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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**APPEAL CASE NO: A14/2020
DPP REF NO:10/2/1 (2020/011)**

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

.....
DATE

.....
SIGNATURE

In the matter between:

MATHEBULA, LOUIS COLLINS

Appellant

and

THE STATE

Respondent

CORAM: MABESELE J AND DE VILLIERS AJ

J U D G M E N T

DE VILLIERS, AJ

- [1] The appellant was charged in the Soweto Regional Court with four counts of criminal conduct: Two counts of rape of a 16-year-old complainant, a third charge of kidnapping of the same complainant, and fourth charge of rape of 20-year-old complainant. The appellant was legally represented throughout the trial. The presiding magistrate, Mr Mhango, convicted the appellant, as charged, on all four counts on 1 July 2019.
- [2] The learned magistrate sentenced the appellant on 14 October 2019, taking into account the minimum sentence provisions set out section 51 of the Criminal Law Amendment Act 105 of 1997. The appellant was sentenced as follows:
- [2.1] On the first two counts, being the rape of the 16-year-old complainant, life imprisonment;
- [2.2] On the third count, kidnapping of the 16-year-old complainant, four years imprisonment, the sentence to run concurrently with the life imprisonment sentence;
- [2.3] On the fourth count, the rape of 20-year-old complainant, ten years imprisonment, the sentence to run concurrently with the life sentence.
- [3] The learned magistrate also declared the appellant unfit to possess a firearm.
- [4] The appellant had an automatic right to appeal to both the convictions and sentences, hence this appeal that served before us. The real issue on appeal is the conviction in respect of counts one, two and three.
- [5] Accordingly, I start by addressing and disposing of the appeal with regard to count four. The appellant was linked to the rape of the 20-year-old complainant by DNA evidence. The DNA evidence was not challenged at the trial. There is no basis upon which a court on appeal

could or should interfere in his conviction, and none was advanced before us.

- [6] An attempt was made on appeal to challenge the prescribed minimum sentence of ten years imposed in respect of count four. The appellant had raped the complainant, not known to him, by entering her home, and by putting a knife to her throat. He executed a nightmare that women fear. In argument the following factors were advanced as grounds for interfering in the prescribed minimum sentence: (a) the appellant was 23 years old at the time when he committed the rape, (b) he has two children, (c) he had been in prison for three years pending his sentencing, (d) the victim “*did not suffer any grievous physical/ bodily injury*”,¹ (e) he had not used excessive violence in raping the complainant, (f) no evidence had been led of enduring psychological trauma suffered by his victim, and (g) no evidence had been led of HIV transmission to his victim as a result of the rape. These are not factors sufficiently compelling this court to interfere in the prescribed minimum sentence. In fact, grounds (d) to (g) are entirely consistent with the mental attitude of a rapist who still shows no remorse for his deeds. The appellant has shown no remorse, as he still denies his guilt.
- [7] The appeal against conviction and sentence on count four must and does fail.
- [8] As stated, the real issue on appeal is the conviction in respect of counts one, two and three. In broad strokes, the background facts were that in the early hours of the morning of 17 December 2014 (at about 01H30 to 02H00) the 16-year-old complainant was at a tavern with her sister and friends. She alleged that she was forcibly dragged by the appellant to a construction site, where he raped her the first time (count 1). He then took her to his shack at another location, where raped her again (count 2). The appellant was 24 years old on

¹ Under section 51(3)(aA)(ii) of the Criminal Law Amendment Act 105 of 1997, “*an apparent lack of physical injury to the complainant*” does not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed sentence.

the day in question. In his defence, the appellant alleged (a) that he and the complainant were in a “love” relationship (a sexual relationship), (b) that the sexual intercourse in question occurred at the second location only, and (c) that the intercourse occurred by consent. His brother and sister confirmed the fact of a relationship between the complainant and the appellant. The age difference between the appellant and complainant was substantial, she was 16,² nearly 17, and he was 24. The learned magistrate did not err, with respect, with regard to the age of the complainant. The complainant was still 16 years old on the night of 16 December 2014 when the incident took place, having been born on 15 January 1998.

