IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A236/2005

DATE: 7 NOVEMBER 2008

In the matter between:

MKHULULI NOMNGANGQU

versus

THE STATE

JUDGMENT

GERBER, AJ:

The appellant, hereinafter referred to as the accused, was convicted in the Regional Court of the Western Cape, held at Wynberg, on a count of rape. He was thereafter sentenced to 12 years imprisonment. He now appeals against his conviction and sentence.

At the start of the trial, the accused pleaded not guilty to the charge and in his plea explanation denied that he had had sexual intercourse with the complainant.

The evidence can be briefly summarised as follows. I deal

firstly with the State's case and the evidence of the complainant.

The complainant testified that she was 17 years old. She stayed in Gugulethu, in close proximity to the accused. She and her family members knew the accused and his family members beforehand. There was no ill-feeling between them at the time.

On the night of 11 November 2001, she returned home at approximately 21:50. When she arrived home, the door of the house where she stayed with *inter alia* her one sister, Velikazi, was locked. She knocked on the door and called out, but no-one opened the door. Whilst she was there, the accused's mother, Shirley Nomngangqu, also known as Wantu, came past and enquired as to what she was doing. A short conversation between them ensued, whereafter Wantu told the complainant that she should go to her, that is Wantu's, home and sleep there with her, that is Wantu's, children as she did not intend sleeping there herself. As a result the complainant went to Wantu's home, knocked, and one of her children, Zimkitha, opened the door. She informed Zimkitha that Wantu had said she could sleep there, and duly went to sleep in the bedroom.

A while later the accused came in the house, asked for his

food and ate. Zimkitha told the accused that the complainant was sleeping there and the accused also saw her. The accused left, but shortly thereafter returned. He had blankets with him, which he put in the dining room.

The accused asked the complainant to come to him, but she refused. Thereafter the accused started to pull the complainant to the dining room. She attempted to resist, but the accused was too strong for her. The accused told the complainant to undress, but she refused. The accused thereafter smacked her with his open hand and turned the volume of the television set up. The accused also had an empty bottle which he got from the kitchen table, with which he threatened her.

The accused pulled the complainant down on the blanket and told her that he wanted to "sleep with her". Thereupon the complainant told the accused that she did not want to "sleep with him". Thereafter the accused choked the complainant and forced her to take off her pantie and raped her.

The complainant described the sexual act that the accused performed and testified that he had inserted his penis into her vagina. According to the complainant, the sexual act lasted for approximately 30 minutes.

During cross-examination, the complainant confirmed that whilst the accused was having sex with her, she felt "something plastic on his stomach or his side". She was unable to say what exactly it was that she felt.

After the accused had finished, he told the complainant to sleep there next to him. The complainant later got up, but the accused woke up. He asked her where she was going and she told him that she was going to the toilet. The complainant wanted to put her pants on, but the accused said that she should leave it.

Thereupon the complainant went to the toilet and the accused followed her and waited outside. The complainant asked the accused to bring her paper and, when he went inside the house to get the paper, the complainant left the toilet and ran to the nearest house, that of Ntombomsi, whom the complainant also knew. At the time the complainant was only dressed in a polo neck top and a pantie. According to the complainant, the accused chased her, but Ntombomsi opened the door. Ntombomsi's boyfriend was also in the house.

Upon inquiry from Ntombomsi, the complainant told her that the accused was chasing her and wanted to pull her. She did

not tell Ntombomsi that she was raped. The complainant testified that the reason why she did not tell Ntombomsi was because she was ashamed as Ntombomsi's boyfriend was also present.

The complainant thereafter remained at Ntombomsi's house until approximately seven o'clock that morning. She then borrowed a dress from Ntombomsi and went to her own home.

At her home, she found Velikazi and other people present. She informed Velikazi that the accused had pulled her and tried to rape her, but also did not tell her that she was raped. The complainant testified later in this regard that she did not inform Velikazi of the rape as she was ashamed because there were other people present.

Later on she was called by the accused's mother and requested not to lay a charge against the accused.

The complainant thereafter went into the accused's home to retrieve her trousers and shoes which she had left behind the previous evening when she ran away.

Thereafter other people, including her sister, Lulama, arrived and Lulama informed her that she should go to the South

African Police Service. Lulama accompanied the complainant to the police station. On their way Lulama asked the complainant what the accused had done to her. The complainant did not answer. At the police station the complainant told the SAPS members that the accused had raped her and made a written statement in this regard.

