

SOUTH AFRICA / JUDGMENT

Vilakazi v S (A868/2011) [2012] ZAGPPHC 135 (28 June 2012)

[2012] ZAGPPHC 135

COURT

North Gauteng High Court, Pretoria

BEFORE

Khumalo, Raulinga

CASE / FILE NUMBER

A868/2011

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IN THE NORTH GAUTENG-HIGH COURT - PRETORIA

(REPUBLIC OF SOUTH AFRICA)

REPORTABLE

CASE NO: A868/2011

DATE:28/06/2012

(n the matter between)

MUNTUZA RALPH VILAKAZI.....APPELLANT

and

THE STATE..... RESPONDENT

JUDGEMENT

KHUMALO AJ

- [1] The Appellant was arraigned before the Regional Magistrate in Secunda on a charge of rape read with the provisions of Section 51 (1), (52 (2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997 for unlawfully and intentionally having had sexual intercourse during December 2007, with a nine year old girl, without her consent.
- [2] After the trial, the Appellant was convicted on an alternative charge of attempted rape and sentenced to twelve years imprisonment of which five (5) years was suspended on condition he is not convicted of rape, attempted rape or indecent assault committed during the period of suspension.

[3] The Appellant is, with leave of this court, appealing against both the conviction and sentence alleging that there were certain

procedural deficiencies in the trial process and placing in issue the admissibility of certain witness statements, their probative value and the reliance placed upon such statements by the court in arriving to its factual findings.

[4] The nine year old Complainant lived with her father at a farm called Naas Steyn in Charl Celliers. Appellant was their neighbour, staying nearby with his aunt's family and he and the Complainant's father were also employed at the farm.

[5] The state led evidence of five key witnesses on the merits, that of Paulina Johanna Mokeretla ("Paulina"), who was in a relationship with Complainant's father, then of Complainant's father Samuel Nkosi ("Samuel"), followed by Complainant's aunt Johanna Nkosi, ("Johanna"), the Complainant and Dr Mabotja who presented and gave evidence on the J88 medical report. The sixth witness Constable Mkhabela could not take the matter any further testifying on his endeavours to locate Dr Mabotja, the medical doctor.

[6] Paulina's testimony was that:

[6.1] On 23 December 2007 she fetched the Complainant from her husband's place to come and stay with her at her place in Embalenhle Township. On 3 January 2008 her sister in law, Josephine came to visit her. She enquired from Josephine why Complainant looked like a child who had a problem and does not want to play with other children. Complainant was wetting herself and would not say anything when she questions her about it. Josephine told her that Complainant was raped. She then questioned Complainant again, and Complainant confirmed that she was raped by one Muntuza Vilakazi, ("the Appellant"). She has never met the Appellant and did not know who he is. Complainant told her that Appellant came to her place and found her sitting on a chair. Appellant took her from the chair, put her on the bed and closed her mouth. On the bed Appellant removed her panty, took his penis and put it in her vagina. After he finished he told her not to tell her father otherwise he will kill her. She then went to Samuel and informed him of what Complainant had told her and Samuel confirmed that Complainant reported the incident to him. He then ordered her to go and open a case. When she asked him why him and his sister ("Josephine") did not open a case, Samuel told her that he wanted the Appellant to pay him compensation. She then proceeded to report the matter to the police. She was there when Appellant was arrested. Complainant pointed the Appellant out to the police.

[6.2] Under cross-examination, the defence interrogated her on the statement that she made to the police. She confirmed the contents and did not contradict herself in anyway. The statement was consistent with her evidence in chief. The defence then asked her about a discussion that allegedly took place in a taxi she was travelling in with the other witnesses on their way home after attending court proceedings in April 2009, when someone else, a family member, was mentioned as the person who raped the Complainant, to which she responded by denying any knowledge of the said discussion or of the person she was alleged to have spoken to, one Zandile Vilakazi.

[7] Samuel's, evidence was that:

[7.1] During December he asked Paulina to fetch the Complainant and go and stay with her and also enrol her at a school in Embalenhle. During that stay Paulina called him to report that the child has been raped by Appellant. He told Paulina that Complainant also visited Josephine in December who also noticed some strange signs of behaviour. In January, Paulina came back to the farm and again informed him that Complainant has been raped. He ordered Paulina to open a case because the child had already told him in

December that she was raped by Muntuza but he could not confirm that because as a man he could not see anything. He also did not get a chance to speak to Appellant as Paulina went to open a case. When he was confronted with the allegation that he sought compensation from Appellant, he alleged that Paulina was turning against him. He further alleged that Paulina told him that Complainant slept with one of her brother's sons after Complainant touched the boy's private parts.

[7.2] Under cross examination, he contradicted himself alleging that Complainant went to Josephine in December and he made the arrangements for Complainant to go and stay with Paulina only in January, by then he was two months into a relationship with Paulina.

He thought its better that the child leaves the school and the farm since this thing has happened.

