IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

12/5/2015

CASE NUMBER: A547 / 12

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

12 / 05 / 2015
DATE

SIGNATURE

ABOO BAKER SEEDAT — APPELLANT

AND

THE STATE — RESPONDENT

JUDGMENT

MAVUNDLA J,

[1] The appellant, 63 years of age at the time of conviction and sentence, was convicted at the magistrate Court for rape and sentenced to 7 (seven) years imprisonment on 2 February 2011.

[2] The appellant brought an application for leave to appeal against both the conviction and sentence, and simultaneously brought an application for leave to adduce further evidence in terms of s309B of the Criminal Procedure Act 51 of 1977. Leave to appeal against the conviction and sentence was granted. However, the application for leave to adduce further evidence in terms of s309B of the Criminal Procedure Act 51 of 1977 was refused. Leave to appeal against the said refusal was subsequently granted on petition.

[3] The appellant was duly legally represented throughout the trial. He pleaded not guilty to the charges against him. His plea explanation as tendered by his counsel was a denial that he had intercourse with the complainant and that he had committed any act of sexual penetration with the complainant.

[4] It is common cause that the appellant is a businessman, owning two shops. It is also common cause that on the date in question the appellant went to the complainant's place to deliver a bed lamp. The appellant offered to demonstrate to her that the lamp was in a working condition. It is also common cause that the complainant agreed to the

appellant's offer, and invited him to the bedroom, where he plugged the lamp and switched it on. According to the complainant, satisfied that the lamp was working, as she was about to move out of the bedroom, was grabbed by the appellant who threw her against the dressing table ("spielkas"), pulled off her trousers and panty, picked her up and threw her on her back. The appellant penetrated her from behind, had anal sexual intercourse with her. Thereafter, he tuned her around and had frontal vaginal sexual intercourse with her. After finishing, the appellant then left. The complainant ran outside screaming, but no one heard her screams, and returned into the house. She tried to phone the police at Schweizer –Reneke, but her phone was not picked up. She sent her daughter a missed call. When her daughter later phoned her back, she reported to her that the latter sent her the appellant to come rape her. The complainant did not report the incident to the police until on Sunday.

[5] Ms. KSM Koetzee, is the daughter of the appellant, also testified. For purposes of this judgment, I deem it not necessary to chronicle her evidence. It suffices to state that she substantially corroborated the complainant's evidence that she reported to her of the rape.

[6] The complainant was examined by Dr. Nganda D.M. on the 22 June 2008, who compiled the J88 form and recorded his clinical findings as follows:

"After my physical psychological and genital examination there was evidence probable of dry penetration.

From genital organ there was (inscription not legible) on (not legible) area;

From anus; there is was traumatic lesion with penetration."

The J 88 on the schematic vaginal and anus diagram it shows that there was abrasion on the vaginal area and that the anus was inflamed.

[7] The J88 was handed in by consent of the defence as exhibit B. It is instructive to record that counsel for the appellant stated as follows: "From the side of the defence side your worship we admit the contents of J88 as EXHIBIT B in term of section 220 of the Criminal Procedure Act."[1]

[8] Although the doctor who completed the J88 form was available he was however not called to testify by the State. The magistrate in his judgment recorded that "from the form J88 which was entered as EXHIBIT B the doctor did make his finding....the clinical findings of the doctor were to the effect that after the physical secretor and genital examination there is evidence, possible evidence of dry penetration. Also on the anus: the doctor concludes that there is some articulation. Unfortunately the handwriting is at times not clear."

[1] Paginated page 120 lines 10-19.

[9] After the State closed its case, the appellant testified in his own defence. Save what is recorded herein above as common cause the defence of the appellant was that after showing the complainant that the lamp was working he left. He further said that the complainant was so extremely drunk that he decided not to ask her about the money she owed him. He further said that on his arrival at the complainant's place he was seen by Mr. Butler, a neighbor to the complainant. Butler also saw him when he left as he was busy in his garden.[2] Mr. Butler was called as the defence witness, and confirmed seeing the appellant arriving at the complainant's place,[3] but denied seeing him leaving.[4]

[10] The appellant also called his son, Mr. J. Seedat. For purposes of this case, his evidence does not assist in the resolution of the issues in this matter. He confirmed that the appellant had to deliver a lamp at the complainant's place, but he did not accompany him to the complainant's place. Thereafter the appellant closed his case and was convicted as charged.

