



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A48/2014

In the matter between:

TEFO JACKSON THOBELA

Appellant

and

THE STATE

Respondent

CORAM: Van Zyl et Moloi JJ concurring; Daffue J dissenting

HEARD ON: 2 NOVEMBER 2015

DELIVERED ON: 20 OCTOBER 2016

DAFFUE J (dissenting)

I INTRODUCTION

- [1] On 1 June 2002 the appellant was convicted in the Regional Court, Bloemfontein on a charge of raping a 10 year old female complainant whereupon the matter was referred to the High Court for sentencing. On 15 August 2002 Kruger J confirmed the conviction and imposed a sentence of life imprisonment. An application for leave to appeal was dismissed, but leave to appeal was granted many years later by the Supreme Court of Appeal. The features of this appeal are quite unusual and the factual matrix pertaining to the litigation will be dealt with *infra*. It suffices to mention at this stage that we are presently confronted with an appeal against the appellant's conviction and sentence.
- [2] This is a minority judgment. At the time of writing hereof I was not in the privileged position to have read and considered the majority judgment, which as I understand, has not been finalised yet.

II THE FACTUAL MATRIX PERTAINING TO THE LITIGATION

- [3] As mentioned appellant was convicted in the Regional Court on 1 June 2002 and sentenced to life imprisonment in the High Court on 15 August 2002.
- [4] Mr Moeti who appeared for the appellant in the High Court during the sentencing proceedings confirmed that in his opinion the conviction was in order whereupon Kruger J confirmed the conviction and subsequently sentenced appellant as mentioned, having found no compelling and substantial circumstances.

- [5] A year later, on 5 September 2003, appellant applied for leave to appeal which application was dismissed by Kruger J.
- [6] During October 2011 a notice of motion directed to the Registrar of the Supreme Court of Appeal was filed in terms whereof appellant sought condonation as well as leave to appeal against both his conviction and sentence. He apparently also applied for leave to adduce further evidence, although it is not clear from the record whether a formal application in this regard was ever filed. I accept that the judges of the Supreme Court of Appeal, Lewis and Salduker JJA, who considered the application for leave to appeal, were placed in possession of an affidavit of the complainant disavowing her *viva voce* evidence in the Regional Court.
- [7] On 28 January 2014 appellant was granted leave to appeal against his conviction and sentence to the full court of the Free State High Court. Appellant was also given leave to adduce further evidence on appeal unless the state objected within 21 days of the date of the order. No objection was apparently forthcoming.
- [8] On 23 February 2015 Rampai, Van Zyl and Moloi JJ, sitting as a full court of this division, remitted the matter to the trial court with directions pertaining to the receipt of further evidence, to record its findings and to thereafter refer the matter back to the High Court. In the meanwhile and at a date unknown to me, appellant was granted bail pending finalisation of the appeal.

- [9] On 29 April 2015 further evidence was indeed led in the Regional Court. Complainant was the only witness called to testify. The trial court thoroughly considered the new evidence, referred to various improbabilities and found that the complainant's new version could not be regarded as credible.
- [10] On 2 November 2015 the appeal was again heard by the full court of this division, now consisting of Van Zyl, and Moloi JJ and myself.

III EVALUATION OF THE COURT A QUO'S JUDGMENT

- [11] It is an established principle that where an appeal is lodged against a trial court's findings of fact the court of appeal must take into account that that court was in a more favourable position than itself to form a judgment. Even when inferences from proven facts are in issue the court *a quo* may also be in a more favourable position than the court of appeal because it is better able to judge what is probable or improbable in the light of its observations of witnesses who have appeared before it. Therefore if there are no misdirections on fact a court of appeal assumes that the court *a quo*'s findings are correct and will accept these findings unless it is convinced that these are wrong. See **R v Dhlumayo and Another** 1948 (2) SA 677 (AD) at 705 to 706. Therefore in order to interfere with the court *a quo*'s judgment it has to be established that there were misdirections of fact, either where reasons on their face are unsatisfactory or where the record shows them to such. See also **S v Monyane**

and Others 2008 (1) SACR 543 (SCA) at para [15] where the SCA stated that it is only in exceptional cases that it would be entitled to interfere with the trial court's evaluation of oral evidence.