[8] Josephine Nkosi was the third witness to testify, her account of events was that:

[8.1] Complainant visited her during December 2007 for some few days. She noticed that Complainant was walking in a strange way. She asked her about it and Complainant told her that Appellant slept with her. On Saturday she went to see Complainant's father Samuel. She asked Samuel if Complainant had told him about the rape. Samuel was drunk and she could not remember what his response was. She did not go to the police because of work and also because she stays far. She was questioned by Paulina about Complainant's behaviour and she told Paulina that Complainant has once told her about the rape incident. Josephine denied any knowledge or being party to a conversation that allegedly took place in a taxi wherein it was suggested that someone else other than Appellant might have had sexual intercourse with the complainant.

[8.2] Under cross examination Josephine confirmed that Complainant told her that it was the Appellant who raped her. She could not confirm if it was during school holidays when Complainant visited her.

[9] Through the assistance of an intermediary, complainant's testimony was that:

[9.1] Paulina took her to Embalenhle she does not know why. Appellant found her eating at the farm, after she ate, Appellant closed her mouth. She was alone her father was away. She was in the kitchen. Appellant entered through the bedroom door. She knows the Appellant because he stays there at Naas farm and is friends with her father. She tried to fight but she could not and Appellant removed her parity and lav on top of her in the bedroom. It happened in the bedroom, he was on top. On Sunday, Appellant took her to the bedroom. Appellant opened the kitchen door

after that closed her mouth and she could not cry. She was making the bed, when she finished eating. She went to the bedroom to make the bed. Appellant came in whilst she was in the kitchen, he was then crawling towards her, coming to her crawling so that she cannot see him. He came through the kitchen door. She was in the bedroom. Appellant ran slowly towards her and closed her mouth. Appellant was standing behind her. He pushed her to the bed, removed her panty and laid on her. She was lying on her back. Appellant was not wearing his trouser and underpants he put them aside. Appellant then put his penis in her and he was doing it on her. She illustrated that by putting a male doll on top of a female doll and demonstrating

the thrusting movements of the upper body of the male doll. Appellant thereafter dressed himself and left. He did not speak to her or give her anything. Her father Samuel came back on Sunday and she told him that Appellant raped her. Samuel said he was going to open a case against the Appellant. She also told Josephine when Josephine asked her why she was walking with her legs apart.

[9.2] At this stage of Complainant's evidence the prosecutor requested permission from the court to put to Complainant the statement that she made to the police. The presiding officer then enquired from the defence if the statement was in dispute and there was no response. The prosecutor was then allowed to proceed to question

Complainant on the contents of the statement. It was put to the Complainant that in the statement she said that sometimes she used to sleep at Muntuza's parents house especially when her father is drunk and does not come home early, to which she responded that she did not sleep there. However when it was put to her that she also said when she slept at Muntuza's parents house she used to sleep with her friend Ntombi on the kitchen floor, she confirmed, stating that she slept with Ntombi and did not sleep with Muntuza. Her father told her to go and sleep with Ntombi.

[9.3] The prosecution then proceeded to question the Complainant on a second statement that she made to the police, after the court had enquired again from the defence if this statement was in dispute. Again there was no challenge from the defence. It was put to Complainant that in this particular statement she said she was sitting on the chair when Appellant said to her he loves her and she responded by saying to Appellant she does not want him to love her. Complainant confirmed the statement and also added that Appellant locked the door. The prosecutor then asked her if Appellant grabbed her to the bedroom or found her in the bedroom making the bed. Her response was that Appellant grabbed her. She at the same time confirmed that Appellant crept on her whilst she was busy in the bedroom making the bed. When asked why in the statement she said Appellant pulled her into the bedroom she said she has forgotten. In her testimony she said after Appellant raped her he said nothing. She was then asked why in the statement she says Appellant said to her she must not tell anyone what happened otherwise he would hit her, her reply was that Appellant said he would kill her.

[9.4] The prosecutor then asked for permission to hand in both statements into evidence. The defence did not challenge the prosecutor's request or question the use, admissibility or inadmissibility of these statements, as a result the court admitted the statements as Exhibit "D" and "E" whilst Paulina's police statement was already admitted as Exhibit "A" after she was interrogated on it.

[9.5] Notwithstanding all this happening prior to cross examination of the Complainant, the defence did not interrogate her on her oral evidence or witness statements admitted as exhibit "D" and "E" opting instead to question her on Samuel's allegation that she has had sexual intercourse with one of Josephine's sons which allegation she vehemently denied (as all other previous witnesses have done) and maintained that she was raped by Appellant. She also confirmed that it was Plaintiff who came from behind and grabbed her.

[10] The state then called Dr Mabotja who submitted the following medical evidence on the complainant's condition compiled in the J88 medical report:

[10.1] the Posterior fourchette, a part of the female genitalia in the vagina is scarred which means pressure was applied on the genitalia that caused an abrasion that has healed. A scar indicates a healed wound resultant from an abrasion. Hymen configuration

- one finger under 20 which can mean the vagina is normal or that there was a dilation of the vagina, slightly opened. In a nine year old a tip of the finger should go not the whole finger.

