

SOUTH AFRICA / JUDGMENT

V v S (A85/2014) [2015] ZAFSHC 51 (12 March 2015)

[2015] ZAFSHC 51**COURT**

Free State High Court, Bloemfontein

BEFORE

E K Tsatsi, S Ebrahim

CASE / FILE NUMBER

A85/2014

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE DIVISION, BLOEMFONTEIN****Case No: A85/2014****In the matter****between****J[...]****A[...] V[...] A[...]****.....Appellant****and****THE****STATE****.....Respondent****CORAM:****EBRAHIM****J, et****TSATSI,****AJ**

JUDGMENT

BY: TSATSI, AJ

HEARD ON: 17 NOVEMBER 2014

DELIVERED ON: 12 MARCH 2015

[1] This is an appeal against conviction and sentence. The appellant was charged and prosecuted of rape in the Regional Court in Welkom. He pleaded not guilty. The appellant was sentenced to fifteen years imprisonment. He was legally represented throughout the trial. He was declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000. The regional court found substantial and compelling circumstances that warranted a sentence less than the prescribed minimum sentence, which is life sentence. Such substantial and compelling circumstances were based on the fact that the appellant was convicted of assault with intent to do grievous bodily harm, where the complainant testified against him. I will return to this aspect later. The appellant lodged an application for leave to appeal against the rape charge which was granted in regard to both conviction and sentence. The respondent supported the conviction and the sentence imposed on the appellant.

[2] According to the charge sheet, the alleged rape took place on 26 February 2004 when the complainant was nine years old. The testimony of the complainant was conveyed through the CCTV in terms of section 158(3) of Act 51 of

1977. The court informed the appellant that his name will be listed in the National Register of Persons who have sexually abused children and mentally retarded women.

[3] Before I proceed with the events that led to the conviction and sentence of the appellant, I need to point out the following: Another court other than the one that was dealing with the rape charge dealt with the assault charge against the appellant. The court a quo that heard the rape charge against the appellant did not have to deal with the assault charge against the appellant. It only had to deal with the rape charge.

[4] The events giving rise to the charge upon which the appellant was convicted and sentenced are summarized thus: The complainant testified as follows: In 2004 she attended school at H[...] Primary School in Welkom. She was a boarding student. She was nine years old at the time. She stayed with a girl by the name of L[...] who was her roommate. The two did not get along well. They used to argue a lot. L[...] was said to be the one doing “naughty” things” and then pretended like it was the complainant who did “naughty” things. This created unpleasant situations for the complainant and had negative effect on the complainant. It also affected her life negatively. As a result her mother noticed that she was not the same as she was teary and cried a lot. There was something bothering her.

- [5] On 26 February 2004 around three o'clock in the afternoon L[...] informed her that there was somebody who wanted to see her. She went to the room with L[...] and they both found L[...]’s father (the appellant) waiting. The appellant immediately yelled at her, and asked her why she not leaved his child alone. He ordered L[...] to leave the room. The appellant then ordered her to remove her pants and panty. He ordered her to lie on the bed and never to say a word. The appellant had his clothes on and unzipped his trousers whereupon he put his penis into her vagina. She felt like something inside her was tearing apart. The experience was very painful and gave her an excruciating pain. After the rape the appellant took her to the bathroom and assaulted her. He told the complainant that he would kill her and her family if she told anybody anything. The appellant suppressed the rape experience and never told anybody about it until she went to another school. She knew the appellant because the latter used to drop his daughter L[...] at school.
- [6] She further testified that during 2008 she attended school at L[...] Secondary School in Jacobsdal as a grade 9 student. There was an initiation process with the matrics. It was during this time that the students tried to push suppositories between her buttocks. Shortly thereafter she became hysterical and psychotic. This experience reminded her of the rape incident that took place in 2004. There was also a girl in the class room who had a strong resemblance of L[...]. On 5 February 2008 she received a text message on her cell phone that read: “I am coming to get you”. She immediately thought that it was L[...]’s father. Subsequent to the text message she became confused, delusional and disorientated. When she regained her senses her mother informed her that she mentioned that she was raped.
- [7] I should interpose at this stage and mention that the complainant’s testimony was interrupted in order for the court to do an inspection in loco at the school hostel where the complainant was required to point out certain places. The court concluded that there were various points of entrance contrary to what the appellant alleged. I should interpose once again and mention that the complainant was brought back into court at the end of her testimony to identify the appellant. It was stated that the complainant cried profusely and had to be removed from the court room. She was brought back into the court room still emotional and pointed out the appellant as the person who raped her.
- [8] The complainant confirmed her testimony under cross examination. She was cross examined at length regarding security and access control implying that the appellant could not have gained access to her hostel room. She insisted that the appellant was able to gain access to her hostel room.
- [9] Dr Sharon Straite, the psychologist testified and told the court that she diagnosed the complainant with post-traumatic stress disorder, psychosis and major depression. She treated the complainant for nine years, including after the complainant’s testimony. Based on the consultations and assessments she believed that the complainant was sexually abused by the appellant. She reiterated what the complainant told the court. She further told the court that the suppression by the complainant was caused by fear and threats made by the appellant to the complainant. Such threats included the fact that the appellant told the