- [9] Two legal issues are at stake: An interference on appeal with a factual finding by the court a quo, and a conviction based on the evidence of a single witness.
- [10] It was held in *S v Mafaladiso en Andere*,³ translated by BR Southwood in *Essential Judicial Reasoning*,⁴ that it is the duty of the court of appeal to rectify a wrong factual finding, where necessary:

“It is true that a Court of Appeal will not lightly interfere with a factual finding of the trial court - even if it is an inference from proved facts. But this proposition is nothing more than a guideline and is not a legal rule. R v Dhlumayo and Another 1948 (2) SA 677 (A) op 695 in fine et seq) and where a Court of Appeal is satisfied that the Trial Court has made a wrong finding of fact it must rectify it. (See S v Mkohle (supra at 100e-j); President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) in paras [78] - [81])”

- [11] Mbatha JA (Navsa and Dambuza JJA concurring) in *Y v S*⁵ succinctly dealt with the test to be applied in criminal proceedings, with a special

² The incident took place during the night of 16 December 2014. She was born on 15 January 1998.

³ *S v Mafaladiso en Andere* [2002] ZASCA 92:

“Dit is natuurlik so dat 'n hof van appèl nie ligtelike met 'n feite-bevinding, selfs 'n afleiding uit bewese feite, van 'n verhoorhof sal inmeng nie. Maar hierdie stelling is niks meer as 'n riglyn nie en is nie 'n regsreël nie (R v Dhlumayo and Another 1948 (2) SA 617 (A) op 695 in fine ev) en waar 'n hof van appèl oortuig is dat die verhoorhof 'n verkeerde feitebeslissing gemaak het, moet hy dit regstel. (Sien S v Mkohle, supra, op 100 e - f; President of the RSA and Others v South African Rugby Football Union and Others [1999] ZACC 11; 2000 (1) SA 1 (CC) op 42, [78] - [81].)”

⁴ BR Southwood, *Essential Judicial Reasoning*, LexisNexis, Para 13.2.

emphasis on the approach to a conviction based on the evidence of a single witness, as has happened in this case:

[45] In criminal proceedings, the State bears the onus to prove the accused's guilt beyond a reasonable doubt. Furthermore, the accused's version cannot be rejected solely on the basis that it is improbable, but only once the trial court has found on credible evidence that the accused's explanation is false beyond a reasonable doubt. (See: S v V 2000 (1) SACR 453 (SCA) at 455B.) The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. It is trite that in an appeal the accused's conviction can only be sustained after consideration of all the evidence and the accused's version of events.

[46] ...

[48] The applicant was convicted on the evidence of a single witness, which in order to be sufficient to convict, must be clear and satisfactory in every material respect. (See: S v Sauls 1981 4 All SA 182 (A).) It is trite that a court will not rely on such evidence where the witness has made a previous inconsistent statement, where the witness has not had a sufficient opportunity for observation and where there are material contradictions in the evidence of the witness. In Sauls it was held that there is no rule of thumb, test or formula to apply when it comes to the consideration of the credibility of a single witness. Rather, a court should consider the merits and demerits of the evidence, then decide whether it is satisfied that the truth has been told despite the shortcomings in the evidence.

[49] In respect of sexual assault cases, thankfully there is no cautionary rule. In S v Jackson this Court aptly stated as follows:

'In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.'

⁵ Y v S [2020] ZASCA 42 para 45, 48, 49 and 50.

[50] *The only direct evidence implicating the applicant in this case was that of the complainant. For such evidence to be accepted it must be clear and satisfactory in all material respects. ...*”

[12] I omitted the footnote giving a reference to *S v Jackson*.⁶

[13] I summarise the complainant’s evidence in what follows, and reflect the material supporting and contradictory evidence:

[13.1] The complainant alleged that she only knew the appellant by sight. They grew up in the same area, and she alleged that that she only knew the name of his sister. However, according to her sister, N, the morning after the events described below, the complainant already knew the name of the appellant. They moved in the same social circle too, as earlier on 16 December 2014, the complainant went to Protea Mall where she saw the appellant in the company of someone she knew, one K. On her version she only spoke to K, and not to his companion (whose name she allegedly did not know). It is likely that she knew him better than what she was prepared to admit;

[13.2] The complainant went to the tavern at 22H00. On her version, she was in the company of four friends (N, D, A, and P). It later turned out during the evidence of the N, that she is an older sister of the complainant, and not her friend. Both A and N testified. The group partied. The evidence about the exact amount of alcohol consumed was contradictory. During the night, the complainant, on her version, consumed one bottle of cider. N testified that they already had two “beers” each on their way to the tavern, and did not testify about the consumption in the period thereafter. A testified that they

