THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

NO PRECEDENTIAL INTEREST

Case No 590/06

KLAAS SEBETLELA MONAGENG Appellant

and

THE STATE Respondent

Neutral citation: *Monageng v The State* (590/06) [2008] ZASCA 129 (01 OCTOBER 2008)

Coram: MPATI P, BRAND, LEWIS, MAYA JJA and MHLANTLA AJA

Heard: 29 August 2008

Delivered: 01 October 2008

Summary: Rape – appeal against conviction for child rape and sentence of 18 years imprisonment – appellant's version not reasonably possibly true and properly rejected – no material misdirection on the part of the sentencing court and sentence imposed not 'shocking', 'startling' or 'disturbingly inappropriate' – no reason entitling the appeal court to interfere – conviction and sentence confirmed.

ORDER

On appeal from: High Court, Bophuthatswana Provincial Division (Hendricks J, Tlhapi AJ concurring and Landman J dissenting).

The appeal against conviction and sentence is dismissed.

JUDGMENT/S

MAYA JA: (Mhlantla AJA concurring)

[1] The appellant, a 37 year old man, was convicted in the Mogwase regional court (Mr E D Mogotse) of the rape of his 15 year old cousin. Acting in terms of section 52(1) of the Criminal Law Amendment Act 105 of 1997 (the Act),[1] the regional magistrate referred the matter to the high court (Bophuthatswana Provincial Division) for sentence. The high court (Gura J) confirmed the conviction and, having found that substantial and compelling circumstances

[1] Section 52 (1) provides:
'If a regional court, following on –
(a) a plea of guilty; or
(b) a plea of not guilty,
has convicted an accused of an offence referred to in –
(i) Part 1 of Schedule 2; or
(ii) Part II, III or IV of Schedule 2 and the court is of the opinion that the offence concerned merits punishment in excess of the jurisdiction of a regional court in terms of section 51 (2),
the court shall stop the proceedings and commit the accused for sentence as contemplated in section 51 (1) or (2), as the case may be, by a High Court having jurisdiction.'
Rape of a girl under the age of 16 years is one of the offences listed in Part I of Schedule 2 of the Act for which a sentence of life imprisonment is competent.

existed which justified the imposition of a sentence less than the life imprisonment prescribed by the Act,[2] sentenced the appellant to 18 years' imprisonment. The appellant successfully sought leave to appeal to the Full Court against the conviction and sentence. In a split decision, the Full Court (Hendricks J, Tlhapi AJ concurring and Landman J dissenting) dismissed the appeal. The present appeal is with the special leave of this court.

[2] The essential facts which led to the appellant's conviction are, to a large extent, common cause although it was sometimes difficult to follow the sequence of the events, which occurred after the complainant reported that she had been raped, from the record, particularly from the defence version, mainly because of the poor manner in which evidence was elicited from the witnesses. The only major point of divergence in the versions of the complainant and the appellant relates to the rape itself which the appellant denied. The appellant and the complainant are maternal first cousins living in the same locality. On 26 September 2003 the complainant, a high school student, was preparing for a church camping trip at which she was to undergo a confirmation examination. She and a younger cousin went to the appellant's house to borrow a bag from his wife. They found the appellant preparing to do his washing outdoors. His wife was not home. He instructed the younger girl to fetch a bicycle from a house in the neighbourhood – it is not clear from the evidence how far this homestead was from the appellant's – and asked the complainant to fetch a bucket from the house.

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[2] Section 51 provides:

'(1) Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall –

(a) if it has convicted a person of an offence referred to in Part I of Schedule 2; or

(b) if the matter has been referred to it under section 52 (1) for sentence after the person concerned has been convicted of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.

(2) …

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence. '

[3] According to the complainant, she had just found the bucket in the bedroom when the appellant came in and locked the door. He grabbed her and pushed her onto the bed. She screamed and struggled to free herself but he was too strong for her to resist. He told her that he had long been waiting for her to grow up. Holding her down on her back, he undressed and raped her. He would not stop despite her screams which were induced by pain, and only withdrew from her when she threatened to report him to her mother. He apologised and let her out of the room. The other child still had not returned. On the way home she was called by the appellant's sister who gave her a blouse for which she no longer had any use. Further along she was called into her grandmother's homestead by an uncle and remained there for a short while. She made no report to these adults because she wanted to first tell her immediate family.

[4] She said that upon her arrival at home, she found her mother preparing to leave on a trip. She said nothing to her out of fear, presumably of tearing the family apart because the appellant is her nephew. She washed herself and discovered that she was bleeding from her painful vagina, which felt as if it was scratched. She left for her camping trip on the following day and, after the weekend, returned to school where she boarded. She still had not told anyone about the rape incident. However, she was unable to cope with her school work in the days that followed because the memory of the rape haunted her and she was constantly weepy and could not leave her room. On 4 October, she finally phoned one of her brothers, Donald, in Pretoria, with whom she shared a close relationship and told him that the appellant had raped her. Donald said he was going to tell their parents. Indeed, her father phoned her shortly afterwards and asked her to confirm Donald's report, which she did. Donald and their elder brother fetched her from school on the same day. At home they found a gathering of the family at which demand was made of the appellant to pay a fine

of 17 head of cattle. On the following day she was taken to a district surgeon who examined her.