complainant that he would kill her family if, she (the complainant) told anybody about him. Dr Straite described the touching by the students on the complainant's buttocks as secondary trauma. This secondary trauma brought the initial rape incident. Dr Straite further testified that another factor contributing to the suppression was that the complainant found the experience too difficult to deal with. She told the court that during the consultations she could see the trauma and believed that the complainant did not fabricate the rape incident.

[10] Annamarie Coetzee is an experienced social worker who deals with child sexual abuse at the Child Welfare Clinic. She also interviewed

the complainant in an effort to establish if the latter was in deed raped. She used various techniques and skills to assess the

complainant and found that the complainant was an intelligent child who performed very well academically. According to her findings there were no fabrications by the complainant regarding the rape incident. She explained the term dissociative amnesia referred to as Kojala. According to Ms Coetzee dissociative amnesia refers to ".....the ability of the human mind to take an experience, split in into different pieces and act to those pieces separately from each other, the different pieces being put into separate compartments in your conscious mind. You are aware of both pieces, but you don't tend to think of them at the same time". She referred to specific incidents of the complainant's experience like the blood on her panty. She told the court that her conclusion was that the complainant was raped by the appellant during the first term of

2004. She further testified that this experience has caused the complainant severe emotional damage. Ms Coetzee confirmed her testimony under cross examination.

[11] Ms v[...] S[...] ("the complainant's mother") testified that the complainant informed her about the problems she had with L[...]. She further told her mother that L[...]’s father (the appellant) swore at her and told her to leave L[...] alone. She went to see the school principal in an effort to resolve the matter. She suggested that her daughter (the complainant) be separated from L[...]. The school agreed. Whilst the complainant was busy packing her belongings to move to another room, the school bell rang. This was an indication that it was time for the girls to bath. The complainant became hysteric and refused to bath. Her mother wanted to know why she refused to bath. The latter told her mother that the appellant previously tried to drown her in the bath but that she managed to escape. She told her mother that the appellant threatened to kill her and her whole family.

[12] The complainant's mother visited the principal once again and told the principal what the complainant told her. The mother then reported the matter to the police and laid a charge of attempted murder against the appellant. As a result of the said charge the appellant was prosecuted and found guilty on a charge of assault with intent to do grievous bodily harm. The appellant was sentenced to a wholly suspended sentence.

12.1 The mother made an appointment with Dr Sharon Straite to organize therapy for the complainant. The latter received therapy. At this stage nothing was said about the alleged rape. In the first week of school, the clinic sister called her and informed her that the complainant was injured. Subsequently she fetched the complainant and stayed with her at home for a few days. The complainant refused to return to school but eventually she did. During the time when the complainant returned to school, the complainant acted peculiar. The secretary called the mother and the latter fetched the complainant from school. The complainant did not recognize either her mother or father and expressed concern if they were going to hurt her. She referred to her mother as “aunt” and referred to her father as “uncle”. The complainant’s mother called Dr Sharon Straite once again in an effort to organize therapy sessions. It was during this time that the complainant was hospitalized for ten days. It was during her hospitalization that the complainant said that during the initiation at school some learners tried to push something into her buttocks. She was released from hospital and stayed at home. She still acted confused, traumatized and delusional. She regressed and acted as if she was far younger than she was at the time. She referred to her friends when she was nine years old. She also spoke in a voice of a “little girl”.