Later that same day the complainant pointed the accused out to the police, whereafter he was arrested.

The police also took the complainant to a medical doctor for an examination.

The complainant was adamant that the accused had had sex with her without her consent.

The next witness was Velikazi Faith Mashinga Velikazi is one of the sisters of the complainant. Velikazi testified that on the morning of 12 November 2001, when the complainant arrived at her home, she, the complainant, was crying and she noticed that she was wearing someone else's dress. There were also other people present at or in close proximity of her house at the time. The complainant thereafter told her that she had stayed at the accused's house, that the accused had assaulted her and dragged her from the bedroom and

undressed her. The complainant did not at the time inform her that she had been raped.

At a later stage, the accused's mother also arrived and asked the complainant about her, the complainant's, clothes that she had found at her home.

Later on their older sister, Lulama, arrived and took the complainant to the police station. Velikazi only heard at the police station that the complainant alleged that she had been raped by the accused.

Velikazi furthermore testified that she was not aware of any family feud between the accused's family and her own family, and more specifically Lulama.

The third witness for the State was Dr Stanley Martin Trope. Dr Trope testified that he qualified as a medical doctor in 1967 and that he had several years of experience in family practice, internal medicine and cardiology. For approximately the last three years he was employed as a clinical forensic practitioner at the Lady Michaelis Hospital and part of his duties entailed the examination of complaints in sexual and sexual assault cases.

On 12 November 2001, he examined the complainant after the alleged incident. Although the complainant informed him that she had been throttled and hit on her head, he did not find any marks indicating same. Dr Trope explained that it would depend on the severity of the force used whether one would expect to find marks or not.

Dr Trope also testified that prior to the examination, the complainant cried and was upset. He further testified that during the gynaecological examination, he found swollen redness on the edge of the complainant's hymen and that he was of the view that this was caused by recent trauma.

During cross-examination he stated that the redness that he had found at the complainant's hymen would usually not be found with consensual sexual intercourse when there would be adequate lubrication prior to penetration and was more likely to have been caused by intercourse without consent.

The next witness was Lulama Mashinga. Lulama is the older sister of the complainant. On the morning of 12 November 2001 she noticed that there was a lot of people at Velikazi' house. When she went there, she noticed that the complainant was present, that she was crying and that she was wearing someone else's dress. She asked the complainant

why she was crying and one of the other people in the vicinity responded by saying that the complainant had been raped by the accused. She thereupon asked the complainant what had happened. The complainant informed her that the accused had assaulted her and that she had ran to the neighbours.

She thereupon took the complainant to the police station. On their way she asked the complainant whether the accused had raped her, but the complainant informed her he did not. At the police station the police asked the complainant what had happened and she told the police officers that the accused had in fact raped her. The complainant told the police what had happened and made a statement. Lulama later asked the complainant why she had not told her that the accused had raped her, and the complainant informed her that she was ashamed because there was a lot of people around.

Lulama also denied that there was any feud between the accused's family, more specifically the accused's mother, and her own family, more specifically herself. Lulama also denied that she told the complainant to inform the police that she had been raped.

The last witness for the State was Ntombomsi Margaret Pienaar. Ntombomsi testified that at approximately 03:40 on

the morning of 12 November 2001 she heard a knock on her door and the complainant called her by her nickname. She opened the door for the complainant and noticed that she was only wearing a top and a pantie. Ntombomsi asked the complainant what was going on, and she replied that the accused had wanted to "sleep with her" but she had run away. Ntombomsi confirmed that her boyfriend was also in the house at the time. The complainant stayed over at her house and in the morning before she left, she gave the complainant one of her dresses to wear.

In the defence case, the accused first testified. The accused confirmed that he knew the complainant well and that they stayed in the same area. He testified that on the particular evening he was watching TV at home when he heard a knock at the door. When he opened the door, he noticed that it was the complainant. At the time only three children, his two sisters and a further relative, were at home with him. The three children were asleep. The complainant informed him that she wanted a place to sleep.

He let the complainant in and she sat in the lounge with him. The accused spoke to the complainant, but she did not answer him. He noticed that the complainant smelt of liquor and she looked angry whilst watching television. After approximately

ten minutes the complainant informed him that she was going to the toilet. The complainant left and did not return. Later on he went to the toilet to see where the complainant was. He noticed that she was not there and thought that she had gone home.

The next morning the complainant alleged that he had attempted to rape her. He denied it. Later on he heard Lulama say that the complainant should not say that he, the accused, had tried to rape her, but rather that he did rape her.