⁶ *S v J* 1998 (2) SA 984 (SCA) at 994C-996D, a judgment by Olivier JA (Mahomed CJ, Van Heerden DCJ, Streicher JA and Farlam AJA concurring.) See too *Director of Public Prosecutions v S* 2000 (2) SA 711 (T) at 714J-715A and section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2000:

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

each had one cider at the tavern. No evidence was presented that alcohol diminished the observation and recollection of the witnesses;

[13.3] Between 01H30 and 02H00 the next morning, the group commenced to go home. According to the complainant, she and A waited outside the tavern for the rest of the group. According to her, waiting with them was a male person, whom she did not identify. According to the complainant further, he would have walked home with them (and therefore was presumably known to them or some of them). Importantly, A disputed this evidence by the complainant. According to her, only the two of them were waiting outside the tavern, which would make the complainant's version of an abduction by stealth, less probable. The evidence of N was that she had gone out of the tavern with her sister, and then back into the tavern to look for an unidentified male or males to walk home with them. She did not mention a male escort that would have walked home with them who was already waiting outside with her sister and A. A confirmed that N went to look for young men in the tavern to accompany them home;

[13.4] The complainant testified that that of the unidentified male referred to by the complainant, fell on the ground, next to the complainant. According to the complainant, she picked the hat up. A saw the complainant picking up a hat, but as will be seen below, had a different version of events. During cross-examination the complainant confirmed that she was standing next to the unidentified male person, whose hat she had picked up. The complainant changed her evidence during cross-examination and testified that she was standing alone, with A and the unidentified male person standing on the opposite side of the road, about ten steps away from her. A did not support this evidence and testified that the last time

she saw the complainant, she was standing next to her. According to A, the owner of the hat had had walked past when his hat fell off and did not stop (and was not in her company). There are material contradictions in the evidence;

[13.5] The complainant testified that when she bent to pick up the hat, she was grabbed from behind. The assailant, the appellant, dragged her around the corner, into the next street and further away. The last time that A saw the complainant, she was next to her. A noticed nothing about her abduction. It is not clear from the record if the complainant testified that she screamed and was not heard by A, or decided not to scream as she knew she would not be heard because of the loud music. The answers given by the complainant were to the effect that she tried to scream, but that she was told by A that she did not hear her scream due to the loud music. Later in cross-examination she said that she had shouted "A". N testified that A told her that she did not see the complainant leaving, as she was "*disturbed*" by a gentleman standing with her (a version that is conflict with the version of A). It seems improbable that the complainant simply would have disappeared;

[13.6] After an unsuccessful attempt by the complainant to seek help from a passing car, the appellant dragged the complainant towards the building site where the first rape took place. The appellant after a while and bizarrely told her to run, and when she did not do so immediately, he slapped her. She started to run, whilst the appellant followed and gave her instructions where to run to. Only in cross-examination did the complainant add that after she was slapped, the appellant had taken out a knife to threaten her. It was a material omission or a change in her version;

- [13.7] Thereafter, according to the complainant, the appellant dragged her to a shack where he lived. He pushed open the gate and thereafter the door to the shack, both of which were not locked. There were two shacks in close proximity, they entered one, according to the complainant. Once inside, the appellant demanded that the complainant had to get into bed, which she did;
- [13.8] The complainant testified that she took out her phone from a pocket of her jacket in the shack, as she wanted to send a message to her sister, S. This was her first, spontaneous evidence. Under cross-examination the complainant changed her evidence and said that she had sent two SMS messages, one to her sister S and one to her friend D. These were sent at about 03H00. She told them that a man had taken her, in what area she was, and that they had to look for two shacks facing each other. N knew of the second SMS, and testified that it referred to a black gate and to two shacks facing each other. She also stated that it reflected the area where the shacks were, and that the complainant had said that she was raped. They went looking for the complainant, but could not find her. A testified that she read the SMS to D, that it referred to two shacks, a request to be fetched, and a warning that the four of them could not come alone. According to her, they simply went home;
- [13.9] The complainant changed her evidence to say that she sent the messages before they reached the shack, whilst running, without looking at the phone, which was in her jacket's pocket. Not only is this improbable, but as a matter of logic, she could not have conveyed detail about the shack in an SMS before she arrived at it;
- [13.10] In the early morning, the appellant raped the complainant again (according to her). Thereafter he accompanied her

until they were close to her home. He told her not to speak when they pass people. By then it was about 05H30 to 06H00;