[13] The complainant's mother further testified that the complainant told her about what the appellant did to her. She repeated the incident of the bathroom to her mother. The complainant only related the rape incident after the initiation experience and at the time when she was in a confused state. This time she related the rape incident to her mother exactly the way she testified. The complainant’s mother asked the complainant about the rape incident when the latter was not in her confused state. The complainant was shocked and said that her mother should not have found out. Dr Sharon Straite was called again but the complainant refused to repeat what she told her mother. Eventually the complainant wrote the letter describing the same incident that she told her mother when she was confused. Dr Sharon compiled a report which was marked exhibit “E”. Further evidence of the mother was that the complainant refused a physical examination and that she fell back into a state of confusion. He complainant’s mother confirmed her testimony under cross examination.

[14] On 19 May 2008, Dr Britz, the gynaecologist sedated the complainant and did an anaesthetic. The anaesthetic revealed that there was hymeneal damage which was healed ready. There was 3x3 centimetres of old tears. It was Dr Britz’s testimony that there was vaginal penetration at some point, but could not say what kind of object was used, but it was not a small object. Dr Britz agreed under cross examination that this could have been caused by child molestation. This could be consistent with penile penetration or an object like a stick.

- [15] The appellant testified and raised a defence of an alibi. He told the court that he was with some people transporting furniture on the day in question and he never went to his child's school. He said that they started moving furniture from ten o'clock in the morning until nine o'clock in the evening. He further told the court that they used three bakkies which drove together every time they moved the furniture. He denied that he raped the complainant. He further denied that he gained access to the complainant's hostel room.
- [16] The appellant told the court during cross examination that he had never met with the complainant before. He did not know the complainant who was his child's roommate. He said that he only went to the boarding school once when he had to take a towel to his daughter. The prosecutor then challenged him and asked him if he only went once to his child's boarding school. He responded and said that he could have been at the boarding school two or three times. The prosecutor further challenged the appellant and told him that the complainant knew him as L[...]s father, the complainant could recognize him. He contradicted himself further and said that he used to go to his child's boarding school every Friday to fetch L[...]. The appellant further testified that he did not know of any problems between L[...] and the complainant. The appellant further denied that it was possible for him to gain access to the building. The prosecutor then reminded him that the complainant's mother told the court that she could go into the hostel several times, put something into the complainant's room. The appellant disagreed and said that it was not possible as he could only go up to the principal's office.
- [17] The prosecutor challenged the appellant about why he remembered the specific times when he started moving the furniture and when he finished, what was so special about that day. The prosecutor further indicated to the appellant that it was strange that the appellant remembered specific details of what happened on the day in question four years later. The appellant then said that it was because he was there and that was what was written on his police statement. The prosecutor reiterated and put to the appellant that he was the one who raped the complainant on the day in question, there was no reason for the complainant to falsely accuse him of rape. The appellant answered and said that the complainant may have known him but he did not know the complainant.
- [18] The issue to be decided in this appeal was whether or not the court a quo proved beyond a reasonable doubt that the complainant was raped by the appellant. The other issue was whether or not a 15 year prison

sentence handed down against the appellant was appropriate. The identity of the appellant was also an issue.

- [19] Attorney for the appellant submitted that the court omitted to evaluate the argument of the complainant's mother, Ms S[...]. He also said that the court omitted to evaluate the evidence of Ms Coetzee. He said that the only finding regarded the evidence of the complainant. He further told the court that the complainant was a single witness who gave her evidence in a piecemeal fashion. His further submission was that the complainant only mentioned the

assault but never said anything about the rape either to her mother, or Dr Straite. He said that of concern was the fact that the complainant made these serious allegations during a state of confusion. The other concern was that the complainant was not willing to undergo medical examination. The defence did not have an opportunity to call witnesses. The defence asked for the matter to be postponed and the court refused.