[11] It is apposite to deal with the appeal against the refusal for leave to lead further evidence.

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[2] Paginated page 143 lines 4-9.
[3] Paginated page 158 lines 13-24.
[4] Paginated page159 lines 2-5.

[12] The evidence in respect of which leave is sought to be lead is that of Dr. Mohamed Kajee and Dr. Kazeem Adesina Okanlomo. In his confirmatory affidavit Dr. Kazeem Adesina Okanlomo stated that he has read the affidavit of Dr. M Kajeee and agrees with his opinion. However, the confirmatory affidavit of Dr. Kazeem Adesina Okanlomo was deposed to and commissioned before Mr. Jan-Louis Hattingh on the 08 February 2011.[5]

[13] The affidavit of Dr. Mohamed Kajee was deposed to and commissioned before Mr. Mohamed Ashraf Essop on the 18 February 2011.[6] The confirmatory affidavit of Dr. Kazeem Adesina Okanlomo was clearly deposed to much earlier than before that of that of Dr. Kajee, came to existence. In my view, Dr. Okanlomo could not have read the affidavit of Dr Kajee before it could even come into existence, and therefore the conclusion is that he did not tell the truth but committed perjury in alleging that he read it. His confirmatory affidavit can therefore not be of any assistance to the court assuming that it was to be lead as further evidence.

[14] The other evidence sought to be lead is that of Dr Kajee who opined in his affidavit as follows:

> "5.7 The doctor made a note on the J88 that there was evidence of probable "dry penetration".

[5] Vide paginated page 28 of the motion application.
[6] Vide paginated page 20 of the motion application.

5.8 Three genital, two rectal and unspecified numbers of oral swabs were taken during the examination by the doctor. Subsequent examination of these swabs by the forensic services found no DNA.

6. In my respectful opinion, it is noteworthy that the J88 form does not state that the complainant suffered any other injuries that would be consistent with rape, for example, there was no bruising on any other parts of the body of the complainant. I respectfully state that it is improbable that a 57 year old white lady who was forcibly raped and pressed with her back against a dressing table did not have any bruising on her body. It is further extremely unlikely that she was raped for a prolonged time without more serious injuries to the perineum or other parts of the body.

7 A further note in respect of the J88 is that the conclusion reached by the examinant *(sic)* doctor that, "dry penetration" could not be excluded. It is not practice as I understand it for the doctors to comment whether penetration is as the doctor calls it, "dry" or otherwise. I am of the view that the conclusion by the doctor that there was dry penetration needs to be clarified."

[15] In the matter of *R v Dhlumayo and another*[7] the Appellate Court held, *inter alia,* that an accused has an inherent right for reopening of his trial and lead fresh evidence. Although the leading of evidence after conviction and on appeal is permissible, it is an indulgence, in my view, not there for grabs, but granted on application under exceptional circumstances. The applicant for such relief, must satisfy the court on

[7] 1948 (2) SA 677 (A).

cogent reasons why reopening should be allowed. This would invariably demand of the applicant for such indulgence, to furnish cogent reasons why the evidence sought to be introduced after conviction, could not be adduced during the trial. The evidence sought to be introduced at such a late stage must be relevant and have the potential of altering the verdict arrived at by the trial court. In this regard vide *R v De Jager*[8], where the Appellate Court held that the basic requirements for an application for hearing of evidence on appeal, or more usual course of setting aside the conviction and sentence and sending the case back for the hearing of further evidence, are:

"(a) There should be some reasonably explanation, based on allegations which may be true, why the further evidence was not led at the trial;

(b) There should be a *prima facie* likelihood of the truth of the evidence;

(c) The evidence should be materially relevant to the outcome of the trial."

[16] In needs mentioning that the J88 which was handed in by consent, has a schematic diagram showing that there was an abrasion on the vagina and that the anus was inflamed.[9] This must be read with the clinical findings of the Dr. Nganda D.M. that: "on the genital organ there was abrasion on the perennial area and that from anus there was traumatic lesion with penetration."

[8] 1965 (2) SA 612 at 613B-F.
[9] Paginated page 22 of the notice of motion and paginated page 33 of the record.

