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**IN THE HIGH COURT OF SOUTH AFRICA,**  
**FREE STATE DIVISION, BLOEMFONTEIN**

|                              |    |
|------------------------------|----|
| Reportable:                  | NO |
| Of Interest to other Judges: | NO |
| Circulate to Magistrates:    | NO |

Case No: A241/2018

In the matter between:

**ABRAM MOLELEKI HLOJANE**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

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**CORAM:**

NAIDOO, J *et* MOLITSOANE J

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**JUDGMENT BY:**

NAIDOO J

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**HEARD ON:** 11 MARCH 2019

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**DELIVERED ON:** 30 MAY 2019

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## **INTRODUCTION**

- [1] The appellant was convicted of contravening section 3, read with other relevant provisions of Act 32 of 2007 (the Sexual Offences Act) as well as the relevant provisions of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act) on one count of Rape in the Regional Court, Bloemfontein. He pleaded not guilty to the charge, but on 6 October 2009 was convicted thereon and sentenced on 1 June 2010 to Twenty Six (26) years' imprisonment. The court *a quo* granted leave, on 21 November 2016, to appeal in respect of conviction only. Ms S Kruger represented the appellant in this court and Adv Roothman represented the respondent, being the state.
- [2] During 2008, nine year old A[....] Q[....] (complainant) was subjected to three instances where the appellant made sexual advances to her and in the course of one of those instances raped her. She lived with her sickly, bedridden grandmother at the time and it seems that an outbuilding on the premises was used as a church at which the appellant was a preacher. He has been referred to as the deacon and clearly enjoyed a position of authority. He was greatly respected by the community and the family of the complainant.
- [3] After some time (it was not clear how long after), the complainant related to her cousin (N[....]) what had happened to her. N[....] reported the matter to the complainant's mother, who in turn laid a criminal charge against the appellant. The complainant was

examined by a forensic nurse at a hospital, and the nurse completed a medical report on her findings, referred to as the J88. The nurse found that the hymen was intact but that there were clefts at the 2 o'clock, 3 o'clock, 7 o'clock and 11 o'clock positions around the hymen. The nurse who testified, said that clefts are healed wounds and that this was consistent with penetration.

- [4] The complainant's mother told of three incidents related to her by the complainant, the first is when the appellant called her while she  
 was washing dishes. She went to him and he called her into the toilet. When he went into the toilet, she returned home. It seems the next day, the appellant made the complainant touch his  
 genitals  
 and on the third occasion is when he appears to have had sexual intercourse with her. N[...] related a similar version, except that her narrative is that the complainant said she did not touch his  
 genitals, as she was asked to do.

- [5] At the end of the state's case the appellant applied for a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 (CPA). The trial court dismissed the application. The appellant thereafter testified and denied the complainant's version, alleging that there was never any incident of a sexual nature involving the complainant.

He also appeared to suggest that the complainant's mother encouraged the complainant to fabricate this version against him, as the mother had a problem with his girlfriend, who is the cousin of the complainant's mother. The appellant further testified that the uncle of the complainant (V[...]) was also involved in this

conspiracy as he had a long time ago accused the appellant of having an affair with his (V[...]’s ) wife.

- [6] It is trite that the state bears the onus to prove the guilt of an accused beyond reasonable doubt and that the accused person bears no onus to prove his innocence. In this matter the appellant assails the judgment of the trial court on a number of grounds the most important of these being that the court failed to undertake a proper analysis and evaluation of the evidence. The appellant also alleges that the court erred in finding that the state proved its case beyond reasonable doubt, especially as the complainant was a minor child and a single witness, and as such, the court failed to apply the cautionary rule. The court also erred in failing to consider the contradictions in the complainant’s evidence, and by finding the complainant to be a competent and credible witness.
- [7] An appeal court will not lightly interfere with the findings of the trial court especially as the latter was steeped in the atmosphere of the trial and had the benefit of observing witnesses. The trial court is in the best position to make findings as to such matters as credibility, demeanour and reliability. **[See S v Francis 1991(1) SACR 198 (A) at 204 c-e]**

The court *a quo* in this matter undertook a comprehensive analysis of the evidence as a whole. I pause to mention that the magistrate’s manner of delivering her judgment is somewhat strange. She addressed herself to the appellant personally, and often pronounced herself at a personal level in respect of how she conducts herself in relation to other similar matters. It is perhaps advisable for the magistrate to reconsider this method of delivering her judgments and adopt a more general and less personal approach, lest the impression be created that she is not objective.

It should also be borne in mind that the judgment is not exclusively for the accused person. The prosecution, members of the public, whether present at the proceedings or not, students, academics and the appeal court are all part of the audience that the court should seek to address. Having said that, an appeal court will only interfere if there is a misdirection on the part of the trial court in the application of the law or the facts.

- [8] As I indicated, the trial court traversed and analysed the evidence extensively, albeit in a most unconventional fashion. The court gave proper consideration to the discrepancies in the complainant's evidence and to the differences in the evidence of her mother and N[...], and applied the necessary caution in dealing with the evidence of the complainant. A long line of cases in our law have sounded a warning for courts to be cautious in dealing with the evidence of a single witness and particularly that of a young child. Section 208 of the CPA permits a conviction based on the evidence of a single witness.

The predecessor of section 208 was section 256 of the 1955 Criminal Procedure Code and referred to "the single evidence of any competent and credible witness". Although the reference to "credible" is absent in section 208, a single witness must nonetheless be credible [**See S v Sauls & Another 1981(3) SA 172 (A) at 180 d-g**]. With regard to the evidence of young children, the remarks of the Dambuza JA (Shongwe JA concurring) in **Mocumi v The State [2015] JOL 34898 (SCA)** and also **2015 JDR 2653 (SCA)** are apposite:

"Considering the age of the complainant, both at the time of the incident and when she was giving evidence, the lapse of time between the incident and the

trial, I do not think that her momentary lapse of memory was unreasonable or that it was an indication that she was fabricating her evidence”

In *Mocumi*, the majority dissenting judgment was penned by Navsa JA, in which Cachalia and Tshiqi JJA concurred.

**[See also R v Manda 1951(3) SA 158 (A) at 163 c-e]**

[9] In my view, the court took proper account of the age of the complainant, the manner in which she testified, and correctly concluded that, given the circumstances of the case, the complainant was raped, as defined in the Sexual Offences Act. This finding is supported by the objective evidence of the clefts around the hymen of the complainant. In my view the trial court was also correct in finding that the appellant is indeed the perpetrator of the rape of the complainant. The discrepancies or contradictions were correctly treated by the trial court as being of such a nature that they do not cast doubt on whether the complainant was raped by the appellant. I am unable to fault the reasoning of the magistrate in respect of the guilt of the appellant in this matter, and accordingly find no reason to interfere with the conviction in this matter.

[10] The case of **S v Singh 1975(1) SA 227 (N)** sets out how to approach the evidence where the state and defence versions differ from each other. The court said:

“.... it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to

the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses”.

I am therefore of the view that the trial court did conduct an examination of the probabilities, and the merits and demerits of the matter in arriving at the conclusion it did.

## **ORDER**

[11] In the circumstances, the following order is made:

11.1 The appeal against the conviction is dismissed

11.2 The conviction and sentence are confirmed

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**S. NAIDOO, J**

I agree

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**P MOLITSOANE J**

On behalf of Appellant:

Instructed by:

Adv. S Kruger

The Justice Centre

Bloemfontein

On behalf of Respondent:

Instructed by:

Adv. Roothman

The State