[11] Dr Mabotja also read into evidence the contents of the J88 report which was that:

"Nine year old allegedly raped two months ago. Evidence collection kit not used. On examination the posterior fourchette scarred which could mean that there was rubbing around it that resulted in bruising and ultimate scarring. However the hymen seems to be intact. No fresh tears or bleeding seen. The whitish discharge was taken for pathology"

[12] Dr Mabotja further explained that the discharge was not normal and that it signifies an infection going inside the vagina which cannot be contracted without being sexually active. It also cannot be caused by not bathing and will not clear until it is treated. The medical evidence was admitted as exhibit "F".

[13] In closing arguments, the prosecution referred to Complainant's police (witness) statements, pointing out, inter alia, the

consistency between the statements and Paulina's testimony on what Complainant told her and also that the statements confirm that

Complainant reported the incident to Samuel when he came back home on Sunday, the same day that the incident took place. The prosecutor

also explained Complainant's forgetfulness attributing it to the time lapse and the fact that she was very young at the time of the incident. He further confirmed that the witness statements clarify the Complainant's testimony in court, who sometimes mistook the inquisition to be an accusation as indicated by the manner in which she answered the question about sleeping at Muntuza's place that she understood to imply that she slept with Muntuza.

- [14] On the other hand, in its argument, the defence did not refer to any of the oral or written statements of the witnesses but alleged that even though it does seem like Complainant was raped, Appellant was not the perpetrator. The defence further argued that Complainant could not be sure of the identity of the perpetrator because she alleged that the perpetrator came from behind. So she could not have been able to see the perpetrator but just assumed it was Appellant because Appellant usually visited her house to drink with her father. The defence further argued that Complainant has had sexual intercourse with one of her aunt's boys.
- [15] When the court commenced to consider the evidence that was before it, the magistrate mentioned all the witnesses that gave testimony for the state and then announced that "formally admitted as evidence during the course of the trial were Exhibits "A", which was Paulina Mokeretla's witness statement, "B\ Samuel Nkosi's witness statement, "C," Constable Mkabela's witness statement, "D" and "E", Complainant's witness statements and "F"\ the J88 report presented and read out Dr Mabotja who examined the Complainant. It also mentioned that the Appellant did not place any evidence before court.
- [16] Appellant's contention stems from this announcement. Therefore a careful scrutiny of the record, concentrating more on the statements of Samuel, Paulina and more especially that of Complainant, becomes not only necessary but crucial to understand and appreciate the reasons for the announcement and also to establish if it was warranted, since it is the admissibility of these statements that forms the nub of Appellant's disenchantment.
- [17] In examining the circumstances surrounding Samuel's testimony in chief or under cross examination, I could not find an instance where reference was made to Simon's witness statement or to the request that the said statement be admitted as an exhibit. However at the end of Samuel's evidence in chief the prosecutor informed the presiding officer that the defence has no objection to the content thereof, I would imagine the prosecutor was referring to the contents of Samuel's witness statement and handing it in as exhibit "B", This is however not clear from the record. Samuel was not necessarily a hostile witness as his evidence in chief was mostly consistent with the testimony of the other state witnesses, however at the end of his testimony in chief he alleged that Paulina told him that complainant slept with one of her brother's sons as well which allegation was a deviation from his witness statement. The allegation does not have any correlation with whether or not the Appellant raped the Complainant but brought Samuel's credibility into question.

[18] There is an overriding principle that places a duty upon a prosecutor to make available to the defence, with a view to cross examination, a witness statement, mostly referred to as a police statement (which is a privileged statement) of a state witness that deviates from it in his or her oral evidence. Failure to comply with this overriding principle renders the proceedings irregular as pronounced in *S v Xaba* 1983 (3) SACR 717 (A) at 728D. The rule serves as a protective measure against the danger of an accused being found guilty on the strength of the evidence of a witness who is unreliable or lacks credibility. The deviation will frequently be sufficiently far reaching to create a duty of disclosure if the credibility and reliability of a witness may be put in question by the trial court through cross examination upon the deviation. From this perspective it was therefore crucial for the prosecution to make Samuel's statement available to the defence and the court, so as to circumvent the process being afflicted by this irregularity. In *S Ncaphayi en Andere* 1990 (1) SACR 472 (A) on 486-487 the court pronounced that:

"the absence of a request by the defence for the deviating statement to be made available does not relieve the prosecutor of his duty unless, for example the defence has made it clear that it does not require such a statement" hence the prosecutor's disclosure of the statement and making it available to the defence was the correct and proper procedure to follow and the converse could have amounted to an irregularity. Moreover, the question whether irregular or wrongful proceedings are such that the overriding principles are not complied with, must be determined in accordance with the circumstances of each case and with public policy. *S v Mushimba & Andere* 1977 (2) SA 829 (A) at 844H-845.