[13.11] In cross-examination the complainant added a third rape, one that took place when they arrived at the appellant's shack. It is material that he was only charged with two rapes. It seems beyond question that a third rape was only mentioned belatedly. It also was a material omission or a change in her version; and

[13.12] Upon arrival at home, the complainant told her sisters, S, P and N what had happened, and the oldest sister, S, accompanied her to the police station. The complainant is the youngest sister of the three. N testified that the complainant did not tell them how many times she was raped. She did not report immediately the rape at unfinished house, and only mentioned having been raped at the shack. She further testified that the complainant had told them that she was raped at gunpoint at the shack.

[14] The evidence by the complainant was not clear and satisfactory in all material respects. The learned magistrate, with respect, committed a misdirection when he found that the complainant gave consistent evidence, for the reasons set out already herein. In my view, with respect, under those circumstances he could not have found that she was an honest witness, taking into account only the evidence presented for the prosecution.

[15] The appellant testified the complainant had called him to fetch her from the tavern, and that they had consensual sex in his shack. His brother had to unlock the gate to property where their shacks were. His brother confirmed that he had to unlock the gate allow the complainant and the appellant to enter the property. I have dealt with the conformation by the brother a and sister of a relationship between the appellant and the complainant. It also seems probable that the

occupants of the shacks would not have left access to them unsecured, contrary to the evidence by the complainant.

[16] One cannot find that the defence was false beyond a reasonable doubt. The appeal against conviction on counts one to three, must succeed.

[17] Taking all the above in consideration, I propose that the following order be made:

1. The appeal against convictions and sentences on counts one, two and three, is upheld, and the convictions and sentences are set aside;
2. The appeal against conviction and sentence on count four, is dismissed.
3. The order of the court below declaring the appellant unfit to possess a firearm is confirmed.

DP de Villiers AJ

Heard on: 22 June 2020 by written submission at the election of counsel

Delivered on: 10 July 2020 by uploading on CaseLines and by e-mail

On behalf of the Appellant: Adv WA Karam

Instructed by: Legal Aid SA

On behalf of the Respondent: Adv V Maphiri

Instructed by: Office of the Director of Public Prosecutions

MABESELE, J:

[17] I have read the judgment and order of my brother, De Villiers AJ and confirm his order. The reasons are the following:

[18] The appellant was convicted in the Soweto Regional Court on two counts of rape of a 16 year-old complainant and kidnapping of the same complainant. He was also convicted of rape of a 20 year-old complainant. He was sentenced to life imprisonment on the two counts of rape, taken together; 4 years imprisonment on a count of kidnapping and 10 years imprisonment for rape of a 20 year-old complainant. It was ordered that the sentence imposed on counts 3 and 4 run concurrently with that imposed on counts 1 and 2. The appellant was declared unfit to possess a firearm.

[19] Although the indictment reflects the age of complainant as 16 years at the time of the alleged rape, the complainant testified in her evidence-in-chief that she was 17 years old at the time of the incident. During cross-examination she changed her version and said that she was 16 years old. She did not deny that she said she was 17 years old save to say she could not remember saying she was 17 years old. Since this issue was not clarified during re-examination or by the court, it cannot be said with certainty that the complainant was 16 years old when the alleged incident occurred. At any rate, section 16 of the Sexual Offences Act, 32 of 2007 provides that sexual intercourse with a child below the age of 16 years constitutes rape. Since the complainant does not fall within this category this section cannot apply in this case.

[20] There are two issues to be addressed in this appeal. The first is whether the court below correctly convicted and sentenced the appellant on counts 1, 2 and 3 upon the evidence of a single witness. The second is whether the evidence of DNA which links the appellant to the rape of a 20 year-old complainant justifies both the conviction and sentence of the appellant on count 4.