Later on that same morning he was arrested. He requested the police to take him to a hospital, but they did not. Three months earlier, on 12 August 2001, he was injured when he was shot in his back. He testified that as a result of the injury which he had sustained he, at the time that the alleged rape took place, had to carry a bag with a pipe which he used to urinate. He also testified that at the relevant time he could not get an erection. He furthermore testified that he had asked the doctor who attended to him whether he would be able to have sex and the doctor informed him no, he should first wait for an operation which he had to undergo on 6 December 2001.

When asked as to a reason why the complainant would have

laid a false charge of rape against him, the accused suggested two reasons, namely:-

1. That there was a long-standing family feud between his own mother and Lulama.

2. Approximately eight days earlier, Lulama had overheard him when he spoke to a friend about Lulama's brother, who had been arrested for rape of a child. He had told the friend that Lulama's brother should be punished for his actions. Lulama had apparently overhead him and told him that she would get him.

The second witness by the defence was Shirley Nomngangqu. Shirley is the mother of the accused. She testified that on the relevant night she did not sleep at home as she stayed over at her sister's place. She only returned to her own home during the morning of 12 November 2001. Upon her return, she found pants in her dining room. Upon enquiry, Zimkitha informed her that the pants belonged to the complainant. She testified that, at a previous time when the complainant had stayed over at her home, the complainant had stolen certain items from her. She thereupon took the pants and went to look for the complainant. She found the complainant at Velikazi's house. The complainant immediately informed her

that the accused had "wanted to rape her". She and the complainant went to her home where she confronted the accused with the complainant's allegation. The accused denied it. She and the complainant thereupon went back to Velikazi's place and Lulama arrived and told the complainant that they should go to the police station.

She testified that the relationship between herself and Lulama had not been good for some time. She did, however, not have a bad relationship with the complainant.

She did not think that the accused could have had sex with the plastic bag that he had to carry. The accused was unable to tell her why the complainant's pants were left behind at her house that evening.

The following important facts are common cause:-

1. At the relevant time, the complainant did not have a strained relationship with the accused and/or the accused's mother.

2. Late during the particular evening, the complainant arrived at the accused's house.

3. The complainant spent some time at the accused's home.

4. The complainant thereafter left the house during the early hours of the morning.

5. When she left, the complainant only had her top and her pantie on. Her pants were left behind at the accused's home.

6. The complainant went to Ntombomsi's house and informed her that the accused had wanted to rape her and told her that she had run away from him.

7. In the morning the complainant went home and reported to Velikazi and the accused's mother that the accused had wanted to rape her.

8. Lulama took the complainant to the police station.

9. At the police station the complainant laid a charge of rape against the accused.

The magistrate, in her judgment, evaluated the evidence and made the following important findings.

Firstly, the complainant made a favourable impression in the witness stand and she never got the impression that the complainant's evidence was rehearsed or planned.

Secondly, the magistrate accepted the complainant's evidence that it was at the request of the accused's mother that she, the complainant, went to the accused's home on the particular evening.

Thirdly, the magistrate concluded that the explanations given by the complainant for the inconsistent reports made by her the next morning as to whether she was in fact raped or whether there was only an attempt to rape her, were acceptable.

Fourthly, the magistrate found that the complainant's evidence that she was raped was corroborated by the medical evidence and opinions of Dr Trope.

Fifthly, the magistrate found that the complainant's evidence was also corroborated in material respects by the other State witnesses and also by the accused.

Sixthly, the magistrate found that the accused's, and his mother's, version that the charge of rape was pre-planned by

the complainant and her family members, was so improbable, given the accepted facts, that it could be rejected as not reasonably possibly true.

Seventhly, the magistrate concluded that the accused's version was so improbable that it could be rejected as not reasonably possibly true.

On appeal, the following factors were referred to in support of counsel's submissions that the convictions should be set aside.