[19] On the other hand, the reason for the acceptance of Paulina's statement (exhibit "A"), is obvious and easily explicable

because it was introduced by the defence in an attempt to bring to light some contradictions or to show that she might have contradicted

herself on a statement she made under oath in the matter under adjudication. The purpose of which was to discredit her oral evidence. Therefore the admission of the statement after she has been cross examined on it and reliance thereon when making a conclusion on

the facts cannot be irregular. Kgomo J in *S v Agliotti* SACR 2011 (2) 437 SGHC at par 32 clarified what is acceptable evidence when he said that:

"acceptable evidence in a criminal trial is not just the say-so of a witness, ie what the witness tells the court in chief; it is that evidence as qualified or coloured by cross examination".

He further noted that ..."The previous statement(s) made by such a witness may be put to him/her and the cross-examiner may, in that process, succeed in casting aspersions or doubt on the veracity of her story and concomitantly on his /her credibility"

[20] Turning to the Complainant's witness statements, there are underlying principles that govern specifically the admissibility of a complainant's witness statement, especially if the intention is to have the statements admitted into evidence and taken into

consideration when making findings of facts. The state of complainant's oral evidence at the time of the introduction of the witness statements determines whether the way in which they were introduced was acceptable and purpose for which they were used justified.

[21] As it was apparent in her evidence in chief, Complainant was unable to provide a clear account of some of the aspects surrounding the circumstance under which the rape took place, making a few incongruent assertions. At the end of her oral evidence, it was

unclear:

[21.1] if she was in the kitchen or bedroom when the Appellant grabbed her to the bed or bedroom;

[21.2] if Appellant said anything to her after the alleged rape? and if he did, if he threatened to assault or kill her.

[21.3] Whether Appellant entered her house through the kitchen or bedroom door.

Whilst in the police statements she confirmed that Appellant grabbed her to the bedroom and indeed threatened to kill her after raping her.

[22] The assessment of her evidence was made difficult by the fact that neither of the sides enquired from the child about the make up or structure of her home, which information is clearly crucial in order to understand or to can make out if indeed her evidence is discrepant or not. The understanding of the structural build if it is made up of one or two rooms could have changed the perspective placed on her evidence as well. My view as concluded from perusing the record is also that she did not get a satisfactory assistance from the intermediary and interpreter. I would however not dwell on that. Nevertheless, for these reasons and the other factors pointed out by the court, complainant seemed to exhibit a poor recollection of the sequence of events. Accordingly, if one has regard to the prosecution's closing argument, it is evident that the purpose of introducing the statements was to prove the consistency between the witness statements made not long after the incident took place and the oral evidence as well as to clarify the seemingly incongruence in the complainant's oral testimony and have the witness statements admitted into evidence.

[23] A witness statement of a complainant is generally inadmissible as hearsay evidence unless it can be received under the principled

exceptional analysis. Under these circumstances were a party wants to introduce a witness statement for the purpose of proving consistency and clarity, it must do so by way of an Application to the court for permission to cross examine the witness on the said statements in view of the perceived discrepancies. See Sections 196 and 210 of the Criminal Procedure Act 51 of 1977 and also Section 58 of the Criminal Law Amendment Act 32 of 2007 on Sexual Offences and

Related Matters that makes provision specifically for admissibility of previous consistent statements in criminal proceedings involving alleged commission of sexual offences. The witness is cross examined to remove the hurdle created by hearsay evidence due to the difficulty of testing its reliability. The factors relevant to the credibility and reliability of a statement can then be tested with the witness in the witness box and subject to cross examination. However it is important to bear in mind that the reception of these statements under these exceptions is only for the purpose of showing consistency only, not the truth of what is contained in the statement, *S v MG 2010 (2) SACR 66 ECG* at 71.

[24] Section 3 of the Law of Evidence Amendment Act of 45 of 1988 ("the Act) with regard to hearsay evidence in this scenario provides that:-

'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -

- a. each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- b. the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- c. the court.....

[25] it is evident from the record that prior to Complainant being questioned on her police statements, the prosecutor did make a request to the court to cross examine her on the said statements, accordingly, making the envisaged application. The magistrate then enquired if there was any objection from the defence and none was raised, in that case there was no need for the issue to be adjudicated and the magistrate allowed the prosecutor to proceed and cross-examine Complainant on the contents of the statements. At the time, the defence was aware of the permission sought and the magistrate acceding to the state's request to lead the evidence on the statements but did not object. The defence's allegation of

an irregularity in the introduction of the statements is therefore opportunistic and without any foundation.