[21] It is common cause that on the night of 16th December 2014 the complainant on counts 1, 2 and 3 was at the tavern with friends, drinking alcohol. The appellant, too, went to the tavern. The evidence of the complainant is that around 02h00 she and her friend, A, went outside the tavern and waited for the two friends who were still inside. She and A were in the company of a man who was going to accompany them home. While they were still waiting outside, a hat of the man fell on the ground next to her. As she bend down to pick it up someone who she later identified as the appellant pulled her from behind and moved her away from where she was standing, to the next street. She tried to fight so that she could free herself but did not succeed. When she was asked about the whereabouts of her friend, A, when she was taken away by the appellant she responded that A was unable to hear her screaming because of the loud music that was played inside the tavern.

[22] The complainant testified that while she and the appellant were still walking along the street, a motor vehicle came across them. She asked the driver to stop. The driver stopped and opened the door. As she was

explaining to the driver and occupants that the appellants took her by force from the tavern the appellant reprimanded them not to interfere in his affairs and told them that she was her girlfriend. After the vehicle drove off the appellant again dragged her and walked with her. As they approached certain shacks the appellant slapped her on the face and instructed her to run. The appellant ran behind her and directed her to the area which she should run to. They eventually reached the houses which were under construction and the appellant dragged her into one of the houses. He then threatened her and ordered her to undress. After she had obeyed the instructions the appellant had sexual intercourse with her. As the appellant penetrated her, he asked if she knew who he was. She replied and told the appellant that she knew him by sight and is the brother of J. She further told him that she saw him earlier that day. After the appellant had raped her they both stood up. She told the appellant that since he got what he wanted he should release her so that she could go home. When they left the house the appellant took her to an informal settlement called Ngalagatha. On arrival there, the appellant took her into a certain shack and ordered her to get under the blanket. While both of them were under the blanket the appellant again had sexual intercourse with her. At some stage, still under the blanket, she operated her cell phone from the pocket of her jacket and send an SMS to her sister, S, and informed her about her whereabouts. She told her sister that she was in a shack and could not describe the yard save to note the colour of the gate. After the appellant had raped her for the second time he told her that he would accompany her home. Subsequently, the appellant walked her home until they reached a certain passage not far from her home. At the passage the

appellant turned back and she proceeded home. When she reached home she informed her sisters, S and P, about the rape incident. Thereafter one of her sisters accompanied her to the clinic. From the clinic they proceeded to the police station to report the matter to the police.

[23] When the complainant was asked during cross-examination how she sent an SMS to her sister, S and friend, L, she said that she sent an SMS at the time she and the appellant were running. The record reflects the following:

“Ms D: Your Worship, I sent the SMS when he was running, Your Worship and the phone was inside the jacket, I did not put my hand in the jacket, so I was pressing the phone while it was inside the pocket of the jacket.

Mr GUMEDE: This is very interesting, you never removed the phone to see what you were sending?

Ms D: Your worship, when I was fighting, I knew where the alphabets so and so is, Your worship, I would know that it is the second or first or fourth alphabet, Your worship”

[24] Ms N T was one of the friends who were in the company of the complainant at the tavern. She did see in whose company was the complainant when she left the tavern in the early hours of the morning. She

last saw the complainant in the company of A outside the tavern. When she got out of the tavern with other friends they found A standing alone outside the tavern. When they asked A about the whereabouts of the complainant she told them that she did not see what happened to her because she was busy talking to the man who was standing with her. When she was asked about the SMS alleged to have been sent to L she confirmed that L received an SMS from the complainant and informed her about her whereabouts. She had the opportunity to read the SMS. She testified that after they had read the SMS they proceeded to the place where the complainant said she was kept. When they arrived at the area mentioned in the SMS they could not locate the house because people were being relocated to another area and only few shacks were left. They tried to call her but did not pick up the phone.

[25] Ms A M testified that she was in the company of the complainant outside the tavern when the complainant disappeared. Her evidence is that while she and the complainant were outside the tavern a hat of someone fell on the ground. She saw the complainant bend down to pick up the hat. Since then she did not see what happened to the complainant. She tried to look around the gate and could not see anyone. She testified that she, too, had an opportunity to read an SMS from the complainant which was sent to L wherein the complainant informed L about her whereabouts. That concluded the evidence of the complainant in counts 1, 2 and 3.

[26] Ms M M was the complainant in count 4. On the night of 15th December 2014 she and a friend visited Mazazane tavern. After she had consumed few

drinks she went back home. On arrival she put on pyjamas, locked the door and went to sleep. She was suddenly woken up by a man who was on top of her, holding a knife. He had covered his face with what is called 'balaclava.' The man threatened her with a knife and asked her not to scream. Due to the threats she kept quiet. The man then tore her pyjamas and forced her to open her thighs. After she had done so, she was raped. Thereafter the man left the house and ran away.