[5] The doctor's evidence was, in my view, not particularly helpful and not much reliance can be placed on it by either party. He said that he found no evidence of trauma or abnormality although the complainant had no hymen – the absence of which does not necessarily point to sexual activity – and suffered from 'very mild depression'. He stressed that his examination was not meant to establish whether or not the complainant had been raped but merely to check if she had contracted any diseases or had been impregnated. He said there were steps that he did not conduct in his examination because of its purpose. He could neither confirm nor exclude rape in the circumstances.

[6] Donald's account of the events, subsequently corroborated by their father, David, tallied with the complainant's version. He confirmed receiving a telephone call from the complainant who sounded troubled and reluctantly reported that she had been raped by the appellant. He immediately returned home to inform their parents who promptly dispatched him and his older brother to fetch the complainant from boarding school. By the time they arrived home, the family meeting constituted by their parents, certain male elders including Mr Steve Monageng, the appellant, the appellant's wife and his sister was well in progress. Steve informed them that the appellant had been questioned and admitted the rape. Steve then sought their view on a solution and they suggested legal action. A debate ensued because some of the other members wanted the matter to be resolved within the family. Corporal punishment was suggested by their mother but payment of the fine, which the appellant's wife undertook to pay, was finally agreed upon. He then drafted a document embodying the agreement, tendered in evidence by consent, which everyone, including the appellant, willingly signed. The original text of the agreement which bore seven

signatures was in seTswana and it was translated into the record as follows:

'Rape matter between [the appellant] and [the complainant] on 4 October 2003. Date of the incident 26 September 2003.

Agreement

1. A fine of 17 herd of cattle.

2. The time in which the cattle will be paid out, a three month period ….'

[7] According to David the news of the rape threw him and his wife into turmoil. They called the family meeting because they did not know how to handle the problem. He reported to the gathering that the complainant alleged that she had been raped by the appellant. The appellant kept quiet. He was then asked by one of the elders, Mr Alex Monageng, why he had raped the child. The appellant initially denied the accusation but upon persistent questioning by Alex he said he did not rape her but merely locked her in the house and only suggested sexual intercourse. At this juncture Steve asked the appellant if he knew that locking a person up in itself constituted a serious offence and said that the meeting could not continue in the absence of the appellant's wife. Alex then went to fetch her. On her arrival Steve informed her about the accusation. She questioned the appellant in their presence and he admitted the rape. At that stage Donald and the complainant arrived and Steve informed them of the events thus far. As the appellant's guilt had been established, Steve proposed that he should be punished. No one was keen to involve the police. David then demanded the fine and a written agreement which he intended to use against the appellant in a prosecution. The appellant voluntarily signed the agreement along with everybody. David said that he did not wait for the fine to be paid and subsequently laid a complaint with the police.

[8] The appellant's version when he testified was that he sent the complainant indoors to fetch a bucket which he was going to use to rinse his washing. He

followed her because she was taking too long. He said that he found her sitting on a bed looking at a photo album with the bucket next to her. He took the bucket, held her on the shoulder and told her that ‘she was so beautiful’. The complainant asked him what he meant and threatened to report him to her mother. He apologised and the complainant then left. He denied admitting the rape at the meeting and called Steve to corroborate his version. He said that he agreed to pay the fine and signed the agreement with the intention of paying the fine and thereafter laying a complaint with the authorities that he had been falsely accused once medical proof absolving him became available.

[9] Steve, clearly a critical witness, was regrettably very poorly examined. This appears to be an unfortunate result of the presiding officer’s rather impatient interjections, during his examination-in-chief, which suggested that events at the meeting were not in dispute. This obviously disconcerted the prosecutor such that he all but abandoned questioning the witness. Consequently, it seems, Steve was not cross-examined. He did make the point, however, that the appellant denied the rape and that after the agreement of payment of a fine was concluded the appellant requested medical proof on the understanding that Steve would pursue the payment of the fine only after such proof became available.

[10] The trial court, having cautioned itself that the complainant was a single, child witness, found her a satisfactory witness who, in its view, had no reason to falsely implicate the appellant. It found her version credible and rejected the appellant’s evidence on the basis that it was so improbable that it could not reasonably possibly be true. The question for decision is whether the State established the appellant’s guilt beyond reasonable doubt.

[11] In argument before us, the appellant’s counsel levelled a number of

criticisms against the manner in which the trial court assessed the evidence – which he said was decided purely on probabilities – and its findings which were confirmed by the sentencing court and the court below. He contended that the complainant's evidence was inherently improbable and her conduct inconsistent with trauma because she did not report the incident promptly; the adults that she saw directly after the rape seem not to have observed anything untoward in her appearance; she was able to attend the church camp and no physical injuries were found. It was further contended that the written agreement, which according to the trial court supported the State version, amounted to a confession. In the event, so it was argued, its admission did not comply with the statutory provisions governing the admissibility of confessions[3] as its voluntariness had not been proved. An objection that the complainant's testimony had been improperly admitted because she had not been properly sworn as a witness was, prudently, not pursued before us.