[26] At the end of the prosecutor's cross examination of Complainant, the prosecutor then requested to hand in both statements as evidence and again there was no objection or contest from the defence, the statements were then admitted into evidence as Exhibit "D" and "E". Since there was no disagreement or contest to the admission of the statements and the Complainant, being the person upon whom the probative value of the statement depended, herself testified, and was available to be cross examined in accordance with Section 3 (1) (b) of the Act, removing the hurdle created by hearsay evidence, the evidence itself became admissible, so a formal ruling was not necessary, (as it would have been the case under 3 (1) (c)). This dispels the crux of Appellant's challenge on the admissibility of this evidence.

[27] Consequently the defence was aware of all the evidence and the case that Appellant was facing at the time when Complainant and the other witnesses was placed at the disposal of the defence for cross examination and had an opportunity to deal with the said evidence, challenging and displacing its probative value as highlighted in *S v Ndlovu* 2002 (2) SACR 325 SCA, at by Mlambo J that:

"Cross examination was an integral part of the armoury placed at the disposal of an accused person to test, challenge and discredit evidence tendered against him or her".

[28] Appellant's allegation of any prejudice suffered as a result of the admission of the said statements in evidence is also opportunistic

like his challenge on their introduction. He was able to cross-examine, if he so wished and to deal with the statements in the

preparation and presentation of his case, which he chose not to do. See Cachalia AJA statement in *S v Molimi and Another* 2008 (2) SACR 8 at 17 supporting that view that:

"The tendering of this evidence against the Appellants came as no surprise in the sense that they were unable to deal with it. They were able to cross-examine..... There was no prejudice to them and the fairness of the trial had not been compromised".

[29] Appellant also appreciated the full evidentiary ambit that he faced by the time the state closed its case so it cannot be said that Appellant was ambushed by the late or unheralded admission of hearsay evidence. See, *S v Molimi* on para 17. Appellant nonetheless chose not to challenge the evidence or to submit any testimony to refute any of the evidence tendered against it.

[30] I therefore cannot find any irregularity in the introduction of these witness statements and their admission into evidence later. Appellant did not suffer any prejudice through their admission, any potential prejudice was vitiated by the opportunity that the Appellant was given to challenge the state's request for permission to lead and hand in the said statements as evidence, to cross examine the witnesses on the statements and through the said cross examination to displace their value and dependability and finally to place evidence before court to counter that evidence.

[31] The other contention raised by the Appellant relates to the reliance that was placed on these statements by the trial court when making its findings on the facts and if such reliance resulted in an injustice. The Supreme Court of Appeal in *S v Hadebe & Others* 1998 (1) SACR 422 (SCA) at 426a-b, recommended and emphasised that, it could be useful for the understanding of the evidence as a whole to break it down into components as done above. But the court should in assessing whether the trial court's findings of fact were wrong,

be careful not to focus too much intently on the separate parts, losing sight of the fact that the whole body of the evidence might

shed light on the evidential value of its components.

- [32] Except for Samuel's testimony under cross examination, the magistrate was satisfied with the oral evidence of the state's witnesses that even though the evidence seemed incoherent at some stage it could not be found to be wanting in any material respect when assessed as a whole.
- [33] Complainant's evidence in chief was confirmed to have appeared to have contradictions when compared to her statements to the police but however the court cautioned that in considering these discrepancies to determine her credibility, regard should be had to the fact that Complainant was testifying 2 years after the incident has happened and that she is a young girl, nine years of age, as a result she would not be able to remember everything in detail, referring to *S v Njembe* 1982 (1) SA 835, (A). In comparison, the police statements that were compiled 2 months after the incident, would be clearer and, as it was proven, more consistent with the other witnesses' testimony on what was reported to them by Complainant in relative detail soon after the incident. The court then concluded that it was therefore justified to accept Complainant's statements as a reliable source for proving consistency and clarifying her oral evidence. From this perspective the magistrate could not be said to have misdirected

himself, taking into consideration the statement by Nugent J. In *S V Mayden* 1999 (2) SA 79 (W) when he said;

' A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond

reasonable doubt and so too does it look at the exculpatory evidence in isolation to determine whether it is reasonable possible that it might be true. A court does not base its conclusion, whether to convict or to acquit on only part of the evidence"

- [34] The above conclusion negates the Appellant's allegation that the court a quo failed to apply the cautionary approach when considering

complainant's evidence as a single and child witness. The court was very sensitive and conscious of the obligation that it had in dealing with that challenge and the need for the evaluation of her evidence to be done with full appreciation of the dangers of an uncritical reliance upon such evidence. Evidently the court's assessment included the weighing of all the options and examination of Complainant's position with regard to:-

- [34.1] having a possible motive to implicate the Appellant;
- [34.2] how well known was the Appellant to the Complainant;
- [34.3]. the lapse of time since the alleged offence was committed;
- [34.4] any other independent evidence, that corroborate the complainant's evidence;

[34.5] the existence of evidence pointing to a spontaneous complaint of rape made at a first reasonable opportunity that was consistent with subsequent reporting on the incident.