[20] It was submitted on behalf of the respondent that the case against the appellant was overwhelming. The criticism against the complainant not to report the matter sooner was unfounded. It was stated by Ms Coetzee that the reason why the complainant took so long to report the rape was because she suffered from “dissociative amnesia.” The complainant’s traumatic rape experience was triggered by the initiation process at school when the learners tried to push something in her buttocks. The said experience was also blocked by the fact that the appellant threatened to kill the complainant’s family. Counsel for the respondent further argued that it was a fact that the complainant was raped by the appellant. The reason why the court refused to allow postponement when the appellant asked for one, was because the appellant took too long to call witnesses. Counsel for the respondent further argued that there was no reason for this court to interfere with the sentence handed down by the court a quo.

[21] The cautionary rule generally means that the court is obliged to consciously remind itself to be careful in considering evidence which practice has taught should be viewed with suspicion. In addition the court should seek other safeguard of reducing the risk of a wrong finding based on suspect evidence (Schwikkard and Van der Merwe, Principles of Evidence. 3rd ed)

2005. In *J v S* 1998 (4) BCLR 424 (SCA), the court dismissed the appeal by reasoning that a case might call for a cautionary rule approach only where there was some evidential basis for suggesting that the evidence of the witness may be unreliable and not simply because the witness was a complainant of a sexual offence.

[22] In *S v J* 1998 (1) SACR 470 (SCA), it was stated that the cautionary rule in sexual assault cases was based on an irrational and outdated perceptions. It unjustly

stereotyped complainants in general cases, most of whom are women, as being unreliable. The cautionary rule was abolished in South African Law in 1998 by the Supreme Court of Appeal’s decision in *S v Jackson* (supra). This decision brought South African Law in line with comparable foreign jurisdictions like Canada, England, New Zealand and California. The rule has also been abolished in Namibia and Zimbabwe (*S v Banana* 2000 (2) SACR 1 (ZS). Statutory confirmation of the abolition of the cautionary rule is found in section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of

2007. It provides that:

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

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

[24] In *S v Shackell* 2001

(4) SA 1 (SCA) the court held that the principle in criminal proceedings is that the prosecution must prove its case beyond a reasonable doubt and that a mere preponderance of probabilities is not enough. It follows that the onus rests on the state to prove every element of the crime alleged, including that the appellant is the perpetrator, that he had the required intention and the crime in question was unlawful (*Schwikkard and Van der Merwe: Principles of Evidence* (3rd ed) at paragraph 31.3.1. In order to be acquitted, the version of the appellant has to be reasonably possibly true (*S v Van der Mevden* 1999

(1) SACR 447 W). Nugent J in *S v Van der Mevden* (supra) said that:

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

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

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

[26] In casu the complainant gave a detailed and logical account of the rape incident, even though she took a long time to report the rape to relevant authorities. It is highly improbable that a child of that age could fabricate such details events about rape. It was documented that she suffered from temporary memory loss, known as “dissociative amnesia”. It has been alleged that the complainant used “dissociative amnesia” as a defence mechanism. This is not unusual as we have heard stories of men and women who were allegedly raped when they were young and only reveal such rapes more than thirty years later, sometimes even more. In casu the complainant described the details of the rape by saying that the appellant put the private part that he used to urinate into her private part that she also use to urinate. There is no doubt that this is a description of rape. There is no rule of law requiring corroborations in criminal law. If some safeguard reducing the risk of conviction is

required, the safeguard must not consist of corroboration but if corroboration is relied upon as the safeguard, it must go the length of implicating the accused in the commission of the crime (*S v Artman and Another* 1968)

- (3) SA 339 (AD). In light of the preceding, the evidence in a particular case may call for the application of a cautionary rule. It will depend on the facts and circumstances of such case as to whether such an approach was necessary. I am of the view that in casu the court did call for a cautionary approach. This is despite the fact that the learned magistrate was free to “proceed to consider the evidence without the restraints imposed by the cautionary rule.” (This is what Mclunsky AJA observed in *S v M* (supra) with reference to *S v Jackson* (supra).