Firstly, the inconsistent reports made by the complainant after the incident as to what had occurred, and more specifically her failure to report that she had in fact been raped. As referred to above, the complainant did not initially tell the persons that she spoke to that she had been raped. Initially she reported that the accused had dragged her and that he had wanted to sleep with her. The complainant, however, explained that she was at the relevant times ashamed as there were a number of other non-family members in her presence. The evidence indicates that that was in fact so. Although one may normally expect a complainant in such a situation to report the offence at the earliest reasonable opportunity, this is not an inflexible rule. One has to look at the entire evidence and the

explanation proffered by the complainant for her actions to see whether the complainant's behaviour accords with the offence having been committed. In this regard see R v M, 1959 (1) SA 352 (A) at 357D, as well as S v Hammond, 2004 (2) SACR 303 (SCA). Of particular importance in the present matter in this regard are the following facts. The complainant did immediately report that the accused had wanted to rape her. Prior to the time when she spoke to the police, there were always bystanders in her vicinity when she spoke to the other witnesses about what had happened. Her explanation that she was too ashamed to tell the full story at that stage must be seen in that context, also bearing in mind the magistrate's observations that, even in court, the complainant was extremely embarrassed when she had to relate that sexual intercourse had taken place. On the same morning the complainant informed the police that she had in fact been raped and made a statement to that effect.

Dr Trope's undisputed evidence is that he found recent trauma of the complainant's hymen, which was likely to have been caused by intercourse without consent. Dr Trope's evidence and opinions corroborates the evidence of the complainant in this regard.

It must of course be borne in mind that the complainant was, in

respect of the incidents that had occurred at the home of the accused, a single witness. The approach to be followed in respect of such a witness' testimony was summarised as follows by Diemont, J A in S v Sauls and Others, 1981 (3) SA 172 (A) at 180E - F:-

> "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness (see the remarks of Rumpff, J A 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."
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> (See also S v Webber 1971 (3) SA 754 (A) at 758G - H).

Considering the evidence in totality, I am not persuaded that there is reasonable doubt as to the veracity of the complainant's evidence that there had in fact been sexual intercourse. Her explanation as to why she initially only referred to an attempted rape appears to be acceptable,

reasonable and probable. As mentioned, her evidence that there had been sex is also supported by the medical evidence.

Another aspect raised by counsel was that the State prosecutor elicited corroboration for the complainant's version in an improper manner. The record reveals that Velikazi was asked to explain what had happened on the morning of 12 November 2001. She then gave her narration of the events that had occurred. During Velikazi's evidence, the State prosecutor relayed a part of the complainant's evidence to the witness in respect of a single issue, namely what exactly the complainant had said to the witness initially when she had arrived at her home on that morning. The questions posed were clearly directed to clarify Velikazi's evidence in this regard and to establish whether her evidence contradicted that of the complainant, and if so to what extent. Although the line of questioning may not have been the most appropriate, it was, in my view, not improper. The questions were not really leading questions, but more a narration of a certain section of the complainant's evidence whereafter a response was sought from the witness as to what her version was. It is accepted practice that questions may be asked if it is necessary to clarify issues. It is therefore not surprising that the accused's legal representative at the trial did not object to the line of questioning that is now being attacked. I am therefore of the

view that there is no merit in the point raised on behalf of the accused.

A further aspect raised by counsel in this regard is that the evidence of Velikazi and Lulama do not corroborate the evidence of the complainant. It is obviously correct that neither Velikazi nor Lulama were eyewitnesses to the alleged rape. There are, however, other material aspects in respect whereof their evidence does corroborate that of the complainant, i.e. that there was not a family feud between the accused's family and the family of the complainant, and more specifically Lulama; that the complainant, immediately upon her return home, relayed that the accused had done something untoward against her, which had caused her to run away from him in the middle of the night; that the complainant was wearing someone else's dress. Furthermore, the evidence of Velikazi and Lulama must be assessed as part of the totality of the evidence presented.

Another aspect raised on behalf of the appellant was that Dr Trope's finding that the complainant had no previous pregnancies was inconsistent with Lulama's evidence that the complainant was indeed pregnant. The complainant never testified that she was pregnant at the time when her alleged rape occurred, nor was she asked any questions in this regard.

It is unknown whether the complainant was, on the morning of 12 November 2001, aware of the fact that she was pregnant. It is also unknown whether the complainant in fact had had a child. Dr Trope noted in his medical report that the complainant had had no pregnancies. It can safely be accepted that the complainant did not inform Dr Trope that she was pregnant at the time the incident occurred. Lulama, who testified after the complainant and Dr Trope, at the end of her evidence and upon questioning by the Court, testified that she only later realised that the complainant was pregnant when she had been raped. Lulama furthermore testified that at the time the complainant was two months, and not four months as referred to by counsel in his written heads of argument, pregnant at the time. It is not clear from Lulama's evidence when exactly she found out that the complainant was pregnant. It cannot be found on the evidence that the complainant had purposefully withheld from Dr Trope the fact that she was pregnant. The complainant was never asked to explain her actions in this regard and, more importantly, it is not clear whether at the time when the incident occurred she was aware of the fact that she was pregnant. No negative inference in respect of the complainant's credibility is, in my view, warranted by these facts. Furthermore, the aforesaid facts do not detract in any way from the opinion expressed by Dr Trope in respect of the probability that the complainant had been

subjected to forced sexual intercourse shortly prior to his examination.