[35] Jones J warns in *S v MG* 2010 (2) SACR 66 (SCA) that the cautionary rule is a rule of practice and not a rule of law and refers to the decision of *SvArtman and Another* 1968 (3) SA 339 where Holmes JA stated that:

"while there is always a need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt, and the courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense".

[36] I am in no doubt that the magistrate in the court a quo was appreciative of challenges presented by the statements when he

further proceeded with the analysis of the remainder of the state's evidence. The court used the police statements as a source against which the memory of the witnesses can be measured to test the reliability of their evidence in court and not as a memory refresher as alleged by the Appellant. Understandably so, because the statements were made not so long ago after the incident unlike their testimony in court that was two years after the incident. The court took into consideration that there was consistency in the identification of Appellant by Complainant as the perpetrator not only to Paulina, Samuel, Josephine but also to the police. The report to Samuel was made voluntarily and freely, without a threat, at a first reasonable opportunity she got on that very Sunday the incident took place, immediately after Samuel arrived home. It also regarded the testimony of certain changes in Complainant's behaviour that made others suspect that something was wrong with her and the consistency of that suspicion with Complainant's report of the sexual assault, as a good enough indication of the credibility of that evidence. The court took also into consideration that Appellant was well known to Complainant being a family friend who frequented her home and could not find any reason on the evidence why Complainant would want to falsely incriminate Appellant. Complainant's evidence of a sexual assault is further in line with and corroborated by the doctor's evidence and explanation of the J88 medical report that confirms not only the presence of a scarring that resulted from a healing bruise in the vagina but also of a white discharge that is consistent with an infection caused by sexual intercourse (and excludes the possibility of any other cause) even though successful penetration is debatable due to the hymen being intact. On the basis of the totality of the evidence, court found the evidence of Complainant to be acceptable.

[37] The Appellant's heads of argument also allege that the contradictions that were in complainant's evidence were in relation to material aspect. As already indicated in other parts of this judgement, the court a quo dealt with the contradictions and confirmed that due to the time lapse and the age of the complainant at the time when the incident took place it would be inevitable that she would not remember every minor detail about the incident. It is also important to take cognisance of the fact that what would appear as discrepancies in her evidence paled in importance when balanced against the totality of the

evidence and did not affect the material aspect of the case. Therefore the court a quo correctly found that the perceived contradictions, when looked upon against the totality of the evidence did not alter the adequacy of her evidence or affect its credibility. The acceptance in admission of the police statements against the totality of the state's case lent support to the credibility and evidential value of her statements, that pointed to the guilt of the Appellant.

[38] Conversely, the court also appreciated the fact that Appellant does not have to place any evidence before court as it is not his duty to prove his innocence but that of the state to prove his guilt beyond reasonable doubt. A principle highlighted by Brand AJA in *S v Shackell* 2001 (4) SA 1 (SCA) on para 30;

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

[39] In the same tone, the burden to prove the guilt of an accused beyond reasonable doubt does not impute that it should be beyond any shadow of doubt as held in *R v Mlambo* 1957 (4) SA 727 (A) at 738A-B BY Malan AJ:

"in my opinion there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt an accused has committed the crime charged. He must in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

[40] Now, the Appellant's bare denial lacks sufficient materiality to exclude any reasonable possibility that his denial may have been true. Appellant's Counsel refers, in his heads of argument, to the allegation that was put to all the state witnesses and equally refuted by all, that complainant might have had sexual intercourse with another person. This is obviously a groundless hypothesis, baselessly instigated by Samuel being fuelled on by the defence when he was trying to get himself out of a fix for having sought to be compensated instead of reporting the matter. The story is so far fetched and is, if weighed against the context of the full picture presented in evidence, so improbable that it cannot be reasonably probably

true that whilst being aware of complainant's sexual activity with one of her brother's son, Paulinah would report the incident with the

Appellant to the police and be unhappy with Samuel and Josephine that they did not report the matter themselves. The defence could also not articulate clearly if the other person who allegedly had sexual intercourse with Complainant was Paulinah's brother's son or Josephine's. The allegation lacks substance and the court was correct in not putting any weight to it. The evidence before the court is that the Appellant was well known to the Complainant and a friend of her father. He frequented their home as much as she would also sometimes visit his home. The court found that there would be no reason why she would possibly want to falsely accuse or incriminate the Appellant, continue to falsely point at the Appellant when the perpetrator was somebody else. The totality of the evidence puts the truthfulness of Appellant's denial in serious doubt. Accordingly, the court correctly found the Appellant's guilt to have been proven beyond reasonable doubt.

[41] However, even though there was proof of a possibility of a sexual assault having taken place because of the evidence of a scarring on the vagina and a white discharge found in the vagina which can only originate from a sexual activity, for the reason that the hymen was found to be intact and there was doubt that penetration was successful, I agree with the trial court's conviction of the Appellant on attempted rape and his acquittal on the main charge of rape.

[42] I therefore confirm that the court was correct in acquitting the Appellant on a charge of rape and finding him guilty on the

alternative charge of attempted rape.

