

**REPUBLIC OF SOUTH AFRICA**



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

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: YES

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DATE

SIGNATURE

CASE NO: A139/2020

In the matter between:

AARON CHAUKE

APPELLANT

And

THE STATE

RESPONDENT

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JUDGMENT

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## Headnote

Appeal against a conviction of rape of a 14 year old boy and sentence of life imprisonment – evidence in support of allegation of anal penetration received from victim - competence of victim to testify satisfactorily determined by magistrate upon the evidence of a psychologist having regard to s 164 of CPA – corroboration of allegation of rape derived from a report made by the victim to an examining doctor who conducted an examination within hours of the police bringing him from the scene of the alleged rape – being the appellant’s shack, where the appellant and the victim were found in bed together and the victim in tears; from the doctor’s clinical examination revealing signs in anus consistent with recent penetration, and, from a neighbour who heard the victim whimpering in the night and called the police.

*Obiter* (Majele AJ): consideration of the application of S194 of CPA, of international instruments and caselaw in respect of persons with disabilities, of S 34 and S 9 of the Constitution.

On sentence: no misdirection by the magistrate established.

Ordered: the appeal is dismissed and the conviction and sentence confirmed.

## **Coram: Sutherland DJP, Moila and Matjele AJJ**

**Delivered:** This judgment was handed down electronically by circulation to the parties’ representatives via email. The date and time for hand-down is deemed to be 10H00 on 15 March 2022.

## **MATJELE AJ:**

[1] This appeal was initially considered by Monama J, Moila and Matjele AJJ on the 31<sup>st</sup> January 2022. Before judgment could be delivered, Monama J passed away. To preserve the quorum of the court, Sutherland DJP joined the bench.

[2] In this appeal, appellant was charged and convicted, in the Regional Court, Randfontein, of the charge of rape of a 14 years old child, in contravention of section 3 of the General Law (Sexual offences and related matters) Amendment Act 32 of 2007 (SORMA). He was sentenced to a term of life imprisonment for this charge of rape.

[3] The appeal is before us by way of automatic right of appeal in terms of section 309(1) of the Criminal Procedure Act 51 of 1977, read together with S10 and

43(2) of the Judicial Matters Amendment Act 42 of 2013, by virtue of the imposed sentence of life imprisonment. The appeal is against both conviction and sentence.

[4] Heads of argument were filed, and by agreement the appeal was determined on the papers only without oral argument.

### **Facts**

[5] The State led the evidence of three witnesses, namely: the complainant, Ayabonga Mabusela; Mr. Phule Rampai, the neighbour; the mother of the complainant, Nobisa Cynthia Mabusela; and Dr Saita Kashif. For the defence case only the Accused testified.

[6] The evidence before the Court is that the complainant, Appellant and the complainant's father were seated around the fire at night. According to the complainant his father left them and went to sleep. Appellant sent him inside his room to check on the pots, and the latter complied. The Appellant followed him and then locked the door behind him, pushed him on top of the bed, throttled him and threatened to kill him. Instructed him to undress his trouser, and he undressed his own trouser too. He then penetrated him with his penis on the complainant's anus, and was making back and forward moves with his hips. It was painful and he was crying. He urinated twice not at the same time.<sup>1</sup> He stopped when the police arrived with Rampai, who had alerted them. Appellant ran away.

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<sup>1</sup> The word 'urinated' is used in the testimony. However, what must be inferred that is that 'éjaculation' is what was meant.

[7] Phule Johannes Rampai, the neighbour, heard the sound of the complainant crying inside the Appellant's house. On his way to get assistance from the complainant's parents he saw a police vehicle on the street, which he rushed to, stopped, and asked them to come to the plot where they all lived. The police officers knocked on the door, and when appellant was not opening they broke the padlock and went inside. Appellant stood up wearing only underpants, and the complainant also stood up dressing up while crying. The complainant was taken to the bakkie by one police officer for questioning. The appellant then fought with Rampai as to why he broke his lock and why he brought the police. Rampai then assaulted him thrice. Appellant escaped through the window and ran away in his red underpants. He returned at around 3 am or 4am still wearing the red underpants he was wearing when he ran away. He was then apprehended, and assaulted. The police bakkie that had earlier left with the complainant and his father ultimately returned, and he was arrested.

[8] The mother, Nobisa Cynthia Mabusela, testified that the complainant is her first born child born on the 28<sup>th</sup> June 2004. On the night in question she was sleeping with Samson, her partner in his room. She denied that she was locked out of the house by her husband, Samson that night. She denied appellant's version that she and the complainant slept in appellant's room together with the appellant that night,

[9] Dr Saita Kashif testified that on the 27<sup>th</sup> January 2019 she examined the complainant, and completed a J88 at Leratong Crisis centre, where she was based. Her conclusion was that her examination and clinical findings of his anus

were consistent with the history given by the child that he had been raped. The doctor's evidence was not disputed. There was no DNA evidence presented.

[10] According to the Appellant, Aaron Chauke, on the 26<sup>th</sup> January 2019 went to the liquor store to buy alcohol. On his way back home he met up with Rampai and his friends who robbed him of his money and the liquor. When he arrived at home he found the complainant and his mother sitting around the fire. She requested to sleep with him and the complainant, and indeed slept in his room with him because the complainant's father had locked her outside his room. As they slept, Rampai and the complainant's father came and knocked, the wife went out through the window. They found the complainant fast asleep in bed. The next time they came with the police, and he ran away because Rampai was assaulting him. He confirmed that he returned at dawn and was arrested. He denied raping the child. He does not know what caused the injuries on his anal area.

[11] The court a quo convicted the accused and sentenced him to life imprisonment.

[12] In respect of conviction, appellant's grounds of appeal are that the trial court, in taking the complainant's evidence did not comply with the provisions of Sections 162 and 164 CPA. In respect of sentence, appellant contends that the trial court should have found that there are compelling and substantial circumstances justifying a deviation from imposition of the prescribed minimum sentence of life imprisonment.