[17] In my view, the evidence of Dr. Kajee, which is sought to be lead, cannot explain away the clinical findings regarding abrasions on the vagina and the inflammation on the anus. More particular, the penetration on the anus cannot be explained away. Besides, Dr. Kajee did not challenge the finding of the anal penetration. Besides, Dr. Kajee's conclusions are merely speculative and would not, in my view, contribute towards the resolution of the important question, whether, the State has proven its case against the appellant beyond reasonable doubt, an aspect I shall later herein below deal with. For this reason, I am of the view that there would be no purpose served were leave to lead further evidence to be granted.

[18] The magistrate refused to grant leave to lead further evidence because he was not satisfied with the reason advanced why the relevant evidence was not led during the trial. The reason neither advanced, tersely put, was that the appellant's previous legal representative at no stage told him nor discussed with him the medico-legal reports relating to his trial. His present attorneys have advised the appellant that the failure to lead the evidence, he now seeks leave to lead, cannot be blamed on him. In his affidavit he has referred the court to various authorities, *inter alia*, *S v Charles*[10]; *Beyers v Director of Public Prosecutions*[11] and *S v Tandwa & Others.*[12]

[10] 2002 (2) SACR 492 at 493b-d.
[11] 2003 (1) SACR 164 at 168b.
[12] 2008 (1) SACR 613 (SCA) at 620g-621b.

[19] It brooks no argument that the appellant, just like every accused person, has a right to, *inter alia*, be legally represented, by one of his choice or provided by the State; have a fair trial; as guaranteed by s35 of the Constitution.[13]

[20] The question of whether the appellant had a fair trial is a value judgment, to be arrived at by looking through the trial record. Perusal of the trial record, in my view, shows that the State witnesses, in particular, the complainant, were subjected to intensive cross examination by the defence counsel. It can hardly be said, in my view, that the then legal representative of the appellant was incompetent. Neither can it be said that the appellant did not have a fair trial due to the alleged incompetence on the part of his counsel. On the contrary, in my view, the counsel for the appellant demonstrated through his intensive cross examination of the State witnesses that he was a well-grounded and seasoned practitioner, who is far from incompetence. He can only be faulted on choice of strategy, but this does not help the appellant.

[21] It is trite that an accused person has a right to demand from the State to be provided with the contents of the docket, before the commencement of the trial. Failure by his attorneys to exercise this right cannot be relied upon at a later stage when the shoe pinches. In the result, I am unable to fault the magistrate in his conclusion that the reasons advanced by the appellant for not leading the evidence during the trial, is

[13] *S v Tandwa & Others (supra)* at 620 para [7]

unsatisfactory. Of course, with regard to a value judgment, just like a discretionary judgment, it is difficult to have it set aside on appeal, unless on record it is demonstrably clear that there was misdirection or irregularity on the part of the officer making such a discretionary decision; vide *S v Hadebe and others*[14]; *R v Dhlumayo and another*[15]. In my view, the appellant has not advanced any single reason, in what respect the decision of the magistrate can be faulted. In my view, the appeal against the magistrate's refusal to grant leave to lead further evidence must be dismissed for these reasons as well.

[22] On the merits of the appeal against conviction, I am of the view that the appeal must also fail for the reasons mentioned herein below.

[23] The complainant *in casu* was a single witness on the essential aspect of the charge of rape. The evidence of a single witness needs to be approached with great caution. The legal position was aptly stated by Makgoka J in the matter of *S v Mayisela*[16] as follows:

> "[7] The issue in this appeal is whether or not there was penetration — a key consideration which has a bearing on the conviction. This aspect is dependent on the evidence of CD, who was a single witness. In terms of s 208 of the Criminal Procedure Act 51 of 1977, an accused may be convicted of any offence on the single evidence of any competent witness. The court can base its findings on the evidence of a single witness, as long as

[14] 1997 (2) SACR 641 (SCA) at 645E-F.
[15] 1948 (2) SA 677 (A).
[16] 2013 (2) SACR 129 (GNP) at 132f-133e

such evidence is substantially satisfactory in every material respect,[17] or if there is corroboration[18]. See further *R v Mokoena* 1956 (3) SA 81 (A) at 85; *R v T* 1958 (2) SA 676 (A) at 676; *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E – G; and *S v Banana* 2000 (2) SACR 1 (ZS) H (2000 (3) SA 885).