- [12] I accept that the advantages which a trial court enjoys should not be over-emphasised "lest the appellant's right to appeal becomes illusory", as mentioned in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 2000 (1) SA 1 (CC) at para [79] and the CC continued to state that the truthfulness or untruthfulness of a witness can rarely be determined by considering demeanour alone without regard to other factors including, especially, the probabilities. The court proceeded as follows in the aforementioned paragraph "... A further and closely related danger is the implicit assumption, in deferring to the trier of fact's findings on demeanour, that all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of the trier of fact."
- [13] It is acceptable in evaluating the evidence in totality to consider the inherent probabilities and the following *dictum* by Heher AJA as he then was in **S v Chabalala** 2003 (1) SACR 134 (SCA) at para [15] is apposite: "The correct approach is to weigh up all the elements which point toward 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."

- [14] The accused's version cannot be rejected merely because it is improbable. It can only be rejected on the basis of the inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. See **S v Shackell** 2001 (2) SACR 185 (SCA) at para [30] and **S v Van der Meyden** 1991 (1) SACR 447 (WLD) at 449J – 450B.
- [15] Section 208 of the Criminal Procedure Act, 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. When it comes to the consideration of the credibility of a single witness a trial court should weigh the evidence of the single witness and consider its merits and having done so, should decide whether it is satisfied that the truth has been told despite any shortcomings or defects in the evidence. See **S v Sauls** 1981 (3) SA 172 (AD) at 189E-G. *In casu* the complainant is not only a single witness, but also a young child. The power of suggestion by her mother must also be considered carefully.
- [16] The legal and judicial process must always be child-sensitive and courts are obliged to give consideration to the effect that their decisions will have on the rights and interests of the child. See **Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others** 2009 (4) SA 222 (CC) at para [74]. This *dictum* does obviously not dictate that children's evidence should always be accepted in a court of law. In a recent judgment, **Mocumi v The State** (323/2015)

[2015] ZASCA 201 (2 December 2015), Navsa JA, writing for the majority, referred with approval in para [36] to **S v Jackson** 1998 (1) SACR 470 (SCA) at 475e-g wherein the SCA found that the cautionary rule in sexual assault cases was based on an irrational and out-dated perception and particularly the following *dictum*: “The evidence in a particular case may call for a cautionary approach, but it is a far cry from the application of a general cautionary rule”. Navsa JA continued at paragraph [37] of the judgment as follows:

“One must necessarily guard against being too readily critical of child witnesses and, at the same time, avoid too readily excusing material shortcomings in the State’s case.”

Eventually the majority found in **Mocumi** that there were material inconsistencies and contradictions that impacted on the strength of the State’s case and concluded in paragraph [58] as follows:

“I am willing to accept that one or two shortcomings in the evidence of the complainant might be expected and forgiven. However, the lengthy catalogue of materially unsatisfactory aspects referred to above must redound to the benefit of the complainant. They cannot be replaced with the catalogue of excuses.”

- [17] The complainant was 10 years old when she was allegedly raped and testified during the trial just after turning 11 years. The court *a quo* dealt with the inconsistencies in her evidence but found that there was sufficient objective evidence which corroborated her version. Her version was not only supported by the evidence of her mother, but also Dr de Wit who examined her the following

day and even the witness of the accused, Mr Eric Louw. According to the court *a quo* the complainant had no reason to falsely fabricate her version that she had been raped by the appellant, bearing in mind ample proof based on the probabilities that she had indeed been raped if the evidence of the complainant's mother and the medical doctor are accepted. The evidence of appellant, on the other hand, was found to be not reasonably possibly true.