**Issues for determination:**

[13] AD CONVICTION

- a) Whether the trial court failed in its duty to comply with the provisions of sections 162 and 164 CPA?
- b) Whether the state proved its case beyond reasonable doubt, and appellant's version not reasonably possibly true?

[14] AD SENTENCE

- a) Whether the personal circumstances of appellant taken together, especially that he is a first offender, married and has three children, constitute substantial and compelling circumstances necessitating a deviation from imposing the sentence of life imprisonment?

**Law and application:**

[15] Section 162(1) CPA<sup>2</sup> provides that subject to sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath. Section 163 CPA provides for affirmation to be taken in lieu of oath, where a person does not believe in God or subscribe to taking oath. Section 164 CPA<sup>3</sup>

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<sup>2</sup> **162 Witness to be examined under oath** "(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:

*'I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.'*

*(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so."*

<sup>3</sup> Section **164 When unsworn or unaffirmed evidence admissible** "(1) Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.

*(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence."*

enables the court to admonish a witness who is found not to understand the nature and import of the oath or the affirmation.

[16] In the present matter the court realised that the child witness did not understand what taking an oath is, and the applied section 164, trying to determine if the child knows the difference between 'truth and lies'. It is while engaged in the questioning exercise of the child to make this determination prior to admonishing the child that the trial court had a challenge, with the child not answering correctly to prove he knows the difference. The Court insisted on an assessment of the child by a professional to make this determination.

[17] The complainant was therefore referred to the Teddy Bear clinic. He was assessed by a clinical psychologist, Ms. Karen Bradford who conducted a mental age and competency assessment. The recommendations, which were read into the record, were as follows:

- a. *"The results of Ayabonga's assessment indicate that he lives with **learning difficulties**. They do not however indicate that he lives with any intellectual disability.*
- b. *He is able to provide information regarding the alleged incident. He met the necessary criteria for competency to testify.*
- c. *It is recommended that ...[he] be allowed the assistance of an intermediary.*
- d. *Questions posed to ...[him] should be kept simple and direct.*
- e. *The intermediary will need to sit close to Ayabonga as he is do softly spoken and his speech can be difficult to hear.*
- f. *He will not understand words and phrases that he is unfamiliar with. Repetitive questioning may also lead him to believe that he has provided the wrong answer.*

- g. He should be encouraged to speak up should he not understand a word or phrase.*
- h. He becomes visibly uncomfortable when discussing details of the alleged incident, and direct questioning will be necessary to illicit such details.*
- i. Individual court preparation is advised in order to assist him in testifying to the best of his ability.”<sup>4</sup>*

[18] The trial magistrate then asked the following questions to the complainant:

- a. “Court: Are you well?  
Ayabonga: Yes, I’m fine.
- b. Court: Ayabonga do you know the difference between telling the truth and telling a lie?  
Ayabonga: Yes, I do.
- c. Court: Now if I said to you today that the sun is shining outside and it is hot is that the truth or would that be a lie?  
Ayabonga: It is a lie.
- d. Court: Why do you say that?  
Ayabonga: It is cold outside.
- e. Court: Now in Court today Ayabonga the Court needs you to tell only the truth and nothing but the truth. Do you understand that?  
Ayabonga: Yes
- f. Ayabonga is admonished (through the intermediary) (through interpreter)”<sup>5</sup>

[19] In light of the above recommendations, I am satisfied that the magistrate properly admonished the complainant. The record by the typist, states that he was admonished through the intermediary,<sup>6</sup> which is allowed in terms of section

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<sup>4</sup> Page 49-50 of the court record and Exhibit B.

<sup>5</sup> Page 51-52 of the court record.

<sup>6</sup> Section 165 CPA: “Where the person concerned is to give his evidence through an interpreter or an intermediary appointed under section 170A(1), the oath, affirmation or admonition under section 162, 163 or 164 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary or by the interpreter or intermediary in the presence or under the eyes of



165 CPA. It can be safely assumed the latter was following what the Court stated, though the typist's record is silent. Granted, after the report by a clinical psychologist, Ms. Karen Bradford, the trial court did not ask the usual many questions in conducting an enquiry, prior to admonishing the child to speak the truth, unlike on the first day he testified when the court referred him for an assessment.

### **Technical defence**

[20] Appellant is not raising any substantive ground of appeal, but a legally technical ground of non-compliance with the provisions of section 164 CPA. He does not deny that he was found with the 14 years old complainant immediately after he had been raped. It was only he and that child found in that room by the police and Rampai. Even on his version the third person was the mother of the said child, which version was refuted. He ran away wearing only underwear after escaping through the window. He returned an hour or two later, when the police vehicle was gone. The police took the child to the police station to open the case, and the child was medically examined at Leratong Crisis Centre, on the very day of the 27<sup>th</sup> January 2019 where it was confirmed by Dr. Saita Kashif that the child had recently been sexually penetrated on the anus, which was consistent with the history given by the child to Dr. Saita Kashif before examination. The child was injured and could not walk well because of the pain. The appellant's argument that the child is being influenced against him does not hold water, as the child's version is the very same he gave to the doctor as it appears on the J88. Appellant can't even argue that Rampai has something to do with this influence over the child, because when the complainant made a report to the police and

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*the presiding judge or judicial officer, as the case may be."*

doctor, Rampai was not there at the police station. Instead he is the one who apprehended appellant when he returned around 3am with other members of the community, while the complainant and his father were gone with the police and had not yet returned home. There was just no room for collusion, as appellant alleges.

[21] The only ground of appeal against conviction is allegedly non-compliance with section 164 CPA, which is also not true because the court complied. This is just an attempt at getting the complainant's strong evidence eliminated based on a preliminary enquiry, ignoring how he testified during the trial. The hope is that if it is eliminated, then there is no eye witness, and the state remains with circumstantial evidence. It is my view that even if the evidence of the complainant were to be rejected for non-compliance with section 164, as argued by appellant's counsel, the uncontradicted evidence of Dr. Kashif together with the evidence of Rampai who heard the cry of the complainant, and decided to go wake up the parents in the middle of the night, thereby calling a police bakkie patrolling to enter the plot to examine his suspicion, can only lead to one inference that appellant who was found with the child is the perpetrator. Indeed, the suspicion was found to be true after the door was opened by force by the police.

[22] On the other hand, appellant does not deny the child had injuries on his anus, but he does not know how it came about. Applying *R v Blom* 1939 AD 188 at 202-3, firstly, that the inference sought to be drawn must be consistent with all the proven facts, and it is so. Secondly, the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be

drawn', and indeed the only reasonable inference that can be drawn is that appellant is the perpetrator. If the child had been abused by someone else before they went to sleep, appellant would have been the first to report it. The complainant's father would also have also known before he left the fire to sleep.

[23] It is trite that, all things being normal, in terms of section 164 CPA a preliminary enquiry has to be conducted by the presiding judicial officer prior to hearing the evidence of a witness who does not understand the nature and import of the oath or the affirmation, whether from ignorance arising from youth, defective education or other cause for the court to hold an enquiry to determine if the witness knows the difference between truth and lies, prior to being admonished to speak the truth before court.<sup>7</sup> It is my argument that in this case the learned magistrate complied with the provisions of section 164 CPA, read together with section 164A CPA.

[24] Even if there had not been full compliance, which I disagree with, every matter has to be treated and handled according to its own merits. In this case, the witness testified well and despite cross-examination he answered all questions with consistency without contradicting himself. Can his substantive evidence be rejected simply because the preliminary enquiry was not done effectively, or at all?

**Learning difficulties (psychosocial disability):**

[25] It important to note that according to the report of clinical psychologist Ms. Karen Bradford, the complainant lives with '**learning difficulties**', which is not

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<sup>7</sup> *S v Matshivha* 2014 (1) SACR 29 (SCA); *Haarhoff & Another v DPP, Eastern Cape* 2019 (1) SACR 317 (SCA); *S v Nedzamba* 2013 (2) SACR 333 (SCA)

necessarily an intellectual disability, but a psychosocial disability, or what may be attributable to one. I therefore deem it necessary to look at section 194 CPA as read together with section 164 and 165 CPA.

[26] Section 194 CPA provides that:

*'No person appearing or [proven] to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.'* [my emphasis]

[27] Section 225 of the previous Act is the predecessor of section 194, after recommendations of the Botha Commission of Inquiry on Criminal Evidence and Procedure<sup>8</sup> which removed the words 'idiocy' and 'lunacy, and by the substitution of the term 'insanity' with mental illness and of the word 'otherwise' with **'the like'** as well as the inclusion of the term 'drugs'. The amended version of this provision is the current section 194 CPA. However, in spite of these changes, section 194 continued to be interpreted by many courts to exclude the evidence of persons with intellectual disabilities.

[28] The interpretation of section 194 was finally settled by the SCA in *S v Katoo*.<sup>9</sup> In this case the prosecution sought to call the complainant in a rape trial who was described by a psychologist as having 'severe mental retardation', as a witness. The evidence of the psychologist was to the effect that the complainant 'could consequently be described as an imbecile'. The psychologist asserted that the complainant had a *'very limited capacity to exercise her will and make choices,*

<sup>8</sup> Botha Commission 'Commission of Inquiry into Criminal Procedure and Evidence' RP 78/1971 Government Printer, Pretoria. The Botha Commission of Inquiry is responsible for the drafting of the Criminal Procedure Act 51 of 1977 that is currently in force in South Africa.

<sup>9</sup> *S v Katoo* 2005 (1) SACR 522 (SCA).

*and that her mental age was that of a four-year-old child*'. The trial judge interpreted section 194 to mean that due to her status as an 'imbecile', the complainant was not competent to testify. Consequently, the respondent was acquitted.

[29] On appeal the specific question which the Supreme Court of Appeal had to answer was 'whether the court was correct in law in refusing the state an opportunity to present the evidence of the complainant on the charges preferred?' In disagreeing with the finding made by the trial court Jafta AJA clarified that 'it is only imbecility induced by "intoxication, or drugs or the like" that falls within the ambit of the section (and then only when the witness is deprived of the proper use of his or her reason)'. He concluded that the evidence led did not suggest that the complainant was deprived of the proper use of her reason. It simply showed that she had 'limited mental capacity'. Jafta AJA argued that evidence led at trial showed that she did not suffer from a mental illness, but that she was merely an 'imbecile' and that alone did not make her incompetent to testify. It was therefore, held that she did not fall within the ambit of section 194 and she was in fact competent to testify.

[30] Following this decision, it is now settled in South Africa that section 194 need not necessarily apply to persons with intellectual disabilities but instead it applies to cases of mental illness or 'imbecility', **that results from intoxication or drugs** and which affects a person's powers of reason. This is particularly because of the requirement it creates for the court to conduct an inquiry into the cause of 'imbecility'.<sup>10</sup> In holding that the trial court's ruling in *Katoo* was an irregularity and

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<sup>10</sup> Sec 194 Criminal Procedure Act.

a miscarriage of justice, Jafta AJA reiterated the duty of the trial court to conduct an inquiry in order to decide on the issue of competence.<sup>11</sup>

[31] Subsequent to *Katoo* section 194A CPA was inserted by section 10 of Act 8 of 2017, and it reads:

**194A (1) CPA - Evaluation of competency of witnesses due to state of mind:**

*“For purposes of section 193, whenever a court is required to decide on the competency of a witness due to his or her state of mind, as contemplated in section 194, the court may, when it deems it necessary in the interests of justice and with due consideration to the circumstances of the witness, and on such terms and conditions as the court may decide, order that the witness be examined by a medical practitioner, a psychiatrist or clinical psychologist designated by the court, who must furnish the court with a report on the competency of the witness to give evidence.”* [My emphasis]

[32] Based on this section 194A, it was definitely correct for the magistrate to refer the complainant as he did for assessment. And that report by the clinical psychologist is important, instrumental to the process and in compliance with section 194A.

### **Accommodations:**

[33] Article 2 of the **Convention on the Rights of Persons with Disabilities (CRPD)** which is an international human rights treaty dealing specifically with the rights of persons with disabilities, which came to force on 3 May 2008, of which South Africa is a signatory. CRPD defines reasonable accommodation as:

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<sup>115</sup> *Katoo* para 12.

*“necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden where needed in a particular case to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.*

[34] Simply explained, the term ‘accommodations’ refers to any modification to usual practice. There is a requirement in article 2 of the CRPD for accommodations to be reasonable in the sense that the provision of the accommodations should not impose an undue or disproportionate burden.

[35] The CRPD addresses the interaction between witnesses with intellectual disabilities and the criminal justice system by requiring the making of procedural and age-appropriate accommodations.

[36] Legislation in South Africa generally makes provision for accommodations, for example:

- a) In terms of the Child Justice Act the ‘assessment of a child may take place in any suitable place identified by the probation officer, at a police station, a magistrates’ court, the offices of the Department of Social Development or a One-Stop Child Justice Centre’.<sup>12</sup> Also the place chosen must provide as much privacy as possible.<sup>13</sup>
- b) In terms of the Children’s Act proceedings involving children are to be held in a place ‘furnished and designed in a manner aimed at putting children at ease’;<sup>14</sup> ‘conducive to the informality of the proceedings and the active

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<sup>12</sup> Child Justice Act 75 of 2008, sec 37(1).

<sup>13</sup> Sec 37(2) Child Justice Act.

<sup>14</sup> Sec 42(8)(a) Children’s Act 38 of 2005.

participation of all persons involved in the proceedings without compromising the prestige of the court'.<sup>15</sup>

- c) Section 56 of the Children's Act prescribes proceedings to take place *in camera*, in an informal manner,<sup>16</sup> and that children be questioned through an intermediary.<sup>17</sup>

[38] More relevant to our case are accommodations in terms of the CPA, for instance:

- a) This Act requires the proceedings to be held *in camera*, that is, not in open court, in circumstances where the court considers that harm may result to any person who is not the accused,<sup>18</sup> via closed circuit television.<sup>19</sup>
- b) The Act also provides for the giving of evidence through intermediaries<sup>20</sup> for witnesses under the biological or mental age of 18 years.<sup>21</sup> In terms of section 170A(3)(a) where the court appoints an intermediary, the proceedings may take place in a venue which is 'informally arranged to set that witness at ease' and which is 'so situated that any person whose presence may upset that witness is outside the sight and hearing of that witness'.<sup>22</sup> This is to take place in a venue which enables the court and the accused to see and hear, either directly or through the medium of any electronic or other devices, the evidence of the child witness during his or her testimony'.<sup>23</sup>

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<sup>15</sup> Sec 42(8)(b) Children's Act.

<sup>16</sup> Sec 60(3) Children's Act.

<sup>17</sup> Sec 61(2) Children's Act.

<sup>18</sup> Sec 153(2) Criminal Procedure Act 51 of 1977.

<sup>19</sup> Sec 158(2)(a) Criminal Procedure Act.

<sup>20</sup> Sec 170A Criminal Procedure Act.

<sup>21</sup> Sec 170A (1) Criminal Procedure Act.

<sup>22</sup> Sec 170A(3)(b) Criminal Procedure Act.

<sup>23</sup> Sec 170A(3)(c) Criminal Procedure Act.



[39] In international criminal law settings ‘the question is no longer: does a person have the mental capacity to exercise his/her legal capacity? The question is instead: What types of support are required for the person to exercise his or her legal capacity?<sup>24</sup> The question should not be whether a person is competent to testify; rather it should be what types of accommodations are required to enable the person to give effective testimony?

[40] Coming to our present case, the learned magistrate clearly after hearing the clinical psychologist's reports that the complainant knows the difference between truth and lies; knowing about his learning difficulties; and how he was to be accommodated per the recommendations of the clinical psychologist in terms of the type of questioning technique relevant to the child witness to enable him to narrate the incident effectively in court, he put the measures in place. Knowing the expert had already established he knows the difference between truth and lies, the magistrate then asked briefly to satisfy himself if the child knows the difference between truth and lies, and then proceeded to admonish the child to speak the truth, through the intermediary seating with the child. He obviously did not ask long protracted questions as ordinarily would be the case. This was in no way prejudicial to the accused who still had the opportunity to cross-examine the complainant at length, which in fact happened.

### **Right of Access to the Courts:**

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<sup>24</sup> A Nilsson ‘Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities’ Commissioner for Human Rights Issue Paper (2012), at pg. 19.

[41] Thirdly, **section 34** of the Constitution of South Africa provides that everyone, including people with disabilities and/or psycho-social limitations, “...has a right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court...”.

[42] Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD) provides for the right of access to justice,<sup>25</sup> which requires states parties to **‘ensure effective access to justice for persons with disabilities on an equal basis with others’**. Although the CRPD is recognised as the first international human rights instrument containing a substantive right of access to justice, the right existed prior to the coming into force of the CRPD, in international human rights law usually termed as the right to an effective remedy.<sup>26</sup> However, in the CRPD it is a substantive right because it was a response to the ‘specific rights experience of persons with disabilities’. This was a recognition of the fact that persons with disabilities face numerous barriers to accessing justice.<sup>27</sup>

[43] The impact of assessments of competence goes beyond the outcome of a case and affects what has been described as ‘the most basic “human right”’, the right to access justice or the right to effective remedy. CRPD recognises it as a

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<sup>25</sup> The Convention on the Rights of Persons with Disabilities entered into force on 3 May 2008. “The CRPD is an international disability treaty and strengthened legal framework that was inspired by international laws in recognising the rights of persons with disabilities (United Nations, 2006). The CRPD is also quoted as the highest international standard to promote and protect the human rights of persons with disabilities. However, the purpose of this Convention is not merely to promote and protect but also to ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. The CRPD has been signed and ratified by 46 African states, South Africa being one of these.” Robyn White & Diana Msipa – **“IMPLEMENTING ARTICLE 13 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN SOUTH AFRICA: REASONABLE ACCOMMODATIONS FOR PERSONS WITH COMMUNICATION DISABILITIES”**, Chapter 5 of 19 Art 13(1) CRPD. 102 (2018) 6 African Disability Rights Yearbook

<sup>26</sup> International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, art 2(3)(a) (entered into force 23 March 1976) (ICCPR).

<sup>27</sup> F Mégret ‘*The Disabilities Convention: Human rights of persons with disabilities or disability rights?*’ (2008) 30 Human Rights Quarterly 494 at 512.

substantive right, which is crucial for the protection of human rights because it has a bearing on the enjoyment of other rights.<sup>28</sup>

[44] The right of access to the Courts and protection of the law is imperative for all citizens of the country, including this category of people. It would be the worst travesty of justice to ignore this sector of society from protection of the law, while they are equal to all other citizens. Without the courts becoming innovative to accommodate these types of litigants, then their rights of access to courts and justice becomes trampled upon. That means for example a rape victim, as in the present case, may be raped repeatedly with the perpetrator aware that the case will not go any further, failing the preliminary enquiry or inability to communicate well, or other limitations not falling within the knowledge and expertise of the presiding officer.

[45] For instance, a complainant who is deaf and/or dumb person yet not formally educated or trained in formal sign language may easily be denied access to court, whereas there are people who understand their self-developed language. An innovative court would call the friend or even relative, swear them in and have them interpret the victim's evidence, thereby grant them access.

[46] In the present matter, by not asking too many questions as part of the preliminary enquiry, after receiving the report from the clinical psychologist, the court was granting the complainant well-deserved access to court and protection of law.

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<sup>28</sup>M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1978) 27 Buffalo Law Review 185.

### **S. 9 of the Constitution of South Africa (Equality):**

[47] People who experience crime often turn to the criminal justice system for redress. In South Africa, like in many democracies, this ability to turn to the law for protection and redress is a right protected and guaranteed by law. The Constitution guarantees to every citizen the right to equality before the law.<sup>29</sup> It states that everyone is 'equal before the law and has the right to equal protection and benefit of the law'. Section 9(3) provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds, **including disability**.<sup>30</sup> By implication, therefore, persons with disabilities are entitled to the protection and full benefit of the law on an equal basis with others. However, in practice this is not the case, as persons with disabilities face numerous barriers to accessing justice, such as environmental barriers, attitudinal barriers, communication barriers and legal barriers.<sup>31</sup>

[48] Treating them equally as contemplated by Section 9 of the Constitution requires the court accommodate them better than the court would with a normal person. It is in doing so the court is able to balance the scales between this person and other litigants in the case. This is no new concept. For instance, when it comes to child witnesses to avoid causing undue stress to them they testify in camera, in a separate room usually adapted to be as child friendly as possible in terms of section 153 CPA, with the assistance of a trained intermediary in terms of section 170A CPA, mostly through closed circuit television or similar electronic

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<sup>29</sup> Sec 9 of the Constitution of the Republic of South Africa, 1996.

<sup>30</sup> I Grobbelaar-Du Plessis & S van Eck 'Protection of disabled employees in South Africa: An analysis of the Constitution and labour legislation' in I Grobbelaar-Du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 231.

<sup>31</sup> J Bornman et al 'Identifying barriers in the South African criminal justice system: Implications for individuals with severe communication disability' (2016) *Acta Criminologica: Southern African Journal of Criminology* pg 291.

media in terms of section 158(2) CPA. These are necessary accommodations to bring the child witness at an equal level with his/her adult counterparts in the court matter. In the same manner, people living with disabilities, psycho-social illnesses and other limitations such as the complainant's learning disabilities, ought to be accommodated otherwise the whole process becomes unfair and imbalanced thereby running against the spirit and purport of section 9 of the Constitution of South Africa.

[49] It has also been argued that section 164, through a long preliminary enquiry before admonishing a witness to determine if they know the difference between truth and lies amounts to unfair discrimination of those who have to be admonished, in comparison with their counterparts who are sworn in in terms of section 162 CPA or those who affirm to speak the truth in terms of section 163 CPA. The reason is that in case of the latter, they are not disqualified even before they can testify. Secondly, they just swear or affirm to speak the truth, irrespective of how much they are going to lie, and the court makes its findings as to whether they lied or spoke truth at the end of the trial, whereas with the admonished witness there are two determinations, one at the beginning and the other at the end together with his/her counterparts.

[50] Differential treatment arises from the fact that witnesses who take the oath are not required to demonstrate that they understand the meaning of the oath;<sup>32</sup> whereas those testifying under admonition are required to demonstrate an understanding of the difference between truth and falsehood.<sup>33</sup> All that is required of those who take the oath is that they repeat the words prescribed by the statute.

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<sup>32</sup> *Sikhipha v the State* 2006 SCA 71 (RSA) para 14.

<sup>33</sup> *Motsisi v the State* 513/11 2012 ZASCA 59.

Those who are admonished are, however, required to demonstrate an understanding of the difference between truth and falsehood through some lengthy preliminary questioning.

[51] The South African Constitutional Court case of ***DPP v Minister of Justice and Constitutional Development***<sup>34</sup> confirmed the position that it is a requirement for witnesses who are admonished to demonstrate an understanding of the difference between truth and falsehood (through a preliminary). The Constitutional Court stated that:

*“The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a precondition for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth. The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused's right to a fair trial where such evidence to be admitted. To my mind, it does not amount to a violation of s 28(2) to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.”*<sup>35</sup>

[52] The trial court indeed accommodated the child witness, the complainant herein, by not asking him questions *ad-infinitum* just to determine if he knows the difference between truth and lies in addition to the expert's report or testimony which states the same as well. It is however, noteworthy that the court complied

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<sup>34</sup> *DPP v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC).

<sup>35</sup> *DPP v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) para 166.

with the requirements of the law as it stands in that the trial court satisfied itself that the child knew the difference prior to taking his evidence, contrary to submissions by appellant's counsel. However, this position may have to be revisited by our apex court once legislation has been passed by parliament dealing specifically with rights of people with disabilities.<sup>36</sup>

### **Other International jurisdictions**

[53] In **Ruby McDonough's case**<sup>37</sup>, a petitioner, before the Supreme Judicial Court of Massachusetts, Suffolk, a prospective witness in criminal prosecution, who had been found not competent to testify because of her stroke-induced incapacity to communicate orally, filed petition alleging that the ruling violated her rights under the Americans with Disabilities Act (ADA), the Massachusetts Equal Rights Act (MERA), and the state constitution. Exercising its general superintendence power, the Supreme Judicial Court, Marshall, C.J., held that the prospective witness had no standing to seek appellate review of decision that prevented her from testifying at criminal trial; in the future, where a witness's accommodation request is denied, thereby precluding the witness from testifying, interlocutory review of the order may be sought as a matter of right by the party seeking to introduce the testimony; and where there is a dispute concerning a witness's request for accommodation, a judge should conduct a hearing to resolve the dispute, preferably before trial. Petition denied.<sup>38</sup>

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<sup>36</sup> "White Paper on the Rights of Persons with Disabilities" - Government Gazette, 9 March 2016 No.39792.

<sup>37</sup> Ruby McDonough SJC-10609.457 Mass. 512 (Argued May 6, 2010. Decided Aug. 11, 2010.)

<sup>38</sup> At page 514: "Because of the "pervasive unequal treatment" of individuals with disabilities, Tennessee v. Lane, 541 U.S. 09, 524, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004), the Massachusetts Constitution, Massachusetts statutes, and Federal statutes now impose on State courts certain affirmative obligations to accommodate an individual with disabilities in order to provide her with access to the courts, including providing her with the "same rights as other persons" to "give evidence." G.L. c. 93, § 103 (a) . Nevertheless, for the reasons we explain below, we conclude that McDonough has no standing to seek appellate review of the decision of the judge in the District Court that precluded her from testifying in the defendant's criminal trial. Accordingly, we deny her petition."

[54] In **Koali Moshoeshe and Others v the DPP and Others**<sup>39</sup> section 219 of the Criminal Procedure and Evidence Act 9 of 1981 of Lesotho was declared unconstitutional and inconsistent with sections 18 and 19 of the Constitution of Lesotho by the Lesotho High Court. Also the decision by the DPP to decline to prosecute the perpetrator of a sexual offence against Koali Moshoeshe, who had a mental disability, was also declared unconstitutional. This is the case in which the plaintiff, a mentally disabled male challenged the constitutionality of section 219 of the Criminal Procedure and Evidence Act 1981. He contended that by restricting people with mental disabilities to adduce evidence in the courts of laws, this provision of the law, restricted a number of his human rights enshrined in the constitution of Lesotho. These include the Right to fair trial under Section 12 of the Constitution, Freedom from discrimination under section 18, the right to equality before the law under section 19 as well as the right to seek redress for human rights injustices under section 21 of the constitution. Sitting as the Constitutional Court, the High Court of Lesotho in this matter observed judicial activism and held that the contested section was indeed unconstitutional.

[55] In **R v D.A.I.**<sup>40</sup> the **Supreme Court Of Canada** held that the obligation on adult witnesses with mental disabilities to demonstrate understanding of nature of obligation to tell truth in order to be deemed competent to testify is not correct. As to whether finding of testimonial competence without demonstration of understanding of obligation to tell truth breaches accused's right to fair trial the Highest Court of Canada held that it does not. The Crown alleged that the

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<sup>39</sup> Lesotho High Court Constitutional case No. 14/2017 delivered on 16 May 2019.

<sup>40</sup> 2012 SCC 5, [2012] 1 S.C.R. 149. Canada



complainant, a 26-year-old woman with the mental age of a three- six-year-old, was repeatedly sexually assaulted by her mother's partner during the four years that he lived in the home. It sought to call the complainant to testify about the alleged assaults. After a *voir dire* to determine the complainant's capacity to testify, the trial judge found that she had failed to show that she understood the duty to speak the truth. In a separate *voir dire*, the trial judge also excluded out-of-court statements made by the complainant to the police and her teacher on the grounds that the statements were unreliable and would compromise the accused's right to a fair trial. While the remainder of the evidence raised some serious suspicions about the accused's conduct, the case collapsed and the accused was acquitted. The Ontario Court of Appeal affirmed this result. The Supreme Court of Canada Held that the appeal should be allowed, the acquittal set aside and a new trial ordered.

[56] In a case before the **United Nations Convention on the Rights of People with Disabilities** (CRPD),<sup>41</sup> **Mr. Arturo Medina Vela**, a Mexican national who has an intellectual and psychosocial disability claims that he is the victim of a violation by the State party (Mexico, his own Country) of his rights under articles 5, 9, 12, 13, 14 and 19, read in conjunction with article 4, of the Convention (CRPD). He was arrested by the police on suspicion of having stolen a vehicle. The public prosecutor notified the family of the charges against him. His mother supplied the state with all proof of his mental condition, and after taking him to

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<sup>41</sup>CRPD/C/22/D/32/2015 Distr.: General 15 October 2019 English (Original: Spanish)

psychiatric evaluation, which proved what his mother had been saying, he **was declared unfit to testify**. But the prosecution decided to proceed with the case, while he was detained in the men's psychosocial rehabilitation centre. He was not permitted to testify and was not informed of what was happening in the proceedings or notified that he was being tried under the special procedure.

[57] Among others, he argued that by not being tried on an equal basis with others because he had been declared exempt from criminal liability and was therefore subject to the relevant special procedure, he was a victim of discrimination on grounds of disability. He further claims that the State party failed to discharge its obligation to make the necessary reasonable accommodations he requested and to amend or repeal legislation that encourages discrimination against persons with disabilities, in violation of article 5, read alone and in conjunction with article 4, of the Convention. The UN Committee, acting under article 5 of the Optional Protocol, agreed with Mr. Vela that the State party had failed to fulfil its obligations under articles 5, 9, 12, 13 and 14, read in conjunction with article 4, of the Convention, and recommended that the **State party is under an obligation to take measures to prevent similar violations** in the future. In this regard, the Committee refers to the recommendations contained in its concluding observations (CRPD/C/MEX/CO/1, paras. 28 and 30) and requires the State party to:

- a. In close **consultation with persons with disabilities and the organizations that represent them, make all necessary amendments to the criminal law** of the Federal District and all equivalent or related federal and state laws with regard to the "exempt from liability" concept

and the special procedure for persons exempt from criminal liability, with a view to bringing them into line with the principles of the Convention and ensuring respect for due process in cases involving persons with disabilities;

- b. Review the application of security measures involving committal for the purposes of medical and psychiatric treatment and take the necessary steps to promote alternatives in line with the principles of the Convention;
- c. Ensure that persons with intellectual and psychosocial disabilities are provided with **appropriate support and reasonable accommodations** to enable them to exercise their legal capacity before the courts;
- d. Ensure that **judges, judicial officials, public prosecutors and public servants working to facilitate the work of the judiciary are provided with appropriate and regular training** on the scope of the Convention and its Optional Protocol.

[58] South Africa is also a signatory of CRPD. But despite that, no legislation has been passed that specifically addresses and protects the rights of people living with disabilities and psychosocial disabilities in compliance with CRPD. This process was started with a white paper gazetted on the 9<sup>th</sup> March 2016<sup>42</sup>, signed by the then Minister of Social Development, Ms. Bathabile O. Dlamini MP. It would seem the process never moved forward with this **“White Paper on the Rights of Persons with Disabilities”**.<sup>43</sup> This is important legislation parliament must prioritise to ensure the rights of this minority group of our society are understood and protected. It is from the promulgation of this intended legislation

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<sup>42</sup> Government Gazette, 9 March 2016 No. 39792

<sup>43</sup> Government Gazette, 9 March 2016 No. 39792

that our legal jurisprudence may develop in line with international standards, as envisaged in the CRPD and other international instruments. This lack of political will or snail pace on the part of parliament in this regard is not at all helping the vulnerable disabled community. This cannot be tolerated.

### **Conclusion**

[59] Having considered the grounds of appeal raised, alleged non-compliance with sections 162 and 164 CPA, as discussed above there is no merit for that supposition. In addition, relying on the rights in terms of the Constitution, coupled with international legal principles above, I am satisfied that the state in the Court 'a quo' discharged the onus to prove the case beyond reasonable doubt, and appellant's case that is full of contradictions and inconsistencies is not reasonably possibly true. I fully agree with the trial court in this regard.

### **AD SENTENCE**

[60] The essential inquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the sentencing court exercised its discretion properly and judicially. The appeal court will only interfere with the sentence of the trial court if the imposed sentence induces a sense of shock or manifestly inappropriate.

[61] It is trite that sentencing is a judicious exercise which lies exclusively with the discretion of a sentencing court. Regard will have to be had to all the factors relevant to sentencing, that is, the personal circumstances of the offender, the nature and circumstances of the offence, the impact of the offence on the

complainant, the family as well as the society. To that should be included the mitigating and aggravating circumstances.<sup>44</sup>

[62] Rape of a child below the age of 16 is read with the provisions of section 51(1) of the Criminal Law Amendment Act 107 of 1997, which prescribes imprisonment for life, unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed one. And the court shall enter those circumstances on the record of the proceedings and must thereupon impose a lesser sentence.

[63] In *S v Mokela*<sup>45</sup> it was held that sentencing remains pre-eminently within the discretion of the sentencing court, and the appeal court does not enjoy the privilege to interfere with the sentence which has been properly imposed by a sentencing court.

[64] Appellant argues that what constitutes substantial and compelling circumstances that the trial court should have considered in order to deviate from the prescribed sentence is the fact that appellant is married, having three children minor children, and a first offender.

[65] From the reading of the record and having considered the judgment of the trial court on sentence, it is clear that the court in imposing life imprisonment, had taken into account all the relevant factors, including the probation officer's report and the victim impact report. After careful consideration of the trial court's reasons on sentence, it cannot be said that there was material misdirection in the exercise of its judicial discretion. The sentencing court correctly found that there

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<sup>44</sup> *S v Zinn* 1969 (2) SA 537 (A)

<sup>45</sup> 2012 (2) SACR 431 (SCA), at 435f

is no weighty justification for a deviation from the minimum term of imprisonment prescribed.

[66] The views expressed by the Supreme Court of Appeal in *S v MM*<sup>46</sup> are apposite:

*'It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way.'*

[67] *S v Malgas*<sup>47</sup> sets out clear guidelines on the consideration of the minimum sentence provisions (as the Act is often referred to) in cases where they apply. It is however unfortunate that it has often been said that courts tend to pay little more than lip service to these guidelines.<sup>48</sup> Ponnann JA states as follows in *S v Matyityi*,<sup>49</sup> a view I fully align myself with:

*'As Malgas makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as "relative youthfulness" or other equally vague and ill-*

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<sup>46</sup> *S v SMM* 2013 (2) SACR 292 (SCA) para 17

<sup>47</sup> *S v Malgas* 2001 (1) SACR 469 (SCA);

<sup>48</sup> See *S v Dodo* 2001 (1) SACR 594 (CC) at 602-603; *S v Blignaut* 2008 (1) SACR 78 (SCA) para 3 and *S v Nkunkuma & others* 2014 (2) SACR 168 (SCA) paras 9 and 10.

<sup>49</sup> *S v Matyityi* 2011 (1) SACR 40 (SCA), para 23.

*founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.'*

[68] There is no basis for interfering with the sentence imposed on the appellant regarding this rape matter inflicted on a 14 years old child. The attack on the sentencing court is unfounded. In case of serious crimes, it is permissible for the personal circumstances of the offender to recede into the background.

[69] It follows therefore that, the appeal on sentence stands to fail.

[70] In my view, I would make an order as follow:

- (a) The appeal against conviction and sentence is dismissed.
- (b) This sentence shall be effective from the date upon which the trial court initially sentenced the appellant on 28<sup>th</sup> September 2020.

**Sutherland DJP:**

[71] The appellant, Aaron Chauke was convicted of rape on a 14-year old boy and was sentenced to life imprisonment by a Regional Magistrate. The facts and the law have been traversed in the judgment by Matjele AJ and are not rehearsed here. I take a simpler view of the matter that does not require dealing with the several legal and constitutional issues addressed in the judgment of Matjele AJ.