[12] It must be pointed out, before evaluating the evidence, that the trial court patently misdirected itself in some respects when assessing the evidence. In some instances the evidence was misstated and findings were made which were not supported by the evidence. It is, however, not necessary to deal with these misdirections in any detail as they do not fundamentally impact on the trial

[3] Section 217(1) of the Criminal Procedure Act 51 of 1977 (the Act) provides:
Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided –
(a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorised to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and
(b) that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question-
(i) be admissible in evidence against such person ….'

court's reasoning and conclusion. Of more importance is its failure to record its impressions of the witnesses, except for the complainant, and startlingly finding, without giving any reasons, that Steve's evidence was irrelevant. It does appear, however, that its findings of facts predominantly depended not on personal impressions of witnesses but upon inferences from the facts and upon probabilities. This, therefore, leaves this court at large to reconsider the evidence and draw its own inferences from the record.[4]

[13] Turning to the submissions made on the appellant's behalf, it is so that the trial court tested the evidence against the inherent probabilities. There is nothing wrong with this approach. As was reiterated in *S v Chabalala*,[5] the proper approach to assessing evidence is 'to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt'. The inherent probabilities therefore play a critical role in the enquiry.

[14] But whilst it is entirely permissible for a court to test an accused's evidence against the probabilities, it is improper to determine his or her guilt on a balance of probabilities. The standard of proof remains proof beyond reasonable doubt, ie evidence with such a high degree of probability that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime

[4] *R v Dhlumayo* 1948 (2) SA 677 (A) at 698; *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) para 14; *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd* 2002 (4) SA 408 (SCA) para 24.
[5] 2003 (1) SACR 134 (SCA) para 15.

charged.[6] An accused's evidence therefore can be rejected on the basis of probabilities only if found to be so improbable that it cannot reasonably possibly be true.[7]

[15] Motive to incriminate an accused being one of the relevant factors for consideration, the foremost question to my mind is why the complainant, assisted by her father and brother, would implicate a close relative and neighbour unless their evidence was true. The appellant himself confirmed that relations between him and the complainant were normal. The grudge that he alleged David bore against him is not borne out by the facts. David readily confirmed that he once reprimanded the appellant after he was accused of attempted rape but denied any animosity towards the appellant.

[16] I have no difficulty accepting David's version in this regard because the record is replete with evidence which shows that the two families were close knit up to the day of the meeting. For example, the complainant had visited the appellant's wife on the very day of the incident; Donald found his mother visiting at the appellant's home on his return from Pretoria to relay the complainant's disclosure; on the appellant's own version he was watching television with the complainant's parents at their home having gone there to borrow a lawnmower when the family members called to the meeting, unbeknown to him, arrived. It was common cause that no one at the meeting, even the complainant's mother, was keen to have the appellant criminally charged. This includes David as well because he delayed laying a criminal charge despite his uncontested evidence that he insisted on a written agreement to secure evidence to prosecute the appellant which, in my view, is borne out by the fact that he did not wait for the appellant to pay the fine within the agreed

[6] *R v Mlambo* 1957 (4) SA 727 (A) at 738A; *S v Phallo* 1999 (2) SACR 558 (SCA) paras 10 and 11.
[7] *S v Shackell* 2001 (2) SACR 185 (SCA) para 30; *S v V* 2000 (1) SACR 453 (SCA) para 3.

three-month period and had him arrested a mere three weeks after the meeting.

[17] If the elaborate and similar accounts given by Donald and David about the chain of events which took place at the family meeting are untrue then it must be accepted that they conspired together to fabricate those events. I can see no reason on the evidence why they would have done so. This is particularly so bearing in mind that parts of David's version exculpated the appellant and that Donald – who was not at all challenged in cross-examination except to be told that the appellant denied making an admission of guilt – readily stated that he was not present when the appellant admitted the rape. If their intention was to secure the appellant's conviction at whatever cost, it would have been sufficient for them simply to say that the appellant admitted the offence. To my mind, it is utterly improbable that they would have gone to such lengths to incriminate the appellant. This finding does not redound to the credit of the defence version, including Steve's version, in this regard.

[18] As to the nature of the written agreement, I do not agree that it is a confession as it clearly does not fit the requirements of s 217 of the Act. In my view, it bears the hallmarks of an informal admission.[8] In view of the fact that it was tendered in evidence with the appellant's consent, and his own evidence which made it clear that he signed it quite willingly, fully intending to carry it out, contrary to what was put to David that he was pressured to sign, I am of the firm opinion that the trial court was correct in admitting it and according it evidential weight.

[8] In terms of s 219A of the Act '[e]vidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence….'

[19] It may be asked how the gathering could have got to the stage of fixing a fine as punishment if the appellant had not admitted to wrongdoing. Another question that arises when one considers the value of 17 cattle, is why an innocent man, apparently of humble means – he was a locomotive driver in the mines earning a measly monthly salary of R4 800 – would bind himself to pay what to him must be a fortune for a crime he did not commit. The reason he gave, that he planned to complain to the authorities after paying the fine and the matter had been investigated to show that he had been falsely accused, simply makes no sense. Incidentally, this evidence does not support the scenario contended for in argument that his wife agreed to pay the fine out of fear that he would be imprisoned. Similarly, the appellant's version which was not put to David and Donald, that his wife actually defended him at the meeting saying she would have noticed if he had done something wrong and that she is the one who demanded medical proof, is not borne out by the evidence.