- [18] I am satisfied that the inconsistencies in the evidence of the complainant pertaining to when the 70 cents was handed to her, either before or after the rape, and the manner in which appellant kept her mouth closed with his hands, are indeed shortcomings in her evidence that might be expected and forgiven. Her evidence was not of such a poor quality as that of the complainant in **Mocumi** *loc cit.* It is common cause that she was in the presence of appellant on Sunday evening, 17 December 2000 and that shortly thereafter, her mother detected blood on her clothing and blood running down from her private parts down her thigh. The mother confirmed that she was in possession of 70 cents which was handed to the SAPS. Complainant was taken to the SAPS immediately that evening after she had admitted being raped by appellant. I accept that complainant was threatened with arrest if she did not speak the truth, but even so, there was no reason for her to incriminate appellant in circumstances where she might have merely replied that her rapist was unknown to her or could not be identified.

- [19] Complainant's evidence that she was raped in the street is not peculiar. It was already after sunset on the State's version which was not put in dispute when the State witnesses testified and there is no evidence as to the nature of the area where the incident occurred. There was never any uncertainty as to the identity of the rapist as appellant is a close relative and well known to her. Appellant was the one that walked with her the particular evening and the State's version as to from which particular house is far more probable than the long-winded version presented by appellant. The fact that there might be people around in the street is a neutral factor, bearing in mind the lack of evidence pertaining to visibility, the particular area and the distance between such people and the appellant and the complainant.
- [20] Dr De Wit examined complainant and appellant the next day. He was convinced that appellant was suffering from gonorrhoea. He detected semen-like fluid in and around complainant's private parts of which he also took swaps. He noticed a fresh tear at the six o' clock position of complainant's vagina as well as bruises and tenderness. He had no doubt that recent vaginal penetration had occurred.
- [21] The evidence of inspector Amanda van Wyk of the SAPS, a forensic analyst specialising in DNA analyses testified as well. It is clear from her evidence and the reports handed in as exhibits that no male genetic material could be found on the samples received and examined by her. She mentioned several factors that could have had an effect of the absence of male DNA, e.g.

insufficient spermatozoa, dilution of spermatozoa by blood or vaginal fluids, or the DNA could be broken down as a result of bacterial diseases. In this regard it should be mentioned that Dr De Wit was of the view that appellant suffered from a bacterial disease and that he had infected complainant during sexual intercourse. The fact of the matter is that the evidence of the inspector is neutral.

[22] Appellant was represented by an attorney during the trial until the point where his mandate was terminated just after appellant's testimony. All State witnesses were thoroughly cross-examined by the attorney. It was never put to complainant's mother that she had a vendetta against appellant and that she had even falsely accused him previously of trying to rape her in a toilet. This is a serious allegation and in my view appellant would have informed his attorney about this when he instructed him, and furthermore, if such instructions were in fact given, the attorney would in all probabilities put this version to the mother. Bearing in mind the case law referred to above I am satisfied that the court *a quo* properly considered the totality of the evidence, the probabilities and the improbabilities, the onus of proof and the cautionary rule. It correctly came to the conclusion that the State had proven its case beyond reasonable doubt.

[23] I have considered the evidence of complainant some thirteen years after the initial trial and at a stage when she was 23 years old. It is ironic that she never ever disavowed her evidence for more than a decade. She had to be confronted by appellant indirectly when he was serving his sentence. It is also ironic that

appellant made his move only once complainant's mother had passed on. Two social workers visited complainant on 18 December 2013 whereupon "(m)iss M. (the complainant) wrote a statement confessing that our client, Jackson Thobela did not rape her as a child back in the years". (emphasis added). It is also clear from the complainant's new version that appellant called her grandmother "(a)sking my grandmother to tell me to tell the truth that he had never raped me."

- [24] Complainant testified in 2015 "that nothing happened on that particular day." (17 December 2000 – the day of the incident). When confronted with the evidence of Dr de Wit about vaginal penetration she testified as follows: "But there was no one who had sexual intercourse with me." She then came up with the following excuse when confronted with the doctor's version that he found evidence of a venereal disease at the time: "Maybe it is when we are growing up, when we were busy playing pophuis (According to possibly the interpreter who intervened, pophuis is when you are playing when we then live in small houses whereby you (indistinct) there is the father and there is a mother or playing husband wife. That is the way of play." Later on she said that they played "pophuis" a lot with children of different ages and the following questions and answers should be recorded as well: "Do I understand you the playing of this house stopped long before your mother told you to falsely implicate the applicant of rape?... We didn't play." Later on the following is recorded relating to the absence of an explanation in respect of the vaginal injuries: "Just furthermore, it was fresh tears found, not old injuries, fresh injuries – But the applicant didn't do anything to me.