[8] Furthermore, CD was a child witness. When dealing with the evidence of children, our courts have developed a cautionary rule which is to be applied to such evidence. The court must therefore have a proper regard to the danger of an uncritical acceptance of the evidence of a child witness. See the rationale for this approach in *R v Manda* 1951 (3) SA 158 (A) at 163E – F. The state's case also consisted of circumstantial evidence, as there is no direct evidence of penetration. The cardinal rules when it comes to circumstantial evidence are trite, and were laid down in the well-known case of R v Blom[19], namely:

'(1) the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn;

(2) the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[9] Back to the facts of the present case. It was contended on behalf of the appellant that the state had failed to prove that the appellant penetrated the complainant. Furthermore, so it was argued, there was lack of medical corroboration of rape, viewed

[17] R v Mokoena 1932 OPD 79 at 80.
[18] S v Gentle 2005 (1) SACR 420 (SCA).
[19] 1939 AD 188 at 202-203.

also in light of the fact that the complainant did not testify. The state supports the conviction."

[10] Before I consider the submissions in this regard, it is helpful to restate the approach to be adopted by a court of appeal when it deals with the factual findings of a trial court. The proper approach is found in the collective principles laid down in *R v Dhlumayo and Another*[20] by the then Appellate Division. They are the following. A court of appeal will not disturb the factual finding of a trial court, unless the latter has committed misdirection. Where there has been no misdirection on fact by the trial judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it." *Vide* also *S v Hadebe* and others.[21]

[24] The Supreme Court of Appeal in the matter of *S v Ntsele*[22] held that: "the *onus* which rested upon the State in a criminal case was to prove the guilty of the accused beyond reasonable doubt—not beyond all shadow of doubt. The Court need not act only upon absolute certainty, but merely upon justifiable and reasonable convictions, nothing more and nothing less. The Court further held that where the Court was dealing with circumstantial evidence, it need not consider every fragment of evidence individually to determine how much weight it had

[20] 1948 (2) SA 677 (A).
[21] 1997 (2) SACR 641 (SCA) at 645E-F.
[22] 1998 (2) SACR 178 (SCA).

to afford it, it was the cumulative impression, which all the fragments made collectively that the Court had to consider to determine whether the guilty of the accused has been established beyond reasonable doubt. The Court further held that the conclusion that the guilt of an accused has been established is a factual finding by the trial Court. Where it cannot be shown that the trial Court has misdirected itself, then the appeal court is not entitled to interfere."

[25] With regard to the aspect of inferences, the applicable principle is to be found in *R v Blom,*[23] followed by *R v Reddy and Others*[24] where the Appellate Court held that: "The fact that a number of inferences can be drawn from a certain fact, taken in isolation, does not mean that in every case the State, in order to discharge the *onus* which rest upon it, is obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called upon to seek speculative explanations for conduct which on the face of it is incriminating.'

[26] The complainant, *in casu was* a single witness. In my view, she was corroborated by firstly her daughter in so far as the fact that she reported the alleged rape to her. She testified that she was firstly penetrated from the back in her anus. The uncontested evidence of the J88 shows that the anus was inflamed. The clinical examination of Dr. Nganda D. M. was that there was anus penetration. The complainant also testified that she was penetrated frontally in her vagina. In this regard she is corroborated by the fact

[23] Vide fn 18 *supra*.
[24] 1996 (2) SACR 1 (A).

that the J88 shows that there was an abrasion on her vagina and the anus was inflamed. The probative value of this evidence corroborates the evidence of the complainant that she was penetrated on both canals. It needs mentioning that the appellant was charged with contravention of s3 of Act 32 of 2007, in terms of which insertion of any body part into any oracle without consent amounts to rape. This includes vaginal and anal penetration. In my view, on inferential basis and coupled with the evidence of the complainant, the State proved that there was penetration and therefore the finding by the magistrate that rape was committed, cannot be faulted. and this finding cannot be disturbed by this court.