AD SENTENCE

[43] Appellant is also appealing against the sentence on the basis that the court a quo emphasised retribution and deterrence as aims of the sentence, failing to take into consideration the following factors:

[43.1] His actual age, that was not clarified,

[43.2] that no violence or physical injuries were inflicted upon the complainant,

[43.3] that he was gainfully employed,

[43.4] the period of 18 months he has already spent in custody,

[43.5] that he was a suitable candidate for rehabilitation.

[44] The evidence that was considered by the trial court during sentencing was a report compiled by a correctional supervision officer. In terms of this report the Appellant's personal circumstances were briefly outlined as follows:

[44.1] He is 21 years old, born on 11 January 1988 and with no identity number.

[44.2] He is single, living with his married maternal aunt and her family since the death of his mother in 2004 and also uses the family's surname instead of that of his mother. He is an only child and had no other siblings.

[44.3] At the time of sentencing he was unemployed but before his arrest, he worked at the farm earning R600 00 per month for a period of 2 years. He only went up to Standard 6 at school.

[44.4] He was kept in detention from February 2008 until April 2009.

[44.5] Appellant confirmed that he smokes but that he does not use drugs or drink, his family agreed with him. Although the social worker suspects that the said addictives might have played a role in the commission of the crime.

[44.6] He is a first offender and before the alleged offence he had an accident that is said to have affected his ability to maybe have children in future or express himself sexually however has a girlfriend and maintains normal sexual relationship with her.

[44.7] He was unable to express any remorse and continued to deny liability.

[44.8] Complainant was moved to another place for safety.

[45] The report further looked at whether Appellant, considering his personal circumstances, the seriousness of the crime and public

interest, was a suitable candidate for a correctional supervision sentence in terms of Section 276 A (1) of Act 51 of 1977 and also investigated the practicalities of such a sentence.

[46] The conclusion of the report was that the Appellant was not a suitable candidate for correctional supervision sentence in that,

whilst taking note of his youthfulness and the fact that he is a first offender, he was convicted of a very serious offence involving

a young child that was vulnerable and defenceless. He also stays in close proximity with the complainant who had to be moved to go and live at another place for her safety. He put the interest of the community at stake by his persistent denial, of a possibility that he might commit the same offence again. The remoteness of the farm where he stayed to the nearest facility where he would have to perform his community service would make it impractical for him to adhere to the conditions of his sentence.

[47] The report clearly dealt with all the factors that are raised in the Appellant's reasons for appeal against sentence, giving proper, serious and adequate consideration to the Appellant's personal circumstances in determining if he is a proper candidate for a sentence in terms of Section 276 (1) of the Criminal Procedure Act 51 of 1977. Relying on this report, the trial court then proceeded to consider alternative sentencing. In doing so it took into consideration as well, the aggravating circumstances which it pointed out to be the age of the Complainant, the fact that she was violated in the sanctuary of her home, the society's views towards the crime and the fact that the sentence must sufficiently punish the

Appellant

(to fit the crime) and serve as a deterrent as well. It then imposed the sentence of 12 (twelve) years imprisonment of which 5 (five) years was suspended. I cannot find any reason for interference with the imprisonment sentence.

[48] The only time that the court of appeal can interfere with sentence is when the sentencing court has seriously misdirected itself or when there is such disproportion between the sentence that the appeal court considers appropriate and the one imposed by the sentencing court that it invokes a sense of shock, as restated in *S v Malgas* 2001 (2) SA 1222 (SCA) par 12 by Marais AJ that::

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. When material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh... However even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court....when the disparity between the sentence of the trial court and the sentence which the Appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'".

[49] In his heads of argument Appellant's Counsel contends that Appellant's personal circumstances, mainly his age, makes him suitable for a sentence in terms of Section 276 (1) (i) of the Act premised on the contention that the Appellant is 17 years old. In terms of Section 28

(3) of the Constitution, a child is defined as 'a person under the age of 18 years'.

[50] It is to be noted that the Appellant's Counsel at the commencement of the trial in December 2008, a year before sentencing, alleged that Appellant was 17 years old and also that he was 17 years old when the offence was allegedly committed, in December

2007. He, again in October 2009 during sentencing alleged that on that date Appellant was 17 years old which means according to his Counsel his age has remained unchanged from the time when he committed the offence. The correctional supervision officer clearly states in her report that Appellant was born in January 1988, which means he was 19 years old at the time of the commission of the offence, already falling outside the threshold laid down by the constitution at that time. This however did not stop or influence the correctional supervisor's investigation nor was it cited as a reason why the Appellant was not considered to be a good candidate for the rehabilitative sentence.

