REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
…3 June 2010….. DATE	**……(signed)……...** SIGNATURE

Case No. A90/2010

Date of Appeal: 3 June 2010

DPP Reference No. JAP 2010/0096

In the matter of:-

MHLANGA, ARNOLD Appellant

versus

THE STATE Respondent

JUDGMENT

A J Bester, AJ:

[1] The appellant was charged with one count of rape. He denied guilt and provided the following plea explanation: "… *the accused denies ever having sexual intercourse with complainant at any stage, with or without consent*".

[2] The Appellant was convicted and on 31 May 2009, sentenced to one term of life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act, 105 of 1997.

[3] An appeal was noted in terms of section 309(1) of the Criminal Procedure Act, 51 of 1997. The appeal, now before us, is directed against both the conviction and sentence.

[4] It was common cause in the court below that, on the date of the alleged rape, namely 21 October 2006, the complainant was a young, school-going, 15-year old virgin of slight build. The Complainant and the Appellant, the latter then 36 years old with two years of post-secondary teacher training, were co-inhabitants in a boarding house which they shared with various other people. The Complainant and her mother shared a bedroom. The Appellant and his own infant shared another bedroom, his wife having absconded some time earlier. The alleged rape of the Complainant by the Appellant was said to have taken place in the Appellant's bedroom. A medical examination conducted in the early morning hours of the night following upon the alleged rape, showed that the Complainant had suffered vaginal injuries compatible with a recent, violent, non-consensual penetration of the vagina. She displayed no other physical injuries.

[5] It serves mention at this juncture that, although Dr Ntekera, the physician by whom the medical examination was conducted, was cross-examined on behalf of the Appellant as to the possibility that the mentioned vaginal injuries were self-inflicted, it was never put to the doctor on behalf of the Appellant that the injuries were, for example, not sustained; that they were not consistent with a recent, violent, non-consensual penetration; or that they were self afflicted.

[6] The Complainant alleged that the Appellant, who in the past had made amorous advances towards her, accosted her when she was on her way to a communal bathroom in the boarding house. The Complainant's mother being off to work, the Appellant used that opportunity, she says, to force her into his bedroom where he raped her. The Appellant says that is not so and in his

defence propounded a theory that says, in essence, that the Complainant had, on the day of the alleged rape, stolen his cell phone from his bedroom and that, in an altercation where he was about to assault her, he had confronted her about that theft. Then, so the theory goes, apparently as some kind of a pre-emptive strike, the Complainant levelled that trumped-up charge of rape against him to deflect attention from the theft or perhaps to counteract, somehow, a the charge of theft that he could level against her.

[7] The court below was therefore faced with two mutually destructive versions of the events on the day in question. One of these versions must be false.

[8] On appeal, the argument advanced on behalf of the Appellant is that the Complainant's evidence should be rejected because it is riddled with material contradictions. The conclusionary submission is that, as a result of these contradictions, her evidence is therefore not "*clear and satisfactory in every respect*". Contrasted with that material defect in the State's case, it is argued that the Appellant's version of the events should be accepted as "*reasonably possibly true since he maintained his version throughout his trial*".

[9] The latter submission is, if not decidedly wrong, then overly generous to the Appellant because even a cursory perusal of the Appellant's *viva voce* evidence shows that it permeates contradiction and, as correctly summarised by the learned magistrate, displayed "*glaring inconsistencies*". Moreover, when in the concluding moments of the hearing, the Appellant was taxed during in cross-examination for these contradictions and inconsistencies, he launched an attack on his own legal counsel, accusing him of grossly ineffective representation. That accusation is perhaps exemplified, for example, by the following extract from the evidence at Record, page 218, line 16 to 219, line 8:

> "In the times that he has consulted me, like in other times when he comes to Sun City like the time when he came to take my statement he had come visited me in Sun City. That is when he got all my statements and then the other times when it is here, sometimes I happen that when the conversation is

> getting finished in court I lift up my hand and he tells me that he is going to come down to see me. Then I have developed to understand that whenever, most of the times when he tells me that he will come down here, he has never attended me down when I have gone down.
>
> But sir, I saw you coming up with the book. -- Which in the other time when I tell him that he did not come and see me down that day, then he tells me that each and everything which you are again to say you will have an opportunity. The Court is going to give you an opportunity to listen to you. Each and everything, even the day when he consulted with me that I will be starting to come into the witness box he told me that it is the time today.
>
> I saw him consulting with you. -- It is the time today that each and everything that you had wanted to say and anything that you think it was left out, it was the time to cough everything up, and I was happy with that but I am only surprised that now the situation which he put me to is now turning against me."