But who then did it to you? "No one. It was during the time when we were playing child games."

In 2015 complainant accused her mother of lying about the 70 cents which she had in her possession and she also disavowed her own version that she had obtained it from appellant. She blamed her mother who had passed on since as the one who instigated her to inform the police that appellant gave her the money and that he raped her.

[25] Having read the court *a quo*'s findings pertaining to the new evidence and having considered the old and new evidence, I am satisfied that the court *a quo*'s findings are correct. Unlike the guarantees found in the form of objective medical evidence corroborating complainant's initial version, her new evidence is highly improbable, far-fetched and in direct contrast with the uncontested medical evidence. The only reasonable deduction that can be made from the record is that pressure was put on her by appellant indirectly, the two social workers that visited her on behalf of their so-called client, as well as her grandmother in order to ensure that a close relative was saved from further incarceration. In the process a blame game had to be played in order to incriminate complainant's deceased mother.

[26] The appeal against conviction should be dismissed.

IV THE SENTENCE OF LIFE IMPRISONMENT

[27] The appellant was sentenced to life imprisonment in terms of the provisions of s 51(1) read with Part 1 of Schedule II of the Criminal Law Amendment Act, 105 of 1997. The prescribed minimum sentence for the rape of complainant, a ten year old girl

at the time and thus under the age of 16, is life imprisonment. The appellant is not complainant's father, but apparently a close relative. It might therefore be argued that the judgment of the Supreme Court of Appeal in **MDT v S** (548/2013) [2014] ZASCA 15 (20 March 2014) at paragraph [6] where it found that there could be nothing more heinous than the rape of a child by a father, is not directly in point. See also the remarks of Cameron JA in **S v Abrahams** 2002 (1) SACR 116 (SCA) at paragraphs [17] – [23].

[28] In **S v PB** 2013 (2) SACR 533 (SCA), the Supreme Court of Appeal emphasised in paragraph [20] that prescribed minimum sentences should not be departed from lightly or for flimsy reasons. The court refused to interfere with the sentence of life imprisonment imposed on a father who had raped his 12 year old daughter. As mentioned in paragraph [7] of **MDT** *loc cit* "child rape is a national scourge that shames us as a nation." The courts have a serious duty to prevent young children from being abused. Sachs, J stated the following in a unanimous judgment of the Constitutional Court in **Bothma v Els** 2010 (2) SA 622 (CC) at paragraph [47]: "Child rape is an especially egregious form of personal violation By its very nature it is frequently characterised by secrecy and denial. There is accordingly a special public interest in taking action to discourage and prevent rape of children. Because it often takes place behind closed doors and is committed by a person in a position of authority over the child, the result is the silencing of the victim, coupled with difficulty in obtaining eyewitness corroboration."

[29] The determination of a sentence in a criminal case is pre-eminently a matter for the discretion of the trial court. In

exercising this function the trial court has a wide discretion in deciding which factors should be allowed to influence the court in determining the measure of punishment and in determining the value to attach to each factor taken into account. A mere misdirection is not by itself sufficient to entitle a court of appeal to interfere with the sentence as the misdirection must be of such a degree of seriousness that it shows that the court did not exercise its discretion at all or exercise it improperly or unreasonably. See **S v Kibido** 1998 (2) SACR 213 (SCA) at 216g – j. In *casu* and in accordance with appropriate legislation at the time, the Regional Court could not impose sentence and had to refer the matter to the High Court, but the principles remain the same.

- [30] A court of appeal will not alter a sentence imposed by the trial court, unless it is found that no reasonable person ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial court has not exercised its discretion properly. See **S v Fhetani** 2007 (2) SACR 590 (SCA) at para [5], **Director of Public Prosecutions KwaZulu Natal v P** 2006 (1) SACR 243 (SCA) at 254c-f and **S v Boogaards** 2013 (1) SACR 1 (CC) at para [41].

- [31] Kruger J concluded pertaining to sentence as follows: “This was a rape of a 10 year old girl who was traumatised and injured by a person to whom she stood in a relationship of trust, who was over the age of 30, had previously clashed with the law and showed no remorse at all. In my opinion

there are no substantial and compelling circumstances to justify the imposition of a lesser sentence.”

[32] In my view the court *a quo* correctly found no substantial and compelling circumstances and consequently the appeal against sentence should be dismissed as well.

V CONCLUSION

[33] I would have made the following order:

1. The appellant’s appeal against conviction and sentence is dismissed.

J.P. DAFFUE, J

MOLOI J, (Van Zyl J, concurring)

[1] I had the privilege of reading the judgment of Daffue J and agree with the factual matrix sketched by him and in part with the evaluation of the trial court’s judgment. The extend to which I do not agree with him will become clear hereunder.

- [2] Already on 23 February 2015 when this matter served before Rampai, Van Zyl JJ and myself, I held the view that the facts on which the conviction was based were not correct and myself and Van Zyl, J held the view that the appellant ought to succeed in his appeal. Now that new and further evidence has been led I am not persuaded to change that stance.
- [3] The evidence of the complainant was that the appellant took her from where she was playing with her sister. The appellant was going to look for change. She said the appellant was involved in a fight with a certain woman. She did not go away but waited at the scene. She was even asked by some women why she was waiting there and told them she was waiting for the appellant. The appellant had given her 70c and would still get a further amount of R1-00 for her and R5-00 for her mother. It is not clear when the appellant gave her the 70c i.e. whether it was before or after she was sexually assaulted. At an unclear stage the complainant was waiting at Baby's place and did not run away homewards because the sexual assault had taken place. She remained at Baby's place because she was not scared as she did not think she could be sexually assaulted again. In the next breath she remained there despite her realisation she could again be sexually assaulted.

What stage was this is not clear. When asked why she remained on the scene she said she could not go home because the appellant had warned her that her mother would fight with him if she must go home without him as something bad could happen to her and he would be held responsible for that. Fact is, however, at a stage she walked by herself to the grandmother's place.

- [4] The cautionary rule against the evidence of children is to guard against the influence that may distort such evidence as a child is susceptible to manipulation by an adult. This, however, does not mean that logic and the truth must be sacrificed: Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others 2009 (4) SA 222 (CC). It is true that the courts should sympathise with a child witness but this should not be seen as a reason to ignore "*material shortcomings*" in the child's evidence: Mocumi v The State (323)/2015 [2015] ZASCA 201 (2 December 2015). The facts of the case above are such that one cannot determine at which point the sexual act with the complainant took place and that is vital.
- [5] What happened when the complainant got to her grandmother's place is causing more problems in comprehending the

complainant's evidence. When the complainant arrived, the first thing the grandmother asked her was what had happened as she was crying. She would not tell. Later the mother came and asked her the same question. She still would not tell. The mother then saw a blood spot at the back of her dress and some blood was running down her legs. The grandmother did not tell about this. Sara Motseki and other people were there. Only when a stranger, one Butinyana, threatened the complainant with arrest, did she explain that the appellant gave her the 70c and warned her not to tell anyone failing which he (appellant) would kill her. The complainant herself, did not testify about her crying nor the blood spot on the back of the dress nor the blood running down her legs. There is no evidence that the grandmother who saw the complainant first noticed the blood on the complainant's dress nor on her legs.