Another aspect raised by counsel in his heads of argument was that Ntombomsi's evidence that the complainant was not crying when she came to her house is incompatible with the expected behaviour of a person that had just been raped. It must be accepted that different people may behave differently in the same situation. There is no rule of thumb that it is to be expected that a woman who had just been raped should cry immediately thereafter. The complainant's behaviour must be assessed with due regard to the totality of the evidence presented. In this regard the following evidence presented by Ntombomsi corroborates the evidence of the complainant:-

1. Ntombomsi confirmed that the complainant arrived in the early morning hours at her house, knocked on her door and called for her to open up.

2. Ntombomsi noticed that the complainant was only wearing a top and a pantie.

3. The complainant informed Ntombomsi that she had run away from the accused as he had wanted to sleep with her.

The fact that the complainant was at the time not crying is a neutral factor. It does not detract from the complainant's evidence, nor does it make the evidence of the complainant improbable. The said argument furthermore overlooks important corroborating evidence delivered by Ntombomsi in respect of the complainant's actions, comments and her state of dress.

A further aspect raised by counsel was the accused's evidence that, due to the injury he had earlier sustained, he could not have had sex with the complainant. It was submitted that that evidence was reasonably possibly true. The accused's evidence in this regard was that he could not get an erection. He elaborated thereon when he testified:-

> "I was shot at the back, and the bullet went out here, in front of my stomach. I had a bag which was hanging there, to urinate in and the pipe was near my intestines, so that I can urinate. I did ask the doctor whether I will be able to have sex, and the doctor said no, I must first wait for the operation to be done, and the operation was going to be done on the 6th of December last year."

It would thus appear that the medical advice given to the accused was not that he could not have sexual intercourse, but rather that he should refrain from having sexual intercourse prior to the operation that he had to undergo. In the present matter, however, it is striking that the accused did not call any medical evidence to support his version as to his sexual capabilities, or lack thereof, at the relevant time. The accused must have known who the doctor was that had treated him and who had given him the advice referred to earlier. There is no indication on the record that the doctor was unavailable to testify. Although there was no onus on the accused in this regard, one would have expected, in regard to a factual issue such as this, that corroborating evidence would have been presented by the defence. In evaluating the evidence it must, of course, always be borne in mind that it is trite law that there is no onus on an accused in a criminal trial. Zulman J A stated in this regard:-

> "It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the Court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A Court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond

any reasonable doubt it is false (see S v V, 2000 (1) SACR 453 (SCA) at 455a - b)."

The complainant testified that she, whilst they were having sex, did feel "something plastic". Her testimony is clear that sexual intercourse did take place and is corroborated by the evidence of Dr Trope. The accused's explanation as to his inability at the time to have had sexual intercourse can, on an assessment of the totality of the evidence presented, be rejected as so improbable that it is beyond any reasonable doubt false.

A further argument raised was that the accused's version is reasonably possibly true. In evaluating the evidence, the approach a Court should adopt was set out as follows by Nugent, J:-

> "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 the 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 (see S v Van der Meyden, 1991 (1) SACR 447 (W) at 449j - 450b. See also S v Van Aswegen, 2001 (2) SACR 97 (SCA) at 100f - 101e, as well as S v Mafaladiso en Andere, 2003 (1) SACR 583 (SCA) at 595b - d.)

The magistrate gave a number of reasons as to why the accused's version can be rejected as not reasonably possibly true. I can find no fault in the magistrate's reasoning. In assessing the evidence of the accused the following dictum of the Full Court in S v Van Tellingen, 1992 (2) SACR 104 (C) at 106c - f is also apposite:-

