. F. JORDAAN, J

On behalf of the appellant: Mr. Kambi
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. M. Lencoe
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN

/eb