[27] I am satisfied that the complainant’s evidence was true and credible in every material respect. She gave an honest, coherent and logic account of events. This is despite the fact that she was only 15 when she testified. There was no indication that she had a grudge against the appellant, in fact, the opposite seemed to be true. The appellant was the one who seemed to have a grudge against the complainant due to the fact that he believed that the complainant was harassing his daughter. I see the complainant as an opportunistic person who misused the rift between his daughter and the complainant as well as the vulnerable position the complainant was in. My considered view was that the appellant used rape or sex against the complainant as a form of punishment against the complainant.

[28] The approach to be adopted in regard to an alibi defence, which is essentially a straightforward denial of the state's case on the issue of identity, is trite (Schwikkard, Van der Merwe, *Principles of Evidence*, 2nd Ed at par 30 11 24 (p517)) Firstly there is no burden of proof on the accused to prove his alibi. The burden remains on the state to prove its case throughout. As with any other defence, if there is a reasonable possibility that the accused's alibi could be true, then the state has failed to discharge its burden and he must be given the benefit of the doubt. Where a defence of an alibi has been raised and the trial court accepts the evidence in support thereof as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution’s evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct. This is consistent with the approach to alibi evidence laid down by this Court more than 50 years ago in *R v Biya* 1952 (4) SA 514 (A). At 521C-D Greenberg JA said:

“If there is evidence of an accused person’s presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.”

[29] I echo the words of the learned magistrate in casu, when he said that “It is so that the accused raised an defence of an alibi, namely that he was not there on that day and he was with a few other persons

assisting them in the transportation of furniture. But that does not mean that there was no stage where he could have been at the school”. There was also something very peculiar about the memory of the appellant. He remembered every detail about what happened on the day when they were transporting furniture but had a very selective memory regarding the times he had visited his daughter at the boarding school. If this alibi defence was bona fide the people that the appellant allegedly assisted with moving the furniture would have been called to corroborate his version about

moving the furniture.

[30] I am satisfied that the learned magistrate viewed the totality of the evidence and concluded that the appellant's version was not reasonably possibly true. I am of the considered view that there is only one test in a criminal case, which is whether the evidence established the guilt of the appellant was proved beyond a reasonable doubt. In casu the guilt of the appellant was proved beyond a reasonable doubt. This is despite the fact that the appellant tried very hard to dissociate himself from the complainant. The appellant testified that he did not know the complainant and that he had never met her. This is not reasonably possibly true. My view was that any parent would be keen to know who his/her child's roommate was. A parent knows that this/her child's roommate will one way or the other has some influence on his/her child's life. I could not find any reason why the appellant made a bare denial of not knowing who the complainant was. I could only come to a reasonable conclusion that the reason why the appellant denied knowing the complainant was because he thought that this would prove his innocence beyond a reasonable doubt. The appellant's testimony had material inconsistencies which remained unexplained or got more peculiar as he tried to explain them. He entangled himself in incomprehensible explanations, making it difficult for anyone to understand as to how it was possible for him not to have never met the complainant. For instance the appellant said that he never met the complainant before only to find that the complainant testified against him in an assault charge. I am satisfied that the court a quo proved the charge of rape against the appellant beyond a reasonable doubt.

[31] In my view the conviction is in order. There is no merit in the appeal against the conviction. The learned magistrate correctly

convicted the appellant of rape as charged. The appellant did not have a defence to put before the court a quo. Instead he pretended

not to have never met the complainant before. The appellant told the court a quo that he could not think of a reason why the complainant would accuse him of rape. If the appellant knew of no reason then the complainant had no motive to falsely accuse him of rape.

[32] In *S v Chapman* [1997] ZASCA 45; 1997

(2) SACR 3 (SCA) at 5B. Mahomed CJ stated:

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in South Africa are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The Courts are under a duty to send a clear message to the accused in the present case, to other potential rapists and to the community that the Courts are determined to protect the equality, dignity and freedom of all women, and they will show no mercy to those who seek to invade those rights.”

32.1 The Supreme Court of Appeal in S v Malqas 2001

- (1) SACR 469 (SCA) and the Constitutional Court in S v Dodo 2001(1) SACR 594 (CC) had provided some guidelines to the courts with regards to the imposition of the sentences as prescribed in Act 105 of 1997. In paragraph 25 in S v Malqas (supra) it was held:

“If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.”