[10] We are instructed by **S v Bennett** 1994(1) SACR 392C, at 398h, that, regrettably, one of the events which sometimes follows upon a conviction is a recrimination from the convicted person who seeks to attribute his misfortune for having been convicted not to his own guilt, but to his legal counsel's inadequate and ineffective representation. In the case of the Appellant, the recrimination followed upon a bout of incisive cross-examination when it finally dawned on the Appellant that his evidence was perhaps lacking the requisite credibility.

[11] As an aside, although not called upon directly to rule on the adequacy and effectiveness of the Appellant's representation, but perhaps compelled to do so because of the Appellant's accusations, I say this: as submitted by the learned author Steytler in Constitutional Criminal Procedure, Butterworths, 1998, the right to legal representation includes the right to effective representation. However, the author underscores the fact that a court should be alive to the difficulties of reviewing the conduct of a case by legal counsel after the event and, in making that evaluation, a court should be highly deferential. The court must accordingly indulge a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance. In the result, he argues, a claim of ineffective counsel should not readily be accepted.

[12] It is not possible on the record before me to conclude that the Appellant's legal counsel was delinquent in his representation. However, a perusal of the record does tend to show that the Appellant's counsel had discharged his duties with a fair measure of confidence and competence.

[13] To return to an assessment of evidence, it is not competent, as counsel for the Appellant does in her heads of argument, minutely to dissect the evidence adduced for contradiction and inconsistency and then, on that basis, to discount the evidence of the one or the other party. The proper approach to such contradictions and inconsistencies is well-established.

[14] In **S v Van der Meyden** 1999 (2) 79 WLD the court, at 82C-E, formulated the approach as follows:-

> "The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that a conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

[15] The mere fact, therefore, that there might be contradictions and inconsistencies in the evidence of a party, is not decisive. Contradictions and inconsistencies *per se* cannot lead to the rejection of the evidence given by a witness as untrue; they may be indicative of a simple error or poor recollection for the only thing certain about human memory is that it is often frail. And not every error made by a witness affects his or her credibility; an evaluation of the evidence of each witness must be made, taking into account all of the

evidence before the court, including the nature of the contradictions and inconsistencies, their number and importance, and their bearing on other parts of that witness' evidence. See: **S v Oosthuizen** 1982 (3) SA 571 (T) at 576B – H; **S v Mkohle** 1990 (1) SACR 95(A) at 98f-g.

[16] It is unnecessary to regurgitate here the totality of the evidence before the court below and the contradictions and inconsistencies in the evidence. They are clearly and comprehensively chronicled in the judgement of court below. It is clear from the reasons for judgement that the Magistrate approached the evaluation of the evidence holistically as per the test formulated in **Van der Meyden**, supra. He comprehensively considered the contradictions and inconsistencies in the evidence on both sides and weighed up the elements that point towards the guilt of the Appellant against all those which were indicative of his innocence, taking proper account of the strengths and weaknesses, probabilities and improbabilities on both sides. He found, correctly in my view, that the contradictions in the evidence of the Complainant were not material.

[17] In my view the magistrate was correct; such contradictions as were found in the evidence of the Complainant are to be expected given her young age and the trauma of the, by all accounts, rapidly unravelling and unexpected events on the day of the alleged rape. The contradictions in her evidence were not only not material, they concerned inconsequential matter and were few. They were also of the type which suggest absence of fabrication rather than unreliability. The Complainant was corroborated in most respects by her mother, to whom she complained about the rape upon her return from work, by her Uncle, and by the evidence of Dr Ntekera, whose conclusions were not attacked with any modicum of vigour. The magistrate, therefore, in my view correctly found the Complainant to be satisfactory in all material respects as a single witness in respect of the rape.

[18] The magistrate also carefully took into account the quality of the evidence of the Appellant, who was extensively cross examined. As shown above, the magistrate pointed to the material contradictions and glaring inconsistencies in the Appellant’s evidence which remained unexplained. He

also found that material aspects of the Appellant's evidence were improbable. Of particular concern was the fact that the Appellant had failed, without explanation, to call witnesses who were apparently able, on the version of the Appellant, give weighty evidence relevant to the question as to whether or not a rape had been committed. And the fact that, when confronted under cross-examination with the mentioned contradictions and improbabilities, the Appellant readily adjusted his evidence and, as shown above, was quick to accuse his legal counsel of not putting that previously unheard version to the Complainant in her cross-examination.