- [6] The matter was reported to the police immediately i.e on the 17th December 2000. The following day the complainant was taken to Dr De Witt for examination. The doctor took secretion from the complainant's vagina which "*looked like*" semen and noticed a tear in her hymen at 6'o'clock. The semen was smelling of gonorrhea and was sent for DNA analysis, Dr de Witt examined the appellant

as well and discovered he had gonorrhea for which he treated him. Dr de Witt said nothing about the blood-stained dress nor the blood down the complainant's legs. Dr de Witt treated many cases of gonorrhea in that district. Amanda van Wyk attached to the police forensic laboratory analysed the specimen taken by Dr de Witt. She could not find any male DNA in it and that could be attributable to various factors which she enumerated. Only when asked by the court she said the presence of gonorrhea is definitely going to kill the spermatozoa in the sample. This was not one of the nine (9) factors she mentioned as possible causes for the absence of male DNA in a sample. In addition Van Wyk did not perform microscopic examination of the sample to determine if it contained semen.

- [7] It is settled law that the evidence of a child must be weighed with caution not only because she is a child as in this case, but importantly because she was a single witness in as far as the sexual assault is concerned: R v Manda 1951 (3) SA 158 (A) at 163 C-E. It is trite that the State must prove its case beyond a reasonable doubt to found a conviction. Brand AJA expressed this principle as follows in S v Shackell 2001 (4) SA 1 (SCA) at para. 30:

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

- [8] In evaluating the case all the evidence must be considered as a unit: S v Trainor 2003 (1) SACR 35 (SCA) para 9. The complainant waited where she was taken to by the appellant all by herself on numerous occasions – when the appellant was fighting a woman, and when the appellant was at Baby’s place. At what stage and where was she raped by the appellant remains a mystery. The complainant at a stage went alone to her grandmother’s place. How she went there following which route, whether she met other people on route is unknown. When she got to her grandmother’s place, no blood stain was seen by her grandmother, the first

person she met. No evidence of blood running down her legs was presented until the mother arrived later. When the complainant arrived at her grandmother's place, she was crying but would not tell what happened until she was threatened with arrest. Not the grandmother nor the mother inspected her to see where the blood came from. The blood that stained her dress and the blood that ran down her legs was not seen by the doctor who examined her and found "*semen like*" stuff in her vagina, suggesting that she had not had a bath as the matter was reported to the police the same night and she must have been advised not to wash herself before the doctor's examination. Whether the blood have flowed from the little tear in her hymen is not explained. When she was confronted at the grandmother's place the appellant was not present and could not kill her as she explained and she was crying. The appellant's version is denial of raping the complainant. The appellant confirms having taken the complainant along in his search for change and confirms at times he was not in the presence of the complainant and cannot say what happened then. The appellant denied he had gonorrhoea when examined by Dr de Witt. No gonorrhoea was found or tested for when the DNA tests were conducted. No positive DNA results emanated from the testing of the samples analysed.

- [9] The trial court found it strange that the appellant could not state who then raped the complainant. The court rejected the appellant's version on two grounds: firstly, the appellant could not explain why the complainant would falsely incriminate him and states:

“Die beskuldigde kan egter geen rede hoegenaand verstrek waarom die klaagster uit haarself vir hom, wie sy goed mee oor die weg gekom het en by wie sy dikwels geld gekry het, valslik sou wil inkrimineer nie”... Voorts sou dit moet beteken dat sy opsetlik vir beskuldigde in die plek van ‘n ander impliseer. Die hof kan nie aanvaar dat hierdie jong kind in staat sou wees tot so ‘n fabrikasie. Daar is voorts ook geen rede vir haar daartoe nie. Die beskuldigde se bewerings van ‘n fabrikasie is dus nie net hoogs onwaarskynlik nie, maar om die minste te se belaglik.”
P.114 of the record.

Secondly, the court rejected the appellant's version because it is not reasonably possibly true and states at p 115-116

“Die hof vewerp ook die beskuldigde se weergawe as synde nie redelik moontlik waar nie, in die lig van totaliteit van die getuienis asook die riglyne neergele in S v Van der Meyden 1991 (1) SASV 447 (W)”

- [10] In my view both the grounds for the rejection of the appellant's version were based on wrong interpretation of the principles as set

out in Van der Meyden's and several other decisions before and after it. The starting point is that it is the appellant's case that the complainant's mother was the instigator of the prosecution against him. In addition, there is no onus on the accused to point out who otherwise raped the complainant if not himself. Nugent J, (as he then was) stated the following in Van der Meyden at 448f-g:

"The onus of proof in a criminal case is discharged by the state if the evidence established the guilt of the accused beyond reasonable ground. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. These are not separate and independent tests but the expression of the same test when viewed from the opposite perspective."

