IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

[1] REPORTABLE: ~~YES~~/NO

[2] OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

[3] REVISED

APPEAL NO: 525/2017

16/4/2019

In the matter between :

M S OAGENG **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

LOUW, J

[1] The appellant was arraigned on the following charges before the regional court, Klerksdorp:

Count 1: Rape, in that between the years 2003 and 2007 the Appellant unlawfully and intentionally committed an act of sexual penetration with the complainant by having sexual intercourse with her without her consent. The charge sheet alleged that s 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the Minimum Sentences Act") was applicable in that the victim was raped more than once and that she was under the age of 16 at the time of the incident.

Count 2: Contravention of the provisions of s 3 read with ss 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 Of 2007 ("the Sexual Offences Act") in that during or between the years 2007 and 2011 the Appellant unlawfully and intentionally committed an act of sexual penetration with the complainant by having sexual intercourse with her without her consent. Section 51(1) of the Minimum Sentences Act was similarly relied upon in the charge sheet on the ground that the victim was raped more than once and / or that she was under the age of 16 when the incidents occurred.

Court 3: assault with intent to do grievous bodily harm, in that during or between the years 2003 and 2011 the Appellant unlawfully and intentionally assaulted the complainant with open hands, fists, a lineal object or an object resembling same, a belt, a stick and/or by kicking her.

[2] In regard to Count 1, the trial court found that it was not in a position to hold that the appellant had sexual intercourse with the complainant more than once as the complainant only described one incident of rape between the years 2003 in 2007. The court concluded that the Appellant raped the complainant once during the said period. It accordingly convicted him of rape read with s 51(1) of the Minimum Sentences Act and sentenced him to twenty years imprisonment.

[3] On Count 2, the court found that the Appellant had raped the complainant twice, but that the incidents occurred before the Sexual Offences Act came into operation on 16 December 2007. The court therefore found the appellant guilty of common law rape read with s 51(1) of the Minimum Sentences Act and sentenced him to twenty five years imprisonment.

[4] On count 3, the court convicted the Appellant of assault with intent to do grievous bodily harm and sentenced him to five years imprisonment. The court directed that all the sentences shall run concurrently. The appellant applied for leave to appeal against the convictions only, which was granted by the court.

[5] It was common cause that the Appellant is the biological father of the complainant. The first witness called by the state was Ms. L[….] N[….] J[….], a

school friend of the complainant who had known her for 10 or 11 years. She testified that during a school holiday in 2007, the complain ant came to the place where she resided and informed her that her father had had sexual intercourse with her the previous night and also in the morning before he left for a funeral in Lichtenburg. The complainant told her that this happened under threat and that the appellant had a knife with which he stabbed her on her finger. The wound was an open wound which was no longer bleeding. She said that the complainant was emotionally disturbed and that she was crying. The complainant also told her that the Appellant had found the complainant with her boyfriend and had then assaulted the boyfriend, where after the appellant had taken the complainant away and had sexual intercourse with her.

[6] The complainant then slept over at Ms. J[….]' place from where she was fetched the next morning by the appellant, whom Ms. Jonas knew. He told them that if they went to report the matter to the police, he would not be arrested as he had friends inside the police force. They then decided to go to the local Child Protection Unit. On their arrival, they were met by warrant officer Pitso. He was in a hurry to go somewhere, and referred them to two other gentlemen, who took their statements and told them to come back the following day when Mr. Pitso would be available. The appellant, however, fetched the complainant the next morning and took her to Lichtenburg after hurling insults at Ms. Jonas. The appellant went to Lichtenburg to attend the funeral of a cousin. The complainant returned to school after the school holiday.

[7] In cross-examination, Ms. Jonas said that the complainant was in Grade 10 in 2007. The appellant was born on 23 September 1989 . This means that she would have been 17 or 18 years old at the time of the incident. Ms. J[….]confirmed that the complainant gave