[20] I find it difficult to accept the appellant's and Steve's evidence that payment of the fine was conditional upon production of medical proof in view of the fact, on their own version, that the agreement which, significantly, does not reflect this alleged important term, was signed before it was suggested that the complainant be taken for a medical examination. That any medical report might exonerate the appellant seems to me to have been an afterthought. Not to be overlooked is the district surgeon's evidence that the complainant was brought to him to be checked, not to establish rape, but for diseases she may have contracted and any other pathologies she may have sustained during a sexual assault. To my mind this, coupled with the evidence corroborated by the appellant himself that David was extremely concerned at the meeting that he might have infected her with HIV-Aids, shows that the complainant was taken for medical examination merely to safeguard her health and not as part of a deal struck at the meeting.

[21] This, in my view, makes a lie of the condition alleged by the defence. Equally, the submission made on the appellant's behalf that it was unlikely that he would have insisted on the complainant's medical examination if he had raped her, cannot stand. In any event, the submission overlooks the appellant's own evidence that this was Steve's suggestion, which he then supplemented in cross-examination by adding that he asked Steve after the meeting to request a copy of the medical report from David – a request he said was refused, casting further doubt on the alleged condition.

[22] The appellant's account of the events which took place at his home was far from convincing. As the trial court pointed out, it is improbable that instead of chastising the complainant for keeping him waiting for the bucket, he would have paid her a compliment. If he had done no more than tell the complainant that she was beautiful, why would she have been offended and why would the appellant have felt compelled to apologise to her for an innocent remark? Sending the other child away from his house also indicates that he did not have an innocent purpose in mind.

[23] Much was made by the appellant's counsel of the complainant's apparent ability to act normally after the rape and her delay in reporting it. It has been firmly established in a number of studies on the impact of violence, including rape, against women that victims display individualised emotional responses to the assault.[9] Some of the immediate effects are frozen fright or cognitive dissociation, shock, numbness and disbelief.[10] It is therefore not unusual for a victim to present a façade of normality.

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[9] S Bollen et al '*Violence Against Women in Metropolitan South Africa: A study on impact and service delivery*' Institute for Security Studies (1999) Monograph No 41.

[10] S Ullman & R A Knight 'Women's Resistance Strategies to Different Rapist Types' (1995) 22 No 3 *Criminal Justice & Behaviour* 263, 280; S Katz & M A Mazur *Understanding the Rape Victim: A Synthesis of Research Findings* (1979) 172, 173. M Symonds 'Victims of Violence: Psychological effects and after-effects' (1975) 35 (1) *American Journal of Psychoanalysis* 19 - 726, 22.

[24] It is further widely accepted that there are many factors which may inhibit a rape victim from disclosing the assault immediately. Children who have been sexually abused, especially by a family member, often do not disclose their abuse and those who ultimately do may wait for long periods and even until adulthood for fear of retribution, feelings of complicity, embarrassment, guilt, shame and other social and familial consequences of disclosure.[11] Significantly, the newly passed Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides, in s 59, that 'in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof'. Raising a hue and cry and collapsing in a trembling and sobbing heap is not the benchmark for determining whether or not a woman has been raped. There was thus nothing unusual about the complainant's behaviour and her explanation for not immediately reporting the appellant is plausible.

[25] It was argued that the complainant's version was not supported by the medical evidence and that absence of physical injuries was a further indication that there had been no rape. I find no merit in this contention. It needs first to be pointed out that physical injuries are not always a consequence of rape. This is so because physical force is not necessarily used in rape – the more common consequences are therefore those related to reproductive and mental health and social well-being.[12] That being said, the relevant evidence in this case needs to be considered in its proper context. Despite its neutrality, the doctor's evidence did not exclude the possibility of rape in view of the time lapse and the fact that the complainant had since washed. Nor did the doctor exclude the possibility

[11] T B Goodman-Brown et al 'Why Children Tell: A Model of Children's Disclosure of Sexual Abuse' *Child Abuse & Neglect* 27 (2003) 525-540.
[12] E Krug et al '*Sexual Violence, World Report on Violence and Health*' World Health Organisation, (2002).

that she could have sustained minor vaginal injuries which would have healed by the time of the examination. The infliction of injuries to the genitalia, he said, largely depends on the degree of force exerted during the rape. The complainant's direct evidence that she felt pain in her vagina as if it was scratched and bled must be viewed against that background.

[26] Other criticisms including that it is improbable that the appellant would have stopped raping her simply because she threatened to tell her mother, conduct which I find entirely reasonable, were wisely not pursued with any marked degree of enthusiasm. No other cogent reason was advanced against the trial court's credibility findings in respect of the complainant and its assessment of her evidence and the rest of the State version.

[27] The complainant's version of the rape, which as the court below pointed out was clear and straightforward, was unshaken in cross-examination. And in so far as the events after the rape were concerned, she was corroborated by David, Donald and indeed the defence witnesses. The cogency of her evidence, its corroboration in so far as the events following the rape are concerned, David's evidence that the appellant admitted the rape hence the decision to exact a fine from him and the agreement relating to payment of the fine all show that the defence version is inherently so improbable as to be rejected as false. I am thus satisfied that the State proved the appellant's guilt beyond reasonable doubt. There is, therefore, no basis to disturb the trial court's finding of guilt.

[28] As to sentence, the high court's finding that there were substantial and compelling circumstances in the matter justifying the imposition of a lesser sentence than life imprisonment was not in contention between the parties. Thus, the issue before us is whether a lighter sentence should have been imposed on the appellant.

[29] In deciding whether the sentence warrants our interference it should be considered that this court's power to alter sentences is limited as the infliction of punishment lies in the discretion of the sentencing court. A court of appeal may not simply substitute a sentence because it prefers it and will be entitled to interfere only if the sentencing court materially misdirected itself or the disparity between its sentence and the one which this court would have imposed had it been the trial court is 'shocking', 'startling' or 'disturbingly inappropriate'.[13]

[30] It was contended on the appellant's behalf that the sentencing court had misdirected itself materially by finding that the appellant had raped his own child because '[i]n the setting of a seTswana family, a maternal uncle … is in the same position as a father' and that the sentence of 18 years' imprisonment is too harsh.

[31] Regarding the first leg of the appellant's submission, the only misdirection committed by the sentencing court, in my view, which cannot by any stretch of the imagination be regarded as material, was its reference to the seTswana culture. One would reasonably imagine that in any civilized cultural setting, a much older male relative represents a father figure and protector to his child relatives. In any event, the evidence in this case amply shows that the appellant, who the complainant and Donald called 'uncle', was a father figure to her. There is, further, no indication that the sentencing court placed undue weight on this factor.

[32] As to the propriety of the sentence imposed, I do not agree that it is so harsh that it ought to be ameliorated by this court. In my view, the sentencing court properly considered the gravity and prevalence of rape, the interests of the

[13] *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

community, particularly its demand for heavy sentences for child rapists, and the appellant's personal circumstances which, as indicated above, it found sufficiently weighty to warrant reduction of the prescribed sentence of life imprisonment.

[33] As the sentencing court found, there are serious aggravating circumstances present in the case. The appalling and outrageous crime committed by the appellant was worsened by the fact that his young victim is a close blood relative whom he had a duty to protect. In addition to the trauma which a rape victim necessarily suffers from the brutal invasion, the young girl was burdened with a fear of reporting the incident because of their relationship. She was a virgin and he robbed her of her innocence and the wonder and joy of experiencing womanhood when she was ready. His utterances that he had been waiting for the complainant to grow up show clearly that the offence was not impulsive. He obviously planned to rape the complainant when the opportunity, which he craftily created by sending the other child away, arose.

[34] Regrettably, as often happens in these cases, no evidence of the true extent of the mental and psychological harm and scarring sustained by the complainant was led, bar the district surgeon's diagnosis of 'very mild depression' shortly after the rape and her own testimony of her disturbed emotional state before she confided in Donald. Such evidence is highly relevant for the sentencing process and cannot simply be assumed by a sentencing court. I say this mindful that in the case of an emotionally resilient victim who, for some or the other reason, has not been devastated by being raped, that fact should not detract from the seriousness of the offence. It is nonetheless undoubted in this case that the complainant was seriously traumatised by the sexual assault.

[35] Against these aggravating factors, the sentencing court weighed the appellant's personal circumstances – that he was a first offender at the mature age of 37 years and had little education; that he was married and had a young child; that he was in steady employment and had been in custody for seven months before his sentence. The sentencing court found in his favour that the complainant did not seem to have suffered serious physical injuries from the assault and that the violence involved in the commission of the rape was no more than that inherent in the crime of rape.

[36] I am not persuaded that the sentencing court misdirected itself in any significant respect. Bearing in mind that the Legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the offence committed by the appellant and the courts' obligation to respect and not pay mere lip service to that view,[14] it hardly seems to me a sentence of 18 years' imprisonment is disproportionate in the circumstances of this case. Any sentence that I might have imposed had I been in the sentencing court's position is, in my view, not sufficiently disparate from the sentence imposed by the high court to warrant interference on appeal. The appeal against sentence must, therefore, fail.

[37] For all these reasons, the appeal against conviction and sentence is dismissed.

MML MAYA

JUDGE OF APPEAL

[14] *S v Malgas* para 25.

LEWIS JA (concurring in part in this judgment)

[38] I have read the judgments of my colleagues Mpati, Brand and Maya. I agree with Maya JA that the appeal against conviction should be dismissed for the reasons that she has given. However, I consider that Mpati P's view on sentence must be followed. A sentence of 18 years' imprisonment would, for the reasons that the President gives, be disproportionate to the crime committed, and therefore unjust. I would impose a sentence of 12 years' imprisonment.

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C H LEWIS

JUDGE OF APPEAL

MPATI P (dissenting)

[39] I have had the privilege of reading the judgements of my colleagues Brand and Maya. I agree with Brand JA that the appeal should succeed and that the appellant's conviction and sentence should be set aside. Brand JA however agrees with Maya JA that in the event of the appeal against conviction being dismissed this court would not be entitled to interfere with the sentence of 18 years' imprisonment imposed by Gura J. I disagree. In my view the sentencing court omitted to consider at least two important aspects, which, to my mind, should have served as a basis for ameliorating the sentence imposed. As things presently stand, the sentence is, in my view, disproportionate to the offence.

[40] I must, from the outset, associate myself with the views expressed by Nugent JA in *Bongani Phillip Vilakazi v The State*[15] that rape 'is a repulsive crime', 'an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity'.[16] As such, persons who make themselves guilty of it must be punished accordingly. Courts are therefore expected to give effect to the legislative intent as expressed in the minimum sentencing provisions of the Criminal Law Amendment Act 105 of 1997 (the Act) and should not proceed as if it was 'business as usual'.[17]

[41] In the present matter I must, for purposes of this judgment, accept the factual findings of my colleague Maya, hers being the judgment of the majority, except for one aspect in her summation of the complainant's testimony, which is in my view incorrect. I deal with it below (para 4). Although the complainant testified before the trial court that she was fifteen years old (at the time of the trial) she was in fact sixteen. She was born, according to her own evidence, on 19 December 1987.[18] But whether the difference of one year would have had any impact in the sentencing court's assessment of an appropriate sentence is difficult to tell. I do think, though, that it was something to be taken into consideration. In his judgment on sentence Gura J consistently referred to the complainant as a 14 year old. At one point he says the following:

'Law abiding citizens, the community at large, expects protection from Courts against rapists. Especially where victims of rape are young children as complainant in this case, a 14 year old.'

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[15] *Vilakazi v The State* (576/07) [2008] ZASCA 87 (2 September 2008).
[16] At para 1. See too *S v Chapman* 1997 (3) SA 341 (SCA) 345A-B.
[17] *S v Malgas* 2001 (1) SACR 469 SCA.
[18] A birth certificate was handed in to Gura J which seemed to prove that the complainant was 16 years old as at the date of trial on 9 June 2004. She was in fact 15 years 9 months when she was raped on 26 September 2003.

An important factor, however, is that the complainant was under the age of 16 years when she was violated. In such a case, s 51(1) of the Act ordains a sentence of life imprisonment unless there are substantial and compelling circumstances which would justify the imposition of a sentence less than life imprisonment.[19]

[42] That there were substantial and compelling circumstances justifying the imposition of a sentence which is less than the life imprisonment ordained by the Legislature in this case is not in issue. And I agree with my colleague Maya that the misdirection referred to by her (para 30) is not as material as would by itself warrant an interference with the sentencing court's exercise of its discretion. I also have no quarrel with the aggravating features as set out by her (para 33). But there is an aspect which my colleague mentions earlier in her judgment with which I do not entirely agree. In setting out the complainant's evidence she says (para 3):

'Holding her down on her back, he (appellant) undressed and raped her. He would not stop despite her screams . . . and only withdrew from her when she threatened to report him to her mother.'

The complainant did not testify that the appellant 'would not stop despite her screams'. Her evidence was that after he had undressed her around her private parts the appellant 'then started to rape' her. When asked why she said the appellant raped her she said '[h]e took his penis and inserted it inside my vagina . . . and I screamed and cried . . .'. She then testified that she told him that she was going to tell her mother, whereafter 'he then alighted from me' and said he was sorry.

[43] It is not clear from the complainant's testimony whether she

[19] Per s 51(3).

threatened to tell her mother immediately after the appellant had penetrated her or whether this was after some time thereafter. As was the case in *Vilakazi*[20] the evidence in this case was led in a casual manner with the result that very important aspects were left unexplained. The cross-examination of witnesses was no exception. But as the evidence stands, it is susceptible to an interpretation that favours the appellant, which is that he withdrew from the complainant when she threatened to report him to her mother, which may have been immediately after he had penetrated her. This, to my mind, is a factor to be considered in the overall assessment of an appropriate sentence. The appellant did not continue when she screamed and threatened to report him to her mother. This the sentencing court overlooked.

[44] A second and perhaps more important factor which the sentencing court overlooked is the following: During his testimony the complainant's father was asked what made him conclude that the appellant be fined 17 cattle and how he had arrived at that figure. His answer is recorded thus:

'Because of the complainant saying he is a relative and I was not supposed to cause him to be in prison your worship.'

It is clear from this that the complainant, despite the trauma and all other unpleasant and humiliating experiences a rape victim has to go through, she did not wish the appellant to be visited with imprisonment. This attitude on the part of the complainant, taken together with what I have said in para 5, the fact that she did not sustain any serious physical injuries and the fact that the appellant, at 37 years of age, is a first offender, lead me to conclude that the sentence of 18 years' imprisonment imposed by Gura J is disproportionate to the offence. It is also important to remember

[20] Above footnote 1.

that but for the fact that the complainant was a mere three months (in fact less that three months) away from her 16th birthday, the appellant, being a first offender, would have faced the minimum sentence of 10 years' imprisonment.

[45] Taking all these factors into consideration, I am of the view that a sentence of 12 years' imprisonment would have been appropriate in the circumstances. I would accordingly have allowed the appeal on sentence.

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PRESIDENT

BRAND JA (dissenting)

[46] I have had the benefit of reading the judgment of my colleague, Maya JA, ('the main judgment'), but I regret that I cannot agree with her approach to the evidence or with her conclusions that the appeal against conviction should fail. My evaluation of the evidence leaves me with a lingering sense of disquiet as to the appellant's guilt and it is this sense of disquiet – technically described as reasonable doubt – which compels me to disagree.

[47] In evaluating the evidence a general difficulty I experienced was that the case had been so badly presented on both sides that in some instances it is virtually impossible to determine what the witness was trying to say. Moreover, on occasion, there appears to have been some lack of communication between the witness and the interpreter. I do not say that to cast any aspersions. What I am saying is that because I sometimes do not understand what the witness said, my hesitancy to convict is enhanced.

[48] Central to the judgment of my colleague Maya appears to be her finding that the appellant admitted the rape at the family meeting which was held on 4 October 2003. This finding clearly rests on the testimony of the complainant's father, David. As is pointed out in the main judgment (para 17) the complainant's brother, Donald, expressly stated that he was not present when the appellant was supposed to have made the admission. Nor did the complainant herself give any evidence to this effect. David is therefore the only witness who gave evidence supporting the admission.

[49] Now it goes without saying that an admission by the appellant would lend vital support to the State case. My problem is that the admission is denied by the appellant and, as I see it, not borne out by the evidence of David. It is true that according to David's original version under examination in chief, the appellant initially denied that he had raped the complainant, but then admitted that he had done so. In cross-examination, however, he qualified his evidence as follows:

'And at no stage did the accused admit his guilt? – The time when he admitted or the stage when he admitted the guilt was when he signed that document your worship, that is when he admitted for the first time.

That is the first time? – That is when he had agreed or rather when he had admitted the guilt and we were signing when he had just admitted the guilt your worship.'

[50] This leaves me with the distinct impression that David was not relying on an express admission, but an admission implied by the conduct of the appellant in signing the document in which he undertook to pay seventeen cattle. On the face of it, the inference is quite understandable. The obvious implication of the undertaking by itself and without more would indeed be that the appellant admitted his guilt. But there is more. The appellant's evidence, which cannot really be controverted and which is not inherently improbable, is that it was his wife who suggested that he should pay the cattle, because, so she said, even if he did not commit the rape, the possibility of a conviction could not be excluded.

The notion that the undertaking was inspired by the appellant's wife is supported to an extent by the following evidence of Donald:

'Yes, how many cattle [was suggested]? – Seventeen your worship.

What was the accused's response to this? – He did not say anything your worship I only remember his wife replying that it was OK.'

Later on he said:

'And it was then agreed that the accused should pay 17 head of cattle? – It was . . . his wife that agreed to that your worship. His wife your worship.'

[51] What is more, according to the appellant, his undertaking to pay the cattle was then expressly made subject to the condition that the fact of rape be borne out by a medical certificate following upon a medical examination of the complainant. The suspensive condition to the undertaking, as it were, of a medical examination bearing out that the complainant was indeed raped, is specifically confirmed by the evidence of Steve. In the main judgment (para 20) my colleague Maya appears to reject this part of Steve's evidence out of hand (see also para 17). I can see no possible basis for doing so. During the course of the State case it was intimated that Steve would testify on behalf of the State. He appears to have played the leading role at the meeting. No reason is suggested why he would perjure himself. In fact, he was not even cross-examined by the prosecutor at all. It is true, as my colleague Maya explains (in para 9) that the prosecutor may have been influenced by the clear misdirection on the part of the trial magistrate that his evidence was not relevant. But this misdirection cannot possibly be held against Steve. Nor can it be held against the appellant that his witness was interfered with by the court while giving testimony on an aspect of vital importance. It follows that in my view, Steve's evidence must be accepted as a beacon on which we can take our bearing.

[52] To the extent that Steve's evidence was allowed on this subject, he seems to suggest that the inconclusive nature of the medical certificate which was

eventually obtained was the reason why the seventeen cattle were not delivered, which in turn led to the matter being reported to the police. This is supported by the evidence that as a fact, the matter was only reported to the police after the inconclusive medical report had been obtained. David's explanation in this regard that he required an undertaking by the appellant solely as proof of rape, is difficult to accept.

[53] The suggestion in the main judgment (paras 20 and 21) that the condition of a medical certificate was merely an afterthought was never made in cross-examination to either the appellant or Steve. Nor is it based on any factual foundation laid at the trial. And as Cloete JA pointed out in *S v Heslop* 2007 (4) SA 38 (SCA) para 22:

'It goes without saying that it is a requirement of the fair trial guaranteed by s 35(3) of the Constitution . . . that if a court intends drawing an adverse inference against an accused, the facts upon which this inference is based must be properly ventilated during the trial before the inference can be drawn.'

[54] Once it is accepted that the appellant's undertaking was made subject to the stated condition, as in my view it must, certain consequences seem to follow. One of these is that the inference of an implied admission, which my colleague Maya draws from the undertaking (para 19), would no longer be valid. The answer to the rhetorical question she raises as to why an innocent man, apparently of humble means, would bind himself to pay what to him must be a fortune for a crime he did not commit, could very well be this: he believed, as he said, that he would not have to pay.