[19] In the peculiar circumstances of this case, apart from considering the credibility and reliability of the witnesses, the magistrate was correct in assessing the probabilities of the two conflicting versions before him and to reach a finding as to which version is true and which is not. The magistrate could, of course, only dismiss the Appellant's version as false in the event that he reached that conclusion beyond reasonable doubt and to do he considered the evidence before him holistically. **S v Saban** 1992 (1) SACR 199(A) at 203i-204b. Having performed that evaluative exercise, the magistrate concluded that there was a substantial balance of inherent probabilities that support Complainant's version and that that the balance weighed so heavily in favour of the State that it excluded any reasonable doubt about the Appellant's guilt.

[20] In my view the magistrate therefore approached the evidence before him cautiously and correctly and, on a proper conspectus of all the evidence, rejected the defence version as false beyond reasonable doubt. His reasoning in respect of the conviction on the rape count can, therefore, not be faulted.

[21] It is trite that in the absence of a demonstrable and material misdirection by the trial court, its findings are presumed to be correct and that those findings will only be disregarded if the recorded evidence shows them to be clearly wrong. See *S v Francis* 1991 (1) SACR 198 (A) at 204d; **S v Hadebe and Others** 1997 (2) SACR 641 (SCA) at 645e - f.

[22] The Appellant has been unable to point to any demonstrable and material misdirections by the learned magistrate and, in my view, there are none.

[23] **The Appellant's conviction on the count of rape is therefore upheld and appeal against it rejected**.

[24] I now turn to the life sentence imposed upon the Appellant by the court below.

[25] It has often been held that the sentence of life imprisonment is the most serious sentence that can be imposed, for it effectively denies the possibility of rehabilitation.

[26] The imposition of a sentence is, as held in **S v Ntozini** 2009 (1) SACR 42 (E), one of most difficult and onerous duties of judicial officers; perhaps more so in the case of a court sitting in reconsideration of a life sentence in a matter where a first time offender, in the prime of his life and with an otherwise irreproachable record of good conduct and behaviour, has committed a heinous crime, but who is nevertheless sentenced to life imprisonment.

[27] When should a court of appeal interfere with a life sentence imposed on an appellant? Generally, it has been held that appellate interference in respect of sentence is only competent in instances where the appellate court has formed a definite view as to the sentence it would have imposed and where the degree of disparity between that sentence and the one imposed by the sentencing court is so striking that interference on appeal is warranted: see: **Damgazela v The State** (633/09) [2010] ZASCA 69 (26 May 2010).

[28] In **Ntozini,** supra, where the court substituted a life sentence with a term of imprisonment for 20 years, the court articulated the basis for an interference in a sentence as follows:-

> "The concept of substantial and compelling circumstances has engaged the attention of the courts on numerous occasions specifically the Supreme Court

of Appeal in the matters of S v Malgas 2001 (1) SACR 469 (SCA); S v Fatyi 2001 (1) SACR 485 (SCA), and the Constitutional Court in S v Dodo 2001 (1) SACR 594 (CC). Amongst the principles to be extracted from these decisions are the following: In determining whether substantial and compelling circumstances as envisaged in the section are present the court must have regard to all the factors traditionally taken into account in the determination of a discretionary sentence and it is not limited to circumstances which are exceptional or rarely encountered. Nor are there circumstances restricted to factors that reduce the moral blameworthiness of the convicted person. In general, however, it was the intention of the legislature to provide for a severe standardised and consistent response from the courts unless truly convincing reasons exist and are so discernable for a different response. Stated differently the prescribed sentences must in general be regarded as appropriate for the specified offences and should not be deviated from without weighty justification. Where on a conspectus of all the relevant circumstances the court considers that the imposition of the prescribed sentence would work an injustice it is entitled to categorise the circumstances as substantial and compelling sufficient to justify the imposition of a lesser sentence.

In S v Mahomotsa 2002 (2) SACR 435 (SCA) ([2002] 3 All SA 534) the headnote reads in part as follows:

'Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. Some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust. Of course, one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of

> imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty.'"

[29] The learned judge in **Ntozini,** supra, then continued and stated that, although each case must obviously be decided on its own facts, it is useful to compare the facts in other cases emanating from the Supreme Court of Appeal in which substantial and compelling circumstances were found to be present and where the particular instances of rape were held not to fall within the worst category of rape. He then proceeded to analyse a number of such cases, some in which the victims were as young as 13 and 15, and in which the facts compete the one to outweigh the other on an ascending scale of sheer, horrendous brutality and cruelty, but which all share a common denominator, namely that the Supreme Court of Appeal saw fit to impose a sentence less than that of life imprisonment.