[27] By agreement between the state counsel and counsel for the appellant, on the instructions of the appellant, the report on the DNA results which links the appellant to the rape of the complainant in count 4 was handed up to the court to form part of the record.

[28] The appellant testified that he had a love relationship with the complainant in counts 1, 2 and 3. His version is that on 16th December 2014 at 13h00 she met the complainant and her friend at the bottle store. After he had bought them alcohol he parted ways with them. On the night of the same day he noticed a missed call on his phone which came from the complainant. When he returned the call the complainant informed her that she was at the tavern and asked him to come and fetch her. The complainant gave her the directions to the tavern. He proceeded to the tavern. When he arrived he took the complainant to his place of residence at [...] M street. Upon arrival he requested his brother, B, to open the gate for them. After the gate was opened he took the complainant to his room and had sexual intercourse with

her, by consent. In the morning he accompanied the complainant home. He said that K and J knew about his relationship with the complainant.

[29] Although the appellant denied to have raped the complainant in count 4 he admitted the evidence of DNA which linked him to the rape of the complainant on this count.

[30] Ms J M is the sister of the appellant. She and the appellant stay on the same premises. She knows the complainant in counts 1, 2 and 3. Her version is that the appellant and complainant were in a love relationship since 2013 or 2014. She said that the complainant occasionally visited the appellant at his shack. Her version with regards to the affair between the appellant and complainant is corroborated by the appellant's brother, B M. He occasionally saw them together at the mall. In the morning of the alleged incident he opened the gate for both of them to enter the appellant's shack.

[31] Our courts have stated in numerous decisions that evidence of a single witness should be approached with caution. One may add that 'where rape is alleged to have occurred at the tavern in the early hours of the morning, evidence of a single witness, in particular a young victim, should be approached with outmost care. This is because the victim may likely create a story of rape and kidnapping so that the parents understand why she did not sleep at home'.

[32] The testimony of a single witness must be clear and satisfactory in every material respect. Where evidence is riddled with inconsistencies and lies, it may not be regarded as satisfactory (*Mocke V S* [2008] 4 All SA 330 (SCA)).

[33] The complainant and A waited for their friends outside the tavern so that they could all go home. They all secured the services of a male colleague who waited outside the tavern with the complainant and A so that he would accompany all of them safely home. Therefore the version of the complainant that A did not hear her screaming when taken away by force by the Appellant and that of A that she did not see the complainant taken away from them have no merit. Therefore, it stands to reason that the complainant voluntarily left the tavern with the appellant.

[34] The version of the complainant that she stopped the vehicle and sought for help and later sent an SMS to her sister and friend, notifying them of her whereabouts, persuaded the magistrate to regard the complainant as a 'very good and honest witness'. Regrettably, the magistrate omitted to scrutinize the unbelievable version of the complainant that she operated her cell phone from the pocket of her jacket without looking at the alphabets, and send an SMS to her sister and friend. Since this version is unbelievable and improbable it follows that no SMS was sent to the sister and friend. Accordingly, the versions of A and N that they read the message which was sent to the sister of the complainant via SMS are rejected. For all these reasons it cannot be said that the evidence of the complainant that she was kidnapped and raped is satisfactory in every material respect.

[35] The magistrate correctly argued in his judgement that the version of the appellant could only be rejected if the court is satisfied that the evidence is so improbable that there is no reasonable possibility of it being the truth.

[36] The version of the appellant that she had an affair with the complainant is corroborated by her sister and brother who occasionally saw them together. In the morning of the incident the brother of the appellant opened the gate for the appellant and complainant to enter the appellant's shack. Importantly, the appellant would not accompany complainant home while knowing that he had raped her. Therefore, his version that he never raped the complainant and kidnapped her is reasonably possibly true. Therefore the convictions and sentences on counts 1, 2 and 3 should be set aside.

[37] The appellant did not contest the results of the DNA which linked him to the rape of the complainant in count 4. Therefore, there is no basis upon which this court can interfere with the conviction on this count. The sentence of 10 years imprisonment on this count is appropriate in view of the nature and seriousness of this offence. The result is that the conviction and sentence on this count should be dismissed.

M. M MABESELE
JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG