

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal number: A165/2012

In the appeal between:-

GERHARDUS IGNATIUS POTGIETER

Appellant

and

THE STATE

Respondent

JUDGMENT BY: RAMPAL, AJP *et* MOLOI, J *et* PHALATSI, AJ

HEARD ON: 19 AUGUST 2013

DELIVERED ON: 24 OCTOBER 2013

- [1] This is an appeal. The appellant was aggrieved by his conviction and sentence. He was found guilty of rape and sentenced to eight years imprisonment in the Bloemfontein Regional Court. The respondent opposes the appeal.
- [2] The charge against the appellant was one of rape. The state alleged that he unlawfully and intentionally committed an act of sexual penetration with the complainant, one Ms Klaas, an adult female by penetrating her vaginally with his fingers without her consent; that he committed a crime in Bloemfontein on 11 November 2009 and that he did so in contravention of section 3 of the Sexual Offences and Related

Matters Amendment Act, 32 of 2007 read with specified provisions thereof as well as those other relevant statutes.

- [3] He was arrested on 11 November 2009. He was released on R1 000,00 bail pending his trial. His trial commenced in the Bloemfontein Regional Court on 23 July 2010. He pleaded not guilty before Ms R.M. Sepato, the regional magistrate. He enjoyed legal representation throughout his trial. During his trial he was represented by Advocate Groenewald, Attorney S. Kambi and Adv I.J. Bezuidenhout. Those lawyers represented him at different stages of his trial. The state was initially represented by Ms L.M. Lekatsa, Mr T.C. Namola and Ms M. G. Tau.
- [4] Notwithstanding his plea of not guilty the appellant was eventually found guilty as charged on 13 June 2011.
- [5] About five weeks later, on 21 July 2011, to be precise, he was sentenced to eight years imprisonment.
- [6] On 8 September 2011 the appellant unsuccessfully applied for leave to appeal against the conviction and the sentence.
- [7] The appellant now comes before us with the leave of this court. The petition order was granted on 23 April 2012 by Van der Merwe J *et* Phalatsi AJ.
- [8] The version of the prosecution was narrated by three witnesses:

- Ms Nonqceba Magdeline Klaas – the victim;
- Ms Thondai Joyce Mpahlo – the intermediary between the victim and the appellant; and
- Detective-Constable Sello Jonas Mosoeu – the investigating officer.

[9] The version of the defence was narrated by two witnesses, namely:

- Mr Gerhardus Ignatius Pogieter – the appellant; and
- Ms Michelle Lorraine Potgieter – the appellant's ex-wife.

[10] The verdict of the *court a quo* was that the appellant was guilty of raping the victim. The trial magistrate found that:

“The complainant herein impress (sic) me as an honest witness. I do not find any reason to doubt her honesty herein. I find that I can rely on her. You did penetrate her vagina with your fingers.”

[11] The appellant's appeal against the conviction was based on many grounds. Among others, the grounds relied upon were: that the court *a quo* erred in convicting the appellant because the trial magistrate did not expressly find that his version was not reasonably or possibly true; that the court *a quo* erred in rejecting the evidence of Ms Potgieter which substantiated that of the appellant in material respects; that the court *a quo* erred in overlooking material contradictions between the evidence of the complainant on the one hand and those of the other two prosecution witnesses on the other; that the court *a quo* erred in underplaying the material contradictions in the complainant's

own evidence; that the court *a quo* did not approach the evidence of the complainant as a single witness with necessary caution; and that the court *a quo* erred in finding that the evidence tendered by the prosecution proved the guilt of the appellant beyond reasonable doubt.

[12] The *onus* rests on the respondent to prove the guilt of the appellant beyond reasonable doubt – **S v Phallo** 1999 (2) SACR 558 (A). No *onus* rests on the appellant to convince the court of his innocence. A court is not entitled to convict unless it is satisfied not only that the accused's explanation is improbable but that it is beyond reasonable doubt false – **R v Difford** 1937 AD 370 on 373.

[13] The test is whether there is a reasonable possibility that the accused's version may be true – **S v V** 2000 (1) SACR 435 (SCA).

In **S v Shackell** 2001 (4) SACR 1 (SCA) at para [30] the court said the following about probabilities:

“... Of course it is permissible to test the accused's 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.”

[14] The author A Kruger: Hiemstra, 2009: p559 states that in a case where there were no eye-witnesses to the incident the court has to look for other credible evidence that tends to make

the complainant's version more probable than that of the accused. Conversely, the court has to look for other credible evidence that tends to make the accused's version less probable than that of the victims.

“Wat vereis word is geloofwaardige getuienis wat die klaagster se weergawe meer waarskynlik maak en die beskuldigde se weergawe minder waarskynlik.”

[15] **S v Chabalala** 2003 (1) SACR 134 (SCA) para [15]:

“The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.”

[16] The evidence showed that the appellant lived on a plot at Lakeview east of Bloemfontein. His family of four had no domestic worker. The family had a gardener. On Tuesday, 10 November 2009, the appellant and his gardener drove to Bergman Square to look for a domestic worker. Ms T.J. Mpahlo was interested. The appellant picked her up and drove back to his plot with her and the gardener who had introduced them to each other. On the plot Ms Mpahlo met the appellant's wife, Ms Potgieter. Ms Potgieter told her that she wanted someone who could work a five day week. Since Ms Mpahlo was already working elsewhere for three days per week, she

was unable to accept the offer of employment as a domestic worker to the appellant's family. All the same she casually worked for half-day on that particular day for the appellant's family. She earned R40,00. She undertook to look for someone at the request of the appellant's wife who would be interested to work for five days per week.

[17] In the evening of the same day Ms Mpahlo informed the complainant, Ms Klaas, about the request of the appellant's wife. The complainant became interested. The two ladies made suitable arrangements for the complainant to meet her prospective employer.

[18] The next morning, Wednesday, 11 November 2009, the complainant and the appellant met outside Ms Mpahlo's residence. From there they drove together from Bergman to Lakeview. Ms Mpahlo later heard from the complainant's husband about the rape incident. She and the complainant did not subsequently meet again.

[19] The evidence of the complainant was that on her arrival at the appellant's house she briefly met the appellant's wife. Shortly after their meeting, the appellant's wife drove away to take the children to school. She stated that the appellant remained behind with her in the house. She was busy washing dishes in the kitchen when the nude appellant entered the kitchen. She was so shocked she could hardly say or do anything when he suggestively wrapped his arms around her from behind. From the kitchen he took her to the bedroom, undressed her, put her

on the bed lied between her legs, inserted two fingers of his one hand into her vagina while at the same time he was using his other hand to sexually stimulate himself in order to get his penis erect. In the process of fiddling with his and her genitalia, he became so sexually aroused that he ejaculated on her belly. She was crying during the sexual ordeal.

[20] When the appellant had gratified his sexual desire, he wiped off his semen from her belly with a towel. He then washed the towel by means of a washing machine. After the incident she continued to work because the gates were locked and there were vicious dogs on the premises of which she was scared. She sent a “please call me” sms to her husband but he did not immediately respond. A few hours later, the appellant allowed her to leave. She tearfully left the appellant’s house before his wife had come back. He escorted her to the last gate to see her off. On the way he asked her about her previous employment. He asked her not to be angry and to come back the next day.

[21] She made the first report about the rape incident to her husband. Subsequent to that she reported the matter to the police. The witness’s statement was taken down by Det-Const S J Mosoeu – *vide* exhibit “a”. She spoke isiXhosa and the investigating officer wrote down her statement in English. The appellant was arrested in the evening on the same day.

[22] The investigating officer met the complainant at Bloemspruit Police Station on Wednesday, 11 November 2009. She was

emotionally distressed. She was still tearful. He gave her 15 minutes to calm down before he could start to interview her. His evidence was that he accurately took her statement down. He read it back to her from where he took her to Tshepong Centre where Sr Seekoei, the forensic nurse examined her – *vide* exhibit “b”. From the centre the victim led him to the scene, in other words, appellant’s place of residence. She pointed the appellant out as the culprit. He then and there arrested him. He replied that the complainant told him every detail contained in her statement. He said he was not to blame for the discrepancies in the statement.

- [23] The version of the appellant was that his wife could not cope with the huge pile of family washing. She requested him to get a casual domestic worker to help her reduce the huge pile of washing workload. He lived on a plot in Eeufees Road at Lakeview. With the aide of his gardener he drove to Khayelitsha. About 4km from his plot he met the second prosecution witness. He took the witness home. His wife negotiated the deal with the witness. She agreed to help for one day. The two ladies agreed that the witness would do the washing; that she would also do the ironing, that she immediately started at or about midday; and that she could earn R40,00. His wife wanted the witness to return the next day to work for two more days, in order to finish all the washing and ironing, but the witness could not accede to that request. However she promised to find someone. He and the witness made arrangements concerning the possible and temporary worker. He then took the witness back.

[24] The next day he drove back to Khayelitsha where he met the complainant at or about 06:00. He picked her up and drove back to Lakeview. His wife was running late, she had a meeting to attend in the city, but first had to drop off one child at school at Fichardtpark and another at a day-care centre. He helped his wife to get the children ready. While they were doing so he asked the complainant to wash the dishes. She was still busy with the dishes when his wife and the children drove off. But before she left she told the complainant that she would talk to her at 14:00.

[25] When the complainant was done with the dishes he showed her the iron, the basket of dried things she had to iron, the washing machine and the washing line. He told her that his wife would probably pay her R70,00 per day for both washing and house cleaning. The complainant, he testified, wasted no time to reject the rate of pay and indicated that she would accept nothing less than R180,00 per day. He told her her expectations were unrealistic and that she should rather go. He called his wife and told her. She told him to ask the complainant to wait for her.

[26] The complainant was not keen to work seriously after the initial talk she had with him about the wages. She begged for food, did some washing and ironed a little. She idled a lot, she just sat and relaxed. He saw her sitting on a garden chair on the veranda most of the time. When he enquired why she was doing nothing, her response was that she was done with the ironing and that she was waiting for the wet goods that were

hanging on the washing line to get dry so that she could start ironing again. He then asked her to start cleaning the house in the meantime. The complainant refused to do any cleaning because, as she said, the money was not enough.

[27] He told the complaint: that he knew her previous employer Leon well; that he did not believe her claim that she left her previous employer because he had assaulted her; and that she must have stolen from her previous employer which was why she was dismissed. As a result of that the complainant became angry and threatens to go to the police. She made a call. After making a call she immediately demanded R70,00 from him. He did not have the money to pay her. In spite of that she refused to wait any longer for his wife. So he let her go. By eleven o'clock she was gone from the plot.

[28] At 19:00 on that very same day, the complainant returned to his plot with the police. The complainant pointed him out to the police. He was really shocked when the investigating officer told him that he was there to arrest him for raping the complainant.

[29] He denied the allegations: that he expressed his amorous interest in the complainant soon after picking her up; that he told the complainant he preferred slender women; that he walked nude into the kitchen; that he seductively caressed her; that he took her to the bedroom; that he inserted his finger in her vagina; that he ejaculated on her belly; that the

complainant was ever in his bedroom; that she ever cleaned the house; and that he negotiated the terms of the agreement.

[30] The appellant's wife testified on his behalf. She corroborated her husband on what happened in their house before she left for work. Her evidence, for obvious reason, was on peripheral and not material issues. She was not present at the critical time of the incidents.

[31] The two versions were mutually irreconcilable. Because they were, we were called upon to carefully examine the evidence in order to ascertain whether or not there were favourable aspects which rendered the complainant's version more probable than that of the appellant. The converse also holds truth. The converse requires that we also ascertain whether the evidence contained unfavourable aspects which rendered her version less probable than the appellant's – Hiemstra, *supra*.

[32] The appellant's version was that he did not rape the complainant and that she falsely accused him. He gave two reasons why he believed she chose to lay a false charge against him, a completely innocent man. The first was that she felt she could not work for a meagre amount of R70,00 wages per day. She reckoned that the money was too little. As a result of that she repudiated the offer.

[33] The complainant denied that money, or rather the wages, had anything to do with the criminal charge of rape that she laid

against the appellant. According to her the appellant's indecent and unlawful actions had everything to do with the criminal charge.

[34] It was undisputed that Ms Mpahlo recruited the complainant at the request of the Potgieters. It was also common cause that she worked for that couple for half a day and that she earned R40,00. She accordingly informed the complainant. However, the evidence of the complainant was slightly different. That difference is of utmost importance. Her evidence was that Ms Mpahlo told her that she would be remunerated at the rate R30,00 per day.

[35] We know that the appellant and the complainant did not discuss details of her wages on the way from her neighbourhood at Bergman to his plot at Lakeview. That was also common cause. But to his plot she willingly went. What emerged from all these undisputed aspects of the evidence was that her expectations were very modest. She went to the interview expecting to earn hardly R40,00 per day. She was prepared to work for 75% of that amount.

[36] Now, it appeared highly improbable to me that a domestic worker who was prepared to work for R30,00 per day would have summarily rejected an offer of R70,00 per day, an amount which was more than double the figure of the wages she realistically expected to earn. That offer was the equivalent of 233% of what she expected to earn. In my view the appellant's claim that the complainant's inflated an

unrealistic demand of R180 per day set the two on the initial course of collision was not only far less improbable than the complainant's version but was inherently untrue. Accordingly I find that money had nothing to do with the complainant's decision to lay the criminal charge against the appellant. There was no such proven ulterior motive.

[37] The appellant also believed that the complainant falsely accused him because he had branded her a thief. Perhaps the appellant's second reason needs to be contextualised. He wanted to know from the complainant where she previously worked and why she left her previous employment. The complainant answered him. However, he disbelieved her explanation as to why her contract of employment was terminated. He told her that her previous employer, one Leon, was too good a shopkeeper to assault his employee as she alleged. He then put it to her that she must have stolen from Leon which was why he dismissed her. Because he accused her of stealing, so he testified, she was so angered that she decided to leave immediately and threatened to lay a criminal charge against him. He told her to please herself. She then went to the police where she concocted a false story against him.

[38] The complainant admitted: that there was some discussion about her previous employment between her and the appellant; that the employment relationship between her and her previous employer soured; that on account of her previous employer's aggressive conduct towards her, she went to the

police and laid a criminal charge against him; and that as a result of her doing so, her previous employer dismissed her. However, she denied: that she had falsely accused her previous employer; that she had stolen anything from his shop; and that she was not a dishonest person as the appellant alleged she was.

[39] The version of the appellant was improbable. He wanted the court to believe that the complainant laid a false charge against him merely because he had branded her a thief. His version failed to impress the court *a quo*. It did not impress me either. The evidence of the complainant was simple. It was not what was said but rather what was done to her that prompted her to go to the police. It was not the anger of being labelled a criminal that prompted her to go to the police. It was the emotional hurt of been sexually degraded, humiliated and objectified that forced her to do so. From the appellant's plot she went home and from there to Bloemspuit Police Centre where she reported the incident. She was so emotionally distressed that she could not immediately explain what was wrong. She was given 15 minutes to calm down. The interview was done by the investigating officer. She tearfully narrated details of the incident to him.

[40] I find it difficult to believe that the complainant behaved in that way merely because the appellant had called her a thief. There was much more to her conduct than that. Her behaviour was an outward manifestation of deep emotional distress. Her obvious emotional distress was, in my view, indicative of

physical sexual abuse rather than mere derogative verbal abuse. It seemed quite unlikely that anger engendered by mere verbal abuse would make a reasonable and normal person to overreact the way the complainant did. Her conduct went far beyond mere anger. It demonstrated the deep and raw scars of her wounded soul – a hurtful invasion of her privacy, violation of her human dignity and an attack of her femininity. Her conduct was precisely consistent with what a reasonable observer would have expected from a woman who had been sexually molested.

[41] I would therefore also reject the appellant's version in this regard. His version was less probable than that of the complainant. I have outlined credible aspects of the evidence to support this conclusion. I am not persuaded that the complainant was actuated by any ulterior motive to falsely implicate the appellant.

[42] The mere fact that the complainant had once laid a criminal charge against her previous employer did not render her evidence against the appellant, as her then employer, suspect. The appellant knew Leon very well but he did not call Leon to say that he was once wrongly arrested and prosecuted on the strength of a false charge laid against him by the very same woman, the complainant. There was no evidence in the court *a quo* that the complainant was discredited and exposed as an untruthful witness and that, as a result of her lies, Leon was wrongly prosecuted, but ultimately acquitted. Therefore, counsel's submission that the court *a quo* should have

considered the possibility of similar fact evidence was devoid of any substance. In this matter there was no sound reason to entertain any fanciful possibility based on similar fact or deceptive pattern laced with false evidence.

[43] The appellant alleged that the complainant demanded R70,00 from him before she left at 11:00. Because he did not have money, he told her to wait for his wife. She was expected to be back home at 14:00 or so. Notwithstanding his explanation and request the angry complainant refused to wait. The complainant's version was that after the incident she decided to quit. She admitted that the appellant had asked her to wait for his wife to take her home. But she was not prepared to wait any longer. He let her go but asked her to come back the next day.

[44] Ms Bezuidenhout submitted that one would not expect a rape perpetrator to ask a rape victim to wait for his wife since giving the victim such an opportunity could entail the risk of having the incident reported to the perpetrator's spouse by the victim. There was no merit in the submission. The request was not necessarily indicative of the appellant's probable innocence as it was argued. Those who are experienced in dealing with rape cases would know that some rape perpetrators violate inmates of their own households, such as nieces, stepdaughters, daughters and even housekeepers in the hope that the victims would not tell because such victims are often economically dependent on their abusive providers or perpetrators.

[45] The complainant denied that before she left, she demanded to be paid. Although she admitted that the appellant indeed asked her to wait for his wife, she denied that the purpose for the waiting had anything to do with the payment of her wages. Her explanation was never disputed while she was still in the witness box. She further averred she was engaged on permanent basis by the appellant. The appellant and his wife tried very hard to persuade the court *a quo* that the complainant was to be engaged, but that she was factually never engaged as a casual domestic worker. The appellant's belated version, which was supported by his ex-wife, was that the couple did not contemplate employing the complainant as a permanent domestic worker. But that version was never put to the complainant, nor was it ever put to Ms Mpahlo.

[46] I am persuaded that the complainant did not do what she did for money. Since she was permanently employed, she did not expect to be paid anything on that first day. It is improbable, therefore, that she would have demanded any payment as the appellant alleged. The suggestion that she laid a false charge against the appellant because he could not pay her the R70,00 she demanded falls to be rejected. The couple's evidence that she was employed on an *ad hoc* basis was therefore untrue. That version could not be reconciled with Ms Mpahlo's evidence which was unchallenged. Her credible evidence materially corroborated the complainant's version on the point.

[47] The complainant was recruited by Ms Mpahlo. She could not be employed by the Potgieters because they did not want a

casual someone. The complainant was recommended because she, unlike Ms Mpahlo, could work a five day week. The appellant's evidence to the contrary was therefore patently false. It was calculated to deceive the court *a quo*. It was a desperate attempt to explain without success, why the complainant unceremoniously left the job she clearly needed.

[48] Ms Bezuidenhout devoted a great deal of time to almost every single unfavourable aspect of the prosecution case. In my view most of the critique was concerned with immaterial aspects of what took place before and after the incident. The exact room where the victim was undressed was cited as one of the examples which indicated that she was not a truthful witness. In paragraph [7] exhibit "a" it was stated that the complainant's dress was left in the kitchen. That, according to counsel, suggested that the undressing took place in the kitchen and not in the bedroom.

[49] The encounter between the appellant and the complainant took place in the kitchen. That kitchen encounter is described in paragraph [6] exhibit "a". In paragraph [6] nothing is said about undressing or a dress. The penetration is described in paragraph [7]. In that paragraph the events in the bedroom are discussed. The word "dress" and not "undressing" as well as the word "kitchen" were somehow uncomfortably squeezed into the first line of paragraph [7] obviously as an afterthought. The statement as a whole was so poorly written and so fraught with errors that the complainant's testimony must, in my view, prevail wherever there is any inconsistency between her

testimony and her police statement – **S v Mafaladiso en Andere** 2003 (1) SACR 583 (SCA).

[50] The investigating officer did not impress me as a witness. He made a long sermon which was not asked for in an effort to convince the court below about his competence as an investigating officer. He was obviously blowing his own trumpet. The complainant's version was that he did not fully concentrate on the interview. She said that her husband even asked him to pay attention to his wife. That request, she said, annoyed the investigating officer so much that he chased her husband out of the consultation room. Moreover, isiXhosa was not his mother-tongue. Therefore, cultural or linguistic barriers might well have had some adverse impact on the interview and ultimately the witness' statement.

[51] Where a police officer, who ordinarily speaks Sesotho, interviews a witness who speaks isiXhosa, records the statement in English, the third language which neither the witness nor the police officer is very conversant with, serious misunderstanding of the facts is bound to occur. We have to be mindful of such cultural differences and the adverse impact it may have on an otherwise credible and reliable witness. Recognising that the truth almost lies beyond linguistic determination, the courts have to be alive and vigilant to such dangers bearing in mind that almost invariably, police officers would seldom acknowledge that they erroneously recorded the conversation.

[52] Whether the appellant inserted one, two or more fingers in the victim's vagina does not really alter the nature of the prohibited criminal conduct. She was adamant that the appellant, without her consent and against her will, undressed her in his house, put her on his bed, sexually imposed himself on her, stroke her exposed breasts, inserted one finger, at least, in her vagina, pleased himself until he ejaculated on her belly. The appellant's denial that the complainant was ever in his bedroom was untrue. Firstly, because the appellant himself testified that he at one stage ordered the complainant to clean the house. Secondly, her evidence that she factually cleaned the house was never challenged. We have to accept, therefore, that she did.

[53] The court *a quo* heard for the first time when the appellant testified that the victim refused to clean the house. Since it was never put to the victim that she did not clean the house the appellant's evidence to the contrary has to be rejected as untrue.

[54] The appellant cannot escape criminal liability or criminal responsibility by shifting the blame to his legal representatives. In any event it would be ridiculous to suggest that the victim cleaned all the rooms save for the appellant's bedroom. The appellant knew that something untoward happened in his bedroom hence his belated denials. I am not persuaded by his belated allegation that the complainant was never there in his bedroom and that she never cleaned his bedroom.

[55] I deem it unnecessary to overburden this judgment with comments on a number of other insignificant collateral matters, including but not limited to the following:

The escorting of the complainant to the washing line; the remarks about slender woman or girlfriend; the so-called bathroom episode; the vicious dogs; and the immaterial contradictions, internal or external, allegedly associated with all those matters. In my view there were no material contradictions to warrant the total repudiation of the complainant's version.

[56] Ms Potgieter gave no direct evidence concerning the incident itself because she was not present. The greatest weakness in her evidence was her apparent lack of objectivity. The evidence portrayed her as a very biased witness who, in spite of the fact that she was not on the scene of the crime, openly stated that the appellant did not do it and that the complainant was a liar. She clearly showed that she would do anything, whatever it takes, including denying the truth, in order to protect her former husband. Her husband, in very racially derogative terms labelled the complainant as a lazy beggar, a thief and a liar. Ms Potgieter agreed with the latter description without any objective facts. An objective and unbiased witness in her position would have said something along the following lines:

“Naturally I want to believe my husband. He says he did not do it. However, because I was not there, I cannot judge him or the complainant – but the court will.”

- [57] Notwithstanding all the discrepancies in the evidence tendered by the prosecution witnesses and all the shortcomings of the judgment by the court *a quo*, I am satisfied that the version of the appellant was not just improbable but that it was beyond reasonable doubt false. It was implicitly rejected, and correctly so, in my view. The mere fact that the court *a quo* did not expressly reject the appellant's version as beyond reasonable doubt false does not mean that the appellant's version was therefore reasonably true. The appellant was not entitled to the benefit of such an omission because a criminal trial is not a game of tennis, and we are not sitting on this appeal bench like umpires in the game of tennis – **Rex v Hepworth** 1928 AD 265 on 277.
- [58] The court *a quo* was alive and mindful of the principle that the evidence of a single witness must be treated with caution. Indeed the court not only warned itself but also treated the evidence of the complainant with caution because the court *a quo* was aware that she was a single witness.
- [59] In my view her evidence was satisfactory in all material respects notwithstanding its imperfections. The law does not require a single witness to give a perfectly flawless account of an incident. All the court *a quo* was required to do, was to be humanly convinced that the truth had been told. The law required nothing more and nothing less – **S v Guess** 1976 (4) SA 715 (AD); **S v Sauls and Others** 1981 (3) SA 172 (AD); **S v Mlati** 1984 (4) SA 629 (AD) at 632F – 635I.

[60] To a very large extent this appeal focused on the defects of the judgment of the court *a quo* rather than the substantive merits of the case against the appellant. I accept that the critique levelled against the court *a quo* was fair in certain respects. However, I was not persuaded that the ultimate conclusion as to the guilt of the appellant was wrong. On the facts, the conclusion was correct in law. In my view, the court *a quo* committed no appealable misdirection as alleged or at all on the question of law or fact. In the absence of any material misdirection no appellate interference would be justified – **S v Francis** 1991 (1) SACR 198 (AD) at 204c - e. I would, therefore, uphold the conviction. As I see it, none of the grounds of the appeal relied upon, can be upheld.