[27] During cross examination it was put to the complainant that on the day in question she was inebriated, and that after the appellant had left her place without molesting her, she could have subsequently became so inebriated that she was raped by someone else unknown, and when she subsequently sobered up, all she could remember was the appellant and therefore concluded that he is the one who raped her. It was further stated that the defence will call a witness to confirm that the complainant generally imbibes liquor to an extent that she would get so intoxicated to an extent that she would have to be carried to her room. However no such witness was called to buttress this speculative and character assassination. The trial court in rejecting the version of the appellant, took into account his failure to call the witness to confirm the character assassination of the complainant, coupled with the contradictions between the

appellant's evidence and that of his witness Mr. Butler. In my view, the rejection of the appellant's version cannot be faulted. I also find his version to be not reasonably possibly true but false and was quite correctly rejected.

[28] In the matter of *Tladi v S* [25] the Supreme Court of Appeal held as follows:

"The second issue in this appeal is whether the state proved that there were two separate incidents of rape. In S v Blaauw[26] the court said:

'Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course I of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against a tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against the tree. He was not committing another separate act of rape.

Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (i.e. the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place.' [My emphasis.]

[25] 2013 (2) SCAR 287 (SCA) at para [12].
[26] 1999 (2)SACR 295 (W) at 300*a-d*.

[13]..... There is no evidence from the complainant as to how the appellant raped her for the second time. The complainant's evidence does not suggest that there was an interruption 2 in the sexual intercourse to constitute two separate acts of sexual intercourse and, therefore, two separate acts of rape. The complainant's evidence suggests that the sexual acts were closely linked and amount to a single continuing course of conduct. There is no suggestion in her evidence that there was any appreciable length of time between the acts of rape to constitute two separate offences. The evidence against the appellant is therefore limited and is insufficient to establish his guilt on two separate counts of rape. The trial court should have analyzed the state's evidence and should have concluded that only F one act of rape had been proved beyond a reasonable doubt. Counsel for the state was constrained to concede that no evidence was presented in the trial court to sustain a conviction on the second count. Consequently there was no basis for the conviction on the second count of rape. And it falls to be set aside."

[29] *In casu*, the evidence of the complainant, which is corroborated by the clinical examination, revealed that there were two instances of penetration, firstly anally and secondly vaginally. In my view, each instance of penetration is predicated on a separate mental state, *animus*, distinct from the other, although the acts are within the same space of place, time and presence of the perpetrator and the victim. In the matter of *S v Willemse* [27]where there was anal and vaginal penetration during the rape, Griffiths J held with regard to the respective acts of penetration that "By doing so, in my view, the applicant formed a completely separate intent to rape the complainant in a manner which was different to that in which he had initially raped her and is a strong indication that this was a

[27] 2011 (2) SACR 531 (EGG) at para [17] – [19].

separate form of rape, even though it may have occurred reasonably close in the time to the initial act."

[30] In my view, the appellant committed two separate acts of rape. He should have been convicted of repeat rape in terms of s51 (1) of Act 105 of 1997. It is unfortunate that the charge the appellant pleaded not guilty to, only made mention of vaginal penetration. After the complainant testified, the State did not apply to have the charge amended. Neither did the magistrate after having heard evidence, deem it necessary to address the issue of repeat penetration, nor did he convict the appellant on repeat rape. Besides, during the appeal, both counsel for the State and the defence were not invited to address this Court on the aspect of repeat rape. It would therefore be a travesty of justice to at this belated stage, convict the appellant on repeat rape which attracts life sentence alternatively a much longer imprisonment sentence. In the premises, this Court can only confirm, as it does, the conviction of appellant as found by the magistrate, without escalating the conviction he ought to be have been convicted of, as pointed out herein above.

[31] The conviction of the appellant, as it stands, attracted a minimum sentence of 10 years imprisonment.[28] The appellant was 63 years old at the time of conviction and married and has no minor children. The trial court took into account the fact that the appellant:

[28] S51(2)(b) read with Part III of the Criminal Law Amendment Act 105 of 1997.

was of advanced age and his health was failing him and he needed medical treatment; his previous convictions were ten years old and regarded him as a first offender; appellant was willing to pay the complainant. The trial court took into account the fact that the complainant testified that she did not want the appellant to be sent to prison but pleaded that he must buy her a Toyota motor vehicle. She also wanted monetary compensation payable as follows first payment in the amount of R5000.00 followed by R2500. 00 per month for 8 years. The total amount would be R245 000. 00. The appellant was willing to make such payment. The trial court found that *in casu*, the above mentioned factors amounted to substantial and compelling circumstances warranting a lesser sentence. The trial court sentenced the appellant to 7 years imprisonment.