[30] Section 51 of the Criminal Law Amendment Act, 105 of 1997, requires a two-tier test: First the court must determine whether there are substantial and compelling circumstances to warrant a departure from life imprisonment or a prescribed minimum sentence. If it is found that no substantial and compelling circumstances exists to warrant a lesser sentence, the court is obliged to impose the prescribed minimum sentence. Should substantial and compelling circumstances however be present, the second enquiry kicks in and that is to determine an appropriate sentence.

[31] It is difficult to ascertain from a reading of the magistrate's judgement on the sentence if and where this two-tier test was applied and what his motivation was for the imposition of a life sentence. In **Maake v Director of Public Prosecutions** (481/09) [2010] ZASCA 51 (31 March 2010) the Supreme Court of Appeal cited, with approval, the following dictum in **S v Mbatha** 2009 (2) SACR 623 (KZP) (at 631*f-j*):

> "… there is as much a necessity for the court in its judgment on sentence to identify on the record the aggravating circumstances that take the case out of the ordinary, as there is for it in the converse situation to identify those substantial and compelling circumstances that warrant the imposition of a lesser sentence than the prescribed minimum."

[32] What does, however, appear to emerge from his reasons is that the magistrate took account of the fact that, as with all rapes, the emotional distress and damage that accompanied the rape in this case was undeniably extensive and enduring, and more so in the case of young girls. However, his overriding consideration was apparently that, because the Complainant was under 16 when she was raped, that fact alone warranted the imposition of the most severe sentence possible and that sentence he then did impose. But that approach is fundamentally unsound, as demonstrated in the analysis of the cases in **Ntozini,** supra, for it blinded him to those substantial and compelling circumstances that warranted the imposition of a lesser sentence than the prescribed minimum.

[33] In this case, there was no extraneous violence and there was no physical injury other than that inherent in the offence. Of course, as pointed out in **S v Vilikazi** 2009 (1) SACR 552 (SCA), in cases of serious crime the personal circumstances of the offender necessarily receded into the background and, once it was clear that a substantial jail term was appropriate, questions of whether or not the accused was married, or employed, or of how many children he had, were largely immaterial. However, the court held that these factors remain relevant in the assessment of whether the offender was likely to offend again.

[34] In the present case the Appellant had reached the age of 36 and had led, by all accounts, an exemplary life; he was a "*good, non-violent man*", a member of the Seventh Day Adventist Church who cared for his family. He held a steady job as a building contractor in Sandton, where he employed 29 people. He was also at some time a carpenter. The Appellant has, as pointed out above, has two years of post-secondary education in the form of teacher training. He is a displaced Zimbabwean with no prior convictions. Nothing in

his life indicated that he is inherently lawless or lacking in ordinary decency. The very fact that the Complainant's mother did not consider the Appellant as a person who posed a threat to her daughter and was therefore content to lock her into the boarding house with him when she was out, lends support to the mentioned evidence that the Appellant must have been a person of inherent good character. The inference must therefore be that the Appellant had suffered a major, but isolated lapse of better judgement; the inference cannot be that he is a threat liable permanently to be removed from society.

[35] A significant term of imprisonment would therefore in my view have been sufficient to bring home to the Appellant the gravity of his offence and to exact sufficient retribution (in so far as that may still be relevant); life imprisonment was not a just sentence for the Appellant. To cite **Vilikazi**, supra, "*to make him pay for his crime with the remainder of his life would be grossly disproportionate*".

[36] Finally, at the time of sentencing in March 2009, the Appellant had already been incarcerated since 2006. In **S v Stephen** 1994 (2) SACR 163 W at 168f, the court held that time spent in imprisonment awaiting trial must be brought into account in any subsequent custodial sentence, but as double time the time actually served. Taking into account, therefore, the time served awaiting trial, I consider that a period of 18 years' imprisonment will send a sufficiently strong deterrent message to the community that rape, and especially the rape of a young girl, will be visited with severe punishment.

[37] **In the premises, the Appellant's appeal against the sentence is upheld. The life sentence imposed by the magistrate is set aside and a sentence of 18 years' imprisonment is imposed.**

__(Signed)_____

Bester, AJ

Acting Judge of the High Court

3 June 2010

I concur.

_(Signed)_____

Victor, J

Judge of the High Court

3 June 2010