[51] Be as it may, Section 28 (1) (g) of the Constitution provides that 'every child has the right not to be detained except as a measure of last resort in which case the child may be detained only for the shortest appropriate period of time. The youthfulness of the offender does not,

per se, guarantee a non custodial sentence or dictate that the shortest period of time be imposed, but the constitution imposes upon the courts the duty to then weigh the youthfulness against all other factors that are to be considered for the specific crime in determining the appropriate sentence with imprisonment being the last resort. The shortest period referred to herein is to be decided on a case to case basis having regard to the requirement of an individualised, tailor made sentence for each offender. Cameron AJ in his majority judgement in *Ntaka v The State* {2008} ZASCA 30 confirms by stating that:

"the clear injunction is that we must weigh in the mix the fact that he was only seventeen. This bears not only on whether we choose prison as a sentencing option, but on the sort of prison sentence we impose, if we

must..... but if prison is unavoidable its form and duration should also be tempered."

Scott JA expanded the thought to encompass all the circumstances in *S v Ningi* 2000 ZASCA 184 at par 8 where he held that:

"The question is, therefore, whether in all the circumstances a sentence of correctional supervision would be appropriate. It is unnecessary to repeat what has been said before of the advantages of correctional supervision. They are well known. What I think must be acknowledged, however, is that insofar as a first offender in particular is concerned and leaving aside for the moment the practicalities of administering a non-custodial sentence, whether correctional supervision as opposed to direct imprisonment is to be imposed must depend ultimately on the seriousness of the offence and the particular circumstances in which it was committed. This is so because, whatever its advantages, correctional supervision remains a lighter sentence than direct imprisonment. Any contention of the contrary I think would be unrealistic".

[52] Therefore care should be exercised that we guard against placing too much emphasis on the personal circumstances, ie, first offender or youthfulness, of an offender that the sentence imposed ends up not serving the interest of justice and that of society. In the same way as the interest of justice will not be served by a too harsh a sentence or too lenient a sentence that is not in synch with the crime committed. It is a difficult situation that requires careful balancing of the rights involved. Rape itself has been regarded as an atrocious and heinous crime which statistically has been revealed to have become so prevalent in our communities that the legislature saw a need in the sentence it prescribes to convey society's contempt and revulsion towards the offence. As a result every rape sentence is regarded as sending a public message. A non custodial sentence would be too lenient that its message would be misinterpreted. Cameron JA confirms in *S v Ntaka* 2008 (1) ZASCA 30 on para 41 stating that:

"To this extent the appellant must bear the brand and carry the burden of these times, in which rape is a mass circumstance-.... The face of public policy from the executive, the legislature and the courts, must be set unmistakably against perpetration. Even for a child offender over 16 but

not yet 18, where this court has held that the sentencing court "starts with a clean slate", it must nevertheless take into account the weighting effect of the statutorily prescribed minimum sentences (ten years for rape by a first offender). Pure correctional supervision cannot be. A prison sentence is therefore unavoidable".

- [53] In her minority judgement of the same matter Maya JA refers to Nugent J's observations in *S V Swart 2004 (2) SACR 370 (SCA)* in clearing up these comments that the court no doubt did not intend to suggest that the quality of mercy, an intrinsic element of civilised justice, should be altogether overlooked, but rather meant to emphasise that retribution and deterrence will come to the fore (and that rehabilitation of the offender will play a smaller role) in relation to such serious crime.
- [54] The referral also by the Appellant to the fact that Complainant did not suffer any physical injuries is misconceived. In the case of rape that fact does not reduce the gravity of the offence. Section 51 (3) (aA) (ii) of the Criminal Law Amendment Act 105 of 1997 provides that an apparent lack of physical injury to the complainant shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence when imposing a sentence in respect of the offence of rape.

I therefore cannot find any material misdirection that can justify interference with the trial court's decision to sentence the

Appellant to imprisonment.

- [55] However even though I cannot find any material misdirection per se, and find that there is no justification for an imposition of a sentence under Section 276 (1) (i), I however find that there is a disproportion between the sentence that would have been imposed by this court and the sentence imposed by the court a quo that obviously resulted from the court a quo's failure to take into consideration that Appellant had at the time of sentencing spent a period of 18 months in custody already. The sentence was therefore inappropriate for that reason. A sentence of 10 years imprisonment of which 5 years is suspended on condition Appellant is not convicted of rape, attempted murder or indecent assault committed during the period of suspension would be appropriate and fair under the circumstances.

- [56] I therefore propose the following order

[56.1] The Appeal against conviction is dismissed.

[56.2] The Appeal against sentence is upheld, the sentence in the court a quo is set aside and in its stead the following sentence to be imposed: '10 years imprisonment with 5 years suspended on condition that Appellant is not convicted of rape, attempted rape or indecent assault committed during the period of suspension.

N KHUMALO AJ

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

I AGREE AND IT IS SO ORDERED

T J RAULINGA

JUDGE OF THE NORTH GAUTENG HIGH COURT

FOR THE APPELLANT: Adv V Z NEL

FOR THE RESPONDENT: Adv Z G MSHOLOZA

DATE OF JUDGMENT: 28 .06.12

HEARD ON: 19.03.12

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