[32] Concerning the approach to be followed by the appeal court when dealing with sentence, it was aptly chronicled by Makgoka J in *S v Mayisela*[29] as follows:

> "[13] ... It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court. The appeal court's power to interfere with a sentence is circumscribed to instances where the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court. See generally: *S v Petkar* 1988 (3) SA 571 (A); *S v Snyder* 1982 (2) SA 694 (A); *S v Sadler* 2000 (1) SACR 331 (SCA) ([2000] 2 All SA 121); and

[29] 2013 (2) SACR 129 (GNP) at 133i-134e.
S51(1) and Part 1 and Part 2 of the Criminal Law Amendment ACT 105 of 1997.

Director of Public Prosecutions, Kwazulu-Natal v P 2006 (1) SACR 243 (SCA) (2006 (3) SA 515; [2006] 1 All SA 446) para 10.

[14] As to the nature of the misdirection which entitles a court of appeal to interfere, the following was stated in *S v Pillay* 1977 (4) SA 531 (A) C at 535E – F:

'Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.'

[33] With regard to sentence, the attack on behalf of the appellant was not so much on the custodial sentence of 7 years imprisonment imposed, but rather that the trial court erred in not resorting to the restorative justice alternative mechanism, and not ordering the appellant to compensate the complainant, in accordance with her request. It was further submitted that the appellant was of seasoned age and not in good health, and a first offender and willing to pay the complainant a substantial amount and that the magistrate failed to place sufficient weight to all these aspects. This Court was exalted to exercise its discretion and suspend the entire sentence imposed and order the appellant to compensate the complainant in an amount the court would consider just in the circumstances of the case.

[34] I must hasten to point out that during the appeal the State did not vehemently oppose the consideration of restorative compensation.

[35] Although the evidence of the complainant revealed that there was *anal* and vaginal penetration, which constitutes repeated acts of penetration, thus attracting the imposition of life imprisonment,[30] the fact of the matter is that, he was convicted of rape attracting a prescribed minimum sentence *of* 10 years imprisonment[31] and sentenced to 7 years imprisonment after substantial and compelling circumstances were found to exist.

[36] in the matter of *S v Jimenez*[32] it was held that: "even where the sentence does not seem inappropriate, a Court on appeal is entitled to consider the sentence afresh, if there has been material misdirection in the exercise of the sentencing discretion (See, for example, S *v Petkar* 1988 (3) SA 571 (A); *S v Siebert* 1998 (1) SCAR 554 (SCA).)"

[30] S51 (1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.
[31] S51(2)(b) read with Part III of the Criminal Law Amendment Act 105 of 1997.
[32] 2003 (1) SACR 507 (SCA).

[37] Rape is undoubtedly a serious crime which violates the dignity, security, freedom and wellbeing of the victim. The wave of rape cases in not abating, but in the increase[33]. It is a crime which calls for long imprisonment terms.

[38] The magistrate took into account the following facts: that the appellant was 63 years old, and of ill health, a first offender, and that the complainant under oath stated that she wanted the accused not to be sentenced to imprisonment but be ordered to buy her a motor vehicle and pay her, and concluded that substantial and compelling circumstances were present justifying departure from imposing the prescribed minimum sentence and impose a lesser sentence. It needs to be borne in mind that there is no definition of what substantial and compelling circumstances are. These are to be determined on the facts of a particular case. In the result, the magistrate cannot be criticized in his finding that the above mentioned facts are substantial and compelling circumstances, warranting that he departs from imposing the prescribed minimum sentence of 10 years, and in the exercise of his discretion imposed a sentence of 7 years imprisonment.

[39] The trial court in refusing to impose a sentence which accords with restorative justice, was of the view that s300 of the CPA does not permit him to do so. In this regard the magistrate was incorrect because this section deals with compensation where there is

[33] Vide S v Matjitji 2011 (1) SACR 40 (SCA) at 53 53 c-d.

damage or loss to any property, which is not the case *in casu*. I am therefore of the view that the magistrate misdirected himself in declining to consider the restorative justice mechanism premised on s300, and failed to consider other avenues, available to him, as it would be shown herein below. In as much as sentencing is within the discretion of the sentencing officer, where the exercise of the discretion is flawed, this Court is at large to interfere.