"Dit is dalk nodig om weereens te benadruk dat die bewyslas wat op die Staat rus nog altyd dieselfde is, naamlik bewys bo redelike twyfel. Dit beteken nie bewys bo enige sweem van twyfel, selfs vergesogte twyfel nie. Die klem val op die woord

redelik. Aan die ander kant is dit klaarblyklik so dat die redelike twyfelmaatstaf nie gelykstaan in die siviele bewyslas van bewys op 'n oorwig van waarskynlikhede nie. Die Staat se bewyslas in strafverrigtinge is heelwat meer veeleisend as dié van 'n litigant in siviele verrigtinge. Die onderskeid is herhaaldelik deur die Howe benadruk en dit gebeur dus dikwels dat Howe genoop voel om te sê dat `n beskuldigde se weergawe nie verwerp kan word slegs omdat die Staatsgetuies se getuienis op 'n balans van waarskynlikhede meer aanneemlik is nie. Dit beteken egter nie dat die waarskynlikhede irrelevant is in die opweging van die meedingende weergawes nie. Dit beteken ook nie dat slegs omdat `n beskuldigde se getuienis, in isolasie beskou, nie vatbaar vir kritiek is nie, dat daar geen sprake van 'n positiewe verwerping van sy getuienis kan wees nie. Die gehalte en oorwig van getuienis tot die teendeel mag so oortuigend wees dat 'n Hof genoop voel om die moontlikheid dat die beskuldigde se weergawe waar mag wees uit te skakel. Alles sal van die trefkrag van die Staat se getuienis aan die een kant en dié van die beskuldigde aan die ander kant afhang."

In respect of crucial aspects, the accused's version, and that of his mother, is so improbable that it can be rejected with safety i.e:

1. that the complainant and her sisters pre-planned and orchestrated the laying of a false charge of rape.

Firstly, there is no indication of any feud that existed between the complainant and the accused or his mother.

Secondly, how could the complainant have known, beforehand, that on this particular evening the accused's mother would not be present at her home?

Thirdly, why would the complainant then have made inconsistent reports, after the incident, to Ntombomsi and her own sisters as to what had occurred? One would have expected that, if it was a pre-planned event, the complainant would, from the outset, have alleged that she had been raped by the accused.

Fourthly, one would have expected the complainant's version and that of the other witnesses, especially her sisters, to have been similar in content in all relevant aspects. Contrary thereto there were in fact quite a few

differences between their versions, which indicates that their evidence had not been tailored to fit in with each other.

Fifthly, it is highly improbable that a casual and reasonable comment made by the accused in regard to Lulama's brother would result in such an elaborate plan being set in motion to falsely implicate him.

2. The accused could simply not give any plausible explanation as to why the complainant would, in the early hours of the morning, run away from him, half dressed, and report that he had done something untoward against her if in fact he had done nothing to upset her.

Although there were certain inconsistencies and differences in the versions of the State witnesses, none were of such a material nature that it negatively impacted on the complainant's credibility and reliability.

I am satisfied that the State proved beyond reasonable doubt that the accused is guilty of rape and that the appeal against the conviction should therefore be DISMISSED.

As far as is sentence is concerned, the magistrate imposed a

sentence of 12 years imprisonment. The particular offence is scheduled in Part III of Section 51 of Act 105 of 1997, which prescribes a minimum sentence of ten years imprisonment for a first offender, such as the accused, except if the Court finds that there are substantial and compelling circumstances to justify a lesser sentence. The magistrate held that there were no such substantial and compelling circumstances in this matter. I agree with her.

The magistrate did, however, misdirect herself in respect of sentence when she stated, on page 226 of the record:-

> "What I do regard as aggravating is the fact that not only did you show no remorse, but you were intent, you and your family intent, to show what a bad person Shirley is, a thief and a liar."

It is a fundamental right of an accused to plead his innocence and put his case before the Court. The fact that the accused disputed the complainant's version and that, in the process, he attacked her credibility and trustworthiness, cannot be held against him as an aggravating factor.

Given the aforesaid material misdirection by the magistrate, we are in a position to consider sentence afresh (see S v

Oosthuizen, 2007 (1) SACR 321 (SCA) at 324h).

As mentioned, I am of the view that no substantial and compelling circumstances exist which can result in a lesser sentence than the minimum sentence prescribed. Bearing in mind, in particular, that the accused was at the time only 22 years old, that he was a first offender and that there is no clear evidence of any serious permanent physical or psychological trauma that the complainant suffered as a result of the offence, I am of the view that it is inappropriate to impose a longer term of imprisonment than the minimum prescribed by the legislature.

In the result, I would propose an order that the sentence imposed be substituted with a sentence of TEN (10) YEARS IMPRISONMENT. I therefore propose the following order.

The appeal against the conviction is DISMISSED. The appeal against the sentence is UPHELD. The sentence imposed is substituted with a sentence of TEN (10) YEARS IMPRISONMENT.

GERBER, AJ

I agree.

YEKISO, J