[72] The question arose about whether the complainant's evidence was competent when he initially appeared to show a lack of grasp about truth and falsity. The upshot was that the Magistrate called for an assessment. This was undertaken by a Psychologist, Karen Bradford, who adduced proof of her credentials to perform the enquiry into his cognitive status. Her opinion was that although the boy had learning difficulties, he was not cognitively impaired. The Magistrate took appropriate steps to reach the conclusion that his evidence was competent. In my view the Magistrate is not to be faulted in the approach he took to satisfy the precepts of sections 162 and 164 of the Criminal Procedure Act 51 of 1977. He asked appropriate questions, sought expert evaluation, and employed an intermediary. He clearly made a justifiable finding of competence before evidence was adduced from the boy.

[73] The two critical questions of fact in the case are whether a rape occurred at all, and if so, by whom. The point of departure for the enquiry is the objective and uncontroverted facts.

[74] The medical examination by Dr Saida Kashif took place within hours of the alleged rape. Her evidence stood unchallenged. She testified that she observed redness and abrasions at the aperture of the anus which were of recent origin. Also, she observed that the muscle tone of that area was supple and could be prised open without tension. Her opinion was that these *induciae* were consistent with recent penetration. In addition, the blood test taken revealed no drugs or alcohol in the boy's bloodstream.

[75] The evidence of the complainant is the only direct evidence that supports a rape. He says it hurt which is a point to be married to Rampai's evidence, alluded



to hereafter. The only anomaly in the boy's evidence is his claim that the appellant forced him to drink an alcoholic concoction, but no alcohol was found in his bloodstream. This was regrettably not explored in the trial. Because a number of possible explanations exist that could reconcile these two pieces of evidence, nothing can be made of it, save to say, on the probabilities, that either the consumption was early in that evening, or he drank very little. In addition, there is corroborative evidence from Rampai, the neighbour. He testified that he heard crying from the appellant's room. The boy was a frequent visitor to the appellant. He inferred the cries were from the boy. Subsequently, when Rampai and the police gained entry to the room, although the exact circumstances were in dispute, the only two persons in the room were the appellant and the boy.

[76] These pieces of evidence, cumulatively, justify the inference that a rape occurred in that room at that time and that the appellant was probably the rapist.

[77] The evidence of what was observed when entry to the room was gained is in some degree ambivalent. The appellant was clothed only in underpants. He was in bed asleep; no adverse inference can be drawn from his semi-nakedness in those circumstances. Rampai says, at that moment, the boy had to pull up his pants. That is disputed by the appellant who says the boy was fully clothed. Whichever is the truth on this point adds little to offering corroboration of the rape allegation as the boy, too, had been asleep. The appellant fled from an assault. No inference adverse to him can be drawn from that common cause fact either.

[78] The evidence of Rampai is that he called a police patrol to come to the appellant's room after he had heard the crying because, so says Rampai, he inferred a rape was being perpetrated. The boy was removed from the scene by

the police and was taken to the doctor. Ostensibly, he had minimal contact with his mother, who by all accounts was drunk. This is an important point because the crucial evidence to prove a rape was that of the boy and the version that he gave to court was consistent with a report he made to the doctor. The opportunity for the boy to have been put up to give a false version, before he saw the doctor, as claimed by the appellant, was absent.

[79] The focus therefore shifts to whether the appellant's version can displace the evidence against him. The account given, in the main, fits in with the broad strokes of that given by the boy and by Rampai. The police officers were not called to testify, which is a pity, because their evidence might have resolved some of the debate about points of dispute as to the moment of entry into the room of the appellant, but would, nevertheless, not have been crucial to the making of a safe finding on the charge.

[80] The Magistrate addressed the version of the appellant and concluded that it was not reasonably possibly true. The critical aspects were the allegation of the robbery of him by Rampai, his neighbour, as a motive to falsely accuse the appellant of another crime. There is nothing to corroborate this allegation. Moreover, it would require the boy to conspire to give false evidence of a rape. As to an explanation why the boy was with him in the bed, the appellant's version was that the boy's mother, Cynthia also slept in the room, because her husband had locked her out of their common room. This was advanced by the appellant to suggest no opportunity for a rape existed. This claim by the appellant was flatly denied by both the boy and by Cynthia. No rationale was unearthed why they would conspire to put forward an elaborate false claim to support Rampai's pre-

emptive strike against the appellant to divert attention from the robbery by Rampai of the appellant. Moreover, a false claim that fortuitously correlated with injuries to the boy's anus consistent with penetration, exacerbates its improbability.

[81] The finding by the Magistrate, adverse to this tale being true, is not assailable. In the circumstances, the finding of guilty as charged is not subject to criticism.

[82] As to sentence, the Magistrate gave due consideration to the relevant facts and the law, as more fully set out in the judgment of Matjele AJ. In my view, the conclusion that the minimum sentence had to be imposed was correct. The personal circumstances of the appellant were not of the stuff that could justify a deviation from the prescribed sentence.

[83] In my view the appropriate order is that the appeal should be dismissed both as to conviction and the sentence. I do not consider it necessary to make the further order as set out in the Judgment of Matjele AJ.

[84] Accordingly, the order is as follows:

The appeal against conviction and sentence is dismissed.

**MOILA AJ:**

[85] I have had the benefit of reading the judgments of Sutherland DJP and Matjele AJ. I find myself in respectful agreement with their conclusions that the

appeal against conviction and sentence should fail. However, in respect of other issues I align myself with the judgment by DJP Sutherland.

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**Matjele AJ**

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**Sutherland DJP**

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**Moila AJ**

**Heads of argument prepared by:**

On behalf of the applicant: Adv. L Musekwa

Instructed by: Legal Aid Board

On behalf of the respondent: Adv. L R Mashabela

Instructed by: DPP

Date of hearing: 31<sup>st</sup> January 2022

Date of judgment: 15<sup>th</sup> March 2022