[40] It would seem that the magistrate did not consider s297 which provides that:

'(1)-- Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion—

(a) Postpone for a period not exceeding five years the passing of sentence and release the person concerned—

(i) On one or more conditions, whether as to—

(aa) compensation;'

[41] I take note of the fact that of the Criminal Amendment Act 105 of 1997 prescribes as follows:

'(5) The operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the *Criminal Procedure Act*, 1977 (Act 51 of 1977).'

[42] In my view, once the magistrate found that *in casu* substantial and compelling circumstances, exists, he was at large to exercise his discretion and impose a lesser sentence. The imposition of a lesser sentence was no longer under the prescribed minimum sentencing mechanism. His discretion was not therefore to be exercised within the confines of both s51 of the Act 51 of 1977. In *S v Mabena* 2012 (2) SACR 287 (GNP) the Court held that:

> "24.5 Sound penal policy requires consideration of a broader range of sentencing options, from which appropriate option can be selected that best fits the unique circumstances of the case before the court and needs to be to be victim-centered."[34]

[43] Borrowing from what Holmes J.A said in the matter of *S v Rabie*[35] that: "One does not lightly countenance the imprisonment of a man in the afternoon of his years. If one were to consider the crime only, one might have in mind a fairly long term of imprisonment. If one were to consider the mitigating factors only, one might have in mind a fine only. In letting the punishment fit the criminal and the crime, one must also be fair to society. On balance I think

[34] In this regarding citing *Sv Matyityi* 20111 (1) SACR 40 (SCA) para 16.
[35] 1975 (4) SA 855 (A) at 865 A.

that, had I been the trial Judge, I might have suspended the whole of the sentence of imprisonment."

[44] In the matter of *S v Maluleke*[36] Bertelsmann J held that that:

"[26] Restorative justice has been developed by criminal jurists and social scientists as a new approach to dealing with crimes, victims and offenders. It emphasizes the need for reparation, healing and rehabilitation rather than harsher sentences, longer terms of imprisonment, adding to overcrowding in jails and creating greater risks of recidivism.

While improving the efficiency of the criminal justice system is necessary, applying harsher punishment to offenders has been shown internationally to have little success in preventing crime. Moreover, both these approaches are flawed in that they overlook important requirements for the delivery of justice, namely:

- considering the needs of victims;
- helping offenders to take responsibility on an individual level; and
- nurturing a culture that values personal morality and encourages people to take responsibility for their behaviour.

Considering that crime rates in South Africa remain high and that government's focus appears to be on punishment rather than justice, a different approach is needed."

[45] In the matter of *S v Thabethe*[37] where the rape victim was 15 years of age, both she and her mother having been dependent and staying with the accused, Bertelsmann J held

[36] 2008 (1) SACR 49 (T) at 52.

that restorative justice finds application not only in minor rape cases but also in grave ones, and imposed a sentence of ten years suspended for a period of five years on very strict conditions, *inter alia*, that the accused continues to maintain both the complainant and her mother.

[46] Although the State successfully appealed against the imposed sentence, in the matter of *Director of Public Prosecutions, North Gauteng v Thabethe,*[38] Bosielo J cautioned as follows:

"[20] Although restorative justice received a somewhat lukewarm reception by the judiciary, starting tentatively in *S v Shilubane* 2008 (1) SACR 295 (T), it has, in the last few years, grown in its stature and impact — it has even received the approval of the Constitutional Court in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) (2007 (1) BCLR 10); *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) (2008 (3) H SA 232; 2007 (12) BCLR 1312); and The Citizen 1978 (Pty) Ltd and *Others v McBride (Johnstone and Others, Amici Curiae)* 2011 (4) SA 191 (CC). Restorative justice as a viable sentencing alternative has been accorded statutory imprimatur in the Child Justice Act 75 of 2008, in particular s 73 thereof. I have no doubt about the advantages of restorative justice as a viable alternative sentencing option provided it is applied in appropriate cases. Without attempting to lay down a general rule I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to

[37] 2009 (2) SCAR 62 (T).
[38] 2011 (2) SACR 567.

debase it and make it lose its credibility as a viable sentencing option. Sentencing officers should be careful not to allow some overzealousness to lead them to impose restorative justice even in cases where it is patently unsuitable. It is trite that one of the essential ingredients of a balanced sentence is that it must reflect the seriousness of the offence and the natural indignation and outrage of the public. This is aptly captured in the trite dictum by Schreiner JA in *R v Karg* 1961 (1) SA 231 (A) at 236A – C where he stated:

'While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment. SNYMAN, A.J., was bringing home to the appellant and other persons the seriousness of the offence and the need for a severe punishment, and I can find nothing in his remarks to show that he gave undue weight to the retributive aspect.'

E See also *S v Nkambule* 1993 (1) SACR 136 (A) at 147c – e; *S v Mhlakaza and Another*1997 (1) SACR 515 (SCA) ([1997] 2 All SA 185) at 519d – e; and *S v Di Blasi*1996 (1) SACR 1 (A) at 10f – g."

[47] It is trite that in determining what an appropriate sentence should be, the court will take into account, *inter alia*, the gravity of the offence, the interest of society, the retributive aspects, rehabilitation, deterrence, and the interest of the victim, in cases

such as *in casu*, and the interest and personal circumstances of the offender. It is generally a balancing act exercise the court embarks upon, without overemphasizing one aspect against the others.

[48] Deterrence is also an important issue which, the restorative justice seeks to achieve. Regard being had to the desire of the complainant, the seasoned age of the appellant, I am of the view that the circumstances of this case, call for resorting to restorative justice, and make a compensatory award, within the frame work of the existing sentencing mechanism.

[49] Once, it is found that the magistrate was no longer enjoined to sentence the accused in terms of the minimum sentencing mechanism; he was at large to suspend the imposition of sentence for 5 years, and make a restorative justice award. I am of the view that the appellant should be ordered to compensate the complainant, a solace amount. In my view, the amount suggested by the complainant, as referred to herein above, although it would seem that the appellant was willing to agree thereto to, is rather excessive. There is nothing showing how the amount of R245, 000. 00 is arrived at. Compensatory awards are generally difficult to determine. They are generally a guess work, within the discretion of the court. In the circumstances of this case, taking into account the fact that the appellant was seemingly inclined to agree to the

complaint's proposal, I am inclined, in the exercise of my discretion, to determine the compensatory award in the amount of R100. 000. 00.

[50] In the result, the following order is made:

1. That the appeal against is dismissed and the conviction is confirmed;

2. That the appeal against sentence is upheld and the sentence of 7 years is set aside and substituted with the following:

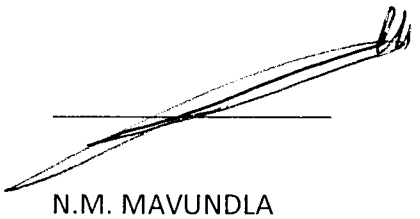
"That the sentencing of the accused is suspended for a period of 5 years on the following conditions:

(i) That the accused pays the complainant a total amount of R100. 000. 00 as follows:

(a) R10, 000. 00 within 10 (ten) days of the delivering of this order;

(b) R2500. 00 per month to be paid on or before 7th of every subsequent month until the full payment of the total amount R100 000. 00 mentioned herein above.

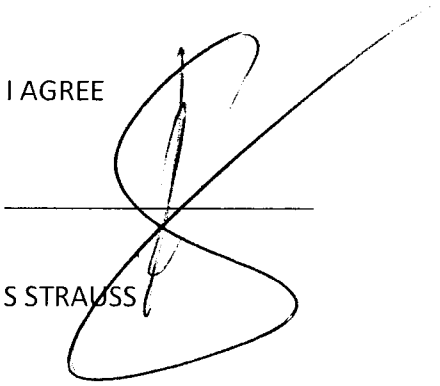
(c) That all the above mentioned amounts shall be paid into the bank account of the complainant the details of which to be provided to the appellant by the complainant, within 10 days of the grant of this order.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

I AGREE



S STRAUSS

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING : 23 APRIL 2015

DATE OF JUDGMENT: 12 MAY 2015

APPICANT'S ATT : PRETORIA JUSTICE CENTRE.

APPLICANT'S ADV : ADV. M.M. HODES SC

RESPONDENTS' ATT : DIRECTOR OF PUBLIC PROSECUTIONS PRETORIA

RESONDENT'S ATT : ADV J.J. KOTZE