- [33] I echo the words of Nugent JA in S v Vilakazi 2009(1) SACR 552, at paragraph 57, where he remarked that:

“I think it must be accepted that no woman, and least of all a child, would be left unscathed by sexual assault, and that in this case the complainant must indeed have been traumatised.....”

- [34] The starting point in any determination of an appropriate sentence is to acknowledge and bring into account the scourge of rape. In S v Ncheche [2005] ZAGPHC 21; 2005 (2) SACR 386 (W), the court said the following:

'Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country, it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman's body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish rapists very severely. '

- [35] With regard to sentence, it is trite that the test for dealing with sentences on appeal is whether the sentence is vitiated by irregularity, misdirection or is shockingly inappropriate. Since the imposition of an appropriate sentence involves the exercise of a judicial discretion, the appeal court has a limited basis to interfere therewith (S v Malqas 2001(2) SA 1222 (SCA)).

[36] It is important for the court to maintain the delicate balance between the triad. In *S v Banda and others* 1991

(2) SA 352 (BGD) at 355A-

D, the court said:

“The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try and balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern. This conception as expounded by the Courts is sound and is incompatible with anything less.”

[37] I am not convinced that the sentence was shockingly inappropriate. In considering whether the sentence imposed upon the appellant was inappropriate, I must of course bear his personal circumstances in mind. The personal circumstances of the appellant were that he was 53 years old at the time of the hearing of the matter in the court a quo, he is a married man, he has two daughters aged 20 and 22 out of his previous marriage, his highest qualification is standard 8. He was previously temporarily employed as a truck driver and subsequently he was permanently and earned a salary of R 8000.00 per month. It was stated that his wife was unemployed and the appellant was the sole bread winner. In contrast to the personal circumstances of the appellant, the aggravating factors were that he committed a serious crime of rape that was also premeditated. The complainant was only 9 years old at the time of the offense. She had not reached puberty and she was not at the stage where she understood what sex was all about. The appellant robbed her of her childhood, virginity and innocence. She endured the humiliation of being attacked in the hostel room. The rape incident happened in the complainant's hostel room where she was supposed to feel safe and protected. She probably looked up to the appellant as a parent and trusted him. The experience left her traumatised and has emotionally affected her. He was the complainant's roommate's father. As a parent he should have treated the complainant as a child not as a “punch

bag” or “sex object”. There was overwhelming evidence regarding emotional and psychological scars which have far reaching consequences. The emotional scars and psychological harm are evident for instance in the fact that the complainant had episodes of getting confused, disorientated and traumatized. She refused to be medically examined which was a sign of the emotional and mental impact the rape had on her.

[38] The appellant has been convicted of a very serious offence and deserves a sentence of direct imprisonment. However in the assessment

of an appropriate sentence, the court must have regard to the main purpose of punishment which is deterrence, preventive, reformatory

and retribution (see *R v Karq* 1961

(1) SA 231 (A) at 236A - B. Having regard to all the relevant factors, I am of the considered view that a sentence of 15 years' imprisonment was appropriate under the circumstances.

[39] Taking into consideration all the circumstances and factors pertaining to sentence, including but not limited to the seriousness

of the offence, the interests of the community, the personal circumstances of the appellant, I am in all circumstances satisfied

that this court should not consider the sentencing of the court a quo afresh. There is no merit in the appeal against the sentence. In my view there was no material misdirection by the court a quo. In addition the appellant did not rely on any misdirections by the trial court but that the sentence is shockingly high. It is my view that the court a quo exercised its discretion judicially and properly. There is nothing that this court can add to the reasoning or the findings of the court a quo. I am of the view that there was no need to tamper with the sentence of the court a quo.

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

ORDER

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

E. K. TSATSI, AJ

I agree.

S. EBRAHIM, J

On behalf of the appellant: Mr. K. Pretorius

Instructed by:

Bloemfontein Justice Centre BLOEMFONTEIN

On behalf of respondent: Adv. C.A. van Der Merwe

Office of the Director of Public Prosecutions BLOEMFONTEIN

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