[61] Before I proceed to deal with the appellant's challenge concerning sentence, I have to point out that Ms Bezuidenhout referred us to the decision in **S v Kubeka** 1982 (1) SA 534 (W) at 537F – G. I draw counsel's attention to the subsequent and authoritative decision in **S v Van Aswegen** 2001 (2) SACR 97 (SCA) at p 100 paras [7] and [8] which expressly overruled the **Kubeka** decision as regards the appropriate test. Accordingly that decision and any other decision premised thereon is, with respect, no longer good law.

[62] As regards the sentence the principle is clear and trite. The sentencing of an offender is the business of a trial court. It is the discretionary prerogative of the trial court to sentence an offender. Sitting as we are, in an appellate mode, we cannot interfere with the sentence imposed by the trial court on the

grounds that sitting as a court of first instance, we would have exercised that discretion differently – **S v Salzweden and Others** 1999 (2) SACR 586 (SCA).

[63] In sentencing the appellant the court *a quo* took into account the following circumstances:

The appellant was 45 years of age; he was self-employed; his highest scholastic achievement was N6; he was a divorced father of two minor children; he and his ex-wife were still living together as husband and wife; and he did not enjoy good health.

[64] The court *a quo* also took into account the following aggravating circumstances: the complainant was helpless; she was alone with the appellant in the house; the gates were locked; she was afraid of the appellant's dogs; the appellant threatened to set the dogs on her if she attempted to run away; she was a married woman; she was financially vulnerable; the appellant showed no remorse and he unjustifiably called her a thief, a beggar and a liar. She was literally detained as a captive for a few hours after the rape incident. The appellant exploited her socio-economic plight.

[65] The court *a quo* also took into account the seriousness of the offence as well as the interest of the community. There can be no doubt that the interest of the community require that vulnerable employees be protected against abusive employers and that the pervasive scourge of rape must be arrested and reduced. The underlying purpose of section 51 of the Criminal

Law Amendment Act 105 of 1977 as amended read together section 3 Sexual Offences and Related Matters Act 32 of 2007 is to have the prevalent rape incidents, among other very serious crimes, reduced by preventatively, deterrently and retributively punishing rape offenders.

[66] The court *a quo* found that there were substantial and compelling circumstances which justified the imposition of a sentence less than the prescribed minimum sentence of ten years for a first time rape offender. By virtue of that finding the court *a quo* imposed a sentence two years less than the prescribed minimum sentence. Ms Bezuidenhout submitted that interference with that sentence was justified because the appellant's penetration of the complainant by means of a finger was not as morally blameworthy as penetration by a penis. Counsel submitted that the court *a quo* did not attach sufficient weight to the manner in which rape, in this particular instance, was committed. But Mr Mohlala differed.

[67] The incident of finger rape allegations has become very prevalent particularly in cases involving small children. While the offender's moral blameworthiness is an important factor in the sentencing of an offender, care must be taken not to put too much emphasis on whether or not rape was committed by means of a penis or a finger. Unless we guard against such danger, the very purpose for which the measure was enacted may well be frustrated.

[68] In sentencing the appellant the court *a quo* said:

“Of course I take into account that a penis was not used.”

It is quite clear that the court *a quo* considered that lack of penal penetration and all the health risks associated with it, was one of the factors which substantially compelled deviation from the prescribed minimum sentence of 10 years. In the light of the aforesaid extract it cannot be argued, with conviction, that the trial court underplayed the alleged low moral blameworthiness of the appellant's actions.

[69] On the facts I am not persuaded that the court *a quo* did not attach adequate weight to the moral blameworthiness of the appellant's conduct. In my view that factor was taken into account. It must be borne in mind that the trial court has a discretion to decide which factors to be taken into account and what value must be attached to those factors in the sentencing of an offender – **S v Kibido** 1998 (2) SACR 213 (SCA) at 216g – j. In the circumstances I am not persuaded that the court *a quo* improperly used its discretion in sentencing the appellant. Instead I am persuaded by Mr Mohlala's submission that no case has been made out for any appellate interference.

[70] Accordingly I make the following order:

70.1 The appeal fails in *toto*;

70.2 The conviction and the sentence are confirmed.

M. H. RAMPAI, AJP

I concur.

K.J. MOLOI, J

I concur.

N.W. PHALATSI, AJ

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