[55] This immediately leads to the further consequence derived from the condition of a medical examination, namely, that the appellant must have thought, as he said, that the outcome of the medical examination would be in his favour. And that he therefore thought, as he said, that the complainant was not

raped. To this inference, which appears to me both inevitable and destructive of the State's case, I find no answer in the main judgment.

[56] As to the complainant's delay in reporting the alleged rape and the reference by my colleague Maya (para 23) to the extensive research done on the reaction of rape victims in general, I am mindful of the caution sounded by Nugent JA in *S v M* 2006 (1) SACR 135 (SCA) para 278 about the 'imprinting of behavioural stereotypes or conceptual models' upon the evidence in a particular case. As I understand it, it means, in short, that we must be careful not to replace old stereotypes with new ones. I respectfully agree. Nonetheless, I share the view of my colleague Maya that on the facts of this case, the apparent lack of an immediate response on the part of the complainant would by no means justify the inference that she had not been raped. What I do say, however, is that evidence of distress or emotional agitation on the part of the complainant, immediately after the event, could perhaps have served to tip the scales in favour of the State (see eg *S v Hammond* 2004 (2) SACR 303 (SCA) para 22. Absent any the evidence of this kind, the position is thus no different from the role played by the medical evidence in this case (for which see para 25 of the main judgment). It is neutral. It does not support either version. There is no objective fact to tip the scales in favour of the complainant's version.

[57] My colleague Maya finds support for the complainant's version in the testimony of Donald and David (para 16 and 17). For purposes of my evaluation, I accept the evidence of Donald without qualifications. But as I see it, there is very little difference of any consequence between his version and that of the appellant. For that matter, it may therefore just as well be said that he corroborated the appellant's version. The same essentially holds true of David, save for the dispute between him and the appellant as to whether the undertaking by the latter was subject to the condition of a medical certificate or not. On this

aspect the appellant is supported, as I have said, by the evidence of Steve, which we have to accept. In this light, I find no foundation for the proposition in the main judgment (para 17) that it is 'utterly improbable that they [Donald and David] would have gone to such lengths to incriminate the appellant'. In short, I do not believe they went to any lengths at all.

[58] I have the same difficulty with my colleague Maya's more general statement in the same vein (para 27) that:

'In so far as the events after the rape were concerned, she [the complainant] was corroborated by David, Donald and indeed the defence witnesses.'

As is pointed out earlier in the main judgment (para 2) the only major point of divergence in the versions of the complainant and the appellant relates to the rape itself which the appellant denied. The complainant's version as to what happened after the event was not in dispute. But how can one refer to 'corroboration' with regard to that which is common cause? As was said in *S v Gentle* 2005 (1) SACR 420 (SCA) para 18:

'[B]y corroboration is meant other evidence which supports the evidence of the complainant . . . *on issues in dispute* . . . [T]he fact that the complainant's evidence accords with the evidence of other State witnesses on issues not in dispute does not provide corroboration.'

[59] Moreover, and more significantly, there is nothing in the complainant's own version – as 'corroborated' by the other evidence – as to what happened after the event which supports her allegation that she was raped. And that underscores my ultimate problem in this case, namely, that there is nothing in the objective facts nor in the evidence of other witnesses – apart from the complainant – which corroborates her version in so far as it is in dispute.

[60] Another consideration in favour of the State's case referred to by my colleague Maya (para 15) relates to the absence of any apparent motive on the part of the complainant to implicate an innocent close relative. In my view this

is self-evidently a consideration against the acceptance of the appellant's version. Equally self-evident, however, is the fact that this consideration on its own cannot justify a conviction. There is no reverse onus, as it were, on the accused in a rape case to show cause why he would be falsely accused.

[61] Finally, my colleague Maya finds support for the State case in what she regards as improbabilities in the appellant's version as to what took place at his home on that day (para 22). Though I am not convinced that all these suggested improbabilities rightfully qualify as such, I do not find it necessary to dwell on each of them in detail. Suffice it, in my view, to say that even if all these were to be accepted as improbabilities, they do not even come close to the standard required for the rejection of an accused's version in a criminal case, namely, that it is so improbable that it cannot reasonably possibly be true.

[62] These are essentially the reasons why I cannot support the conclusion arrived at by my colleague Maya that the appeal against the conviction should fail. Lest there be any misunderstanding, let me make myself clear. I believe that our courts are duty-bound to do everything in their power to protect the vulnerable sections of the community who fall prey to sexually inappropriate behaviour. I therefore share the view of those who believe that rapists, and particularly rapists of young children, should be punished severely. But this does not mean that we can disregard or diminish the time honoured safeguards of our criminal law that are aimed at protecting the rights of an accused person. This must be so, for the mere thought of sending an innocent man to prison fills one with trepidation.

[63] As to the appeal against sentence, I agree with my colleague Maya that if the conviction of the appellant were to stand, this court would not be entitled to interfere with the sentence of eighteen years' imprisonment imposed by the trial

court.

[64] It follows that in my view the appeal should be upheld and that the appellant's conviction and sentence should be set aside.

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F D J BRAND

JUDGE OF APPEAL

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