In R v Difford 1937 AD 370 at 373 it was stated:

"...no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable the court is not entitled to convict unless it is satisfied, not only that explanation is improbable, but that beyond any reasonable doubt, it is false. If there is any reasonable possibility of his explanation being true then he is entitled to his acquittal."

See S v Shackell above. In R v M 1946 AD 1023 at 1027 the following is found:

“... the court does not have to believe the defence story, still less does it have to believe it in all its details, it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.”

From the above it is clear that both the grounds on which the trial court rejected the appellant's version were erroneously applied. The appellant had no onus to point out who must have raped the complainant. It is clear also that he cannot be convicted if his version is not reasonably possibly true. His version must be false to be rejected. If it is reasonably possibly true, then, in that event, he is entitled to be acquitted.

- [11] The new and further evidence totally recants the earlier evidence. The complainant testified that her mother, who has since passed away, compelled her to incriminate the appellant. Her grandmother exonerates the appellant totally from raping her because her grandmother asked her to go tell the truth. She denied every aspect of her mother's evidence in earlier proceedings. She also denied the evidence of the doctor who examined her a day after the alleged rape. She was then 23 when she gave further and new

evidence. The trial court found that the complainant evidence did not impress and “...casts a shadow over her credibility”. My assessment of her latter evidence is that it is clear and direct and contradicts her earlier evidence on the vast material aspects of the case, viz the alleged rape. In the light of what I said above I find this new evidence to be neutral and I cannot find that she committed perjury at any stage. R v Van Heerden & Another 1956 (1) SA 366 (A) at 372 B.

- [12] My brother Daffue J found certain aspects of the complainant’s evidence strange and on that score rejected her latter evidence. He found it strange for instance, that the social workers in the employ of a government department when interviewing the complainant before the new evidence, referred to the appellant as a “*client*”, and that there is a connotation that they favoured him. In many instances I have heard social workers in government service as well as other public servants referring to people they serve as clients. The sense in which the word “*client*” is used in that context has no commercial connotations but simply refers to the person on whose behalf a service is rendered e.g. applying for a passport at Home Affairs or even receiving payment for rates and taxes or other municipal services. My brother Daffue J also

draws certain inferences as to putting pressure on the complainant to save the appellant from incarceration by lying in her subsequent evidence. This is based on the grandmother asking the complainant to go tell the truth in court. He also finds that it was clandestinely agreed to put all the blame for evidence leading to the appellant's conviction on the complainant's late mother as she now cannot dispute that. I could, however, not find evidence on the strength of which such inferences can be based. It is trite that inferences can justifiably be drawn but there must be evidence to support them. In Caswell v Powell Duffry Associated Collieries Ltd 3 All E.R. (1939) 722 at p733 the following was stated:

"Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish... But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

See also R v Blom 1939 AD 188; S v Sauls and Others 1981(3) SA 172 (A) at 182 G-H; S v Reddy 1996 (2) SACR 1 (A).

[13] In conclusion I would find that the appeal must succeed as the trial court must have had a doubt whether the appellant's guilt was proved beyond a reasonable. The principle is if there is a doubt as to the guilt of the accused, never mind how slight, the accused must be given the benefit thereof and be acquitted.

[14] I would consequently make the following order:

The appeal succeeds and the conviction and sentence are set aside.

MOLOI, J

I concur

MOLOI, J

On behalf of the appellant:	Adv. L. N. Tshabalala Instructed by: Justice Centre BLOEMFONTEIN
-----------------------------	---

On behalf of the respondent:	Adv. R. Hoffman Instructed by: Director: Public Prosecution
------------------------------	---

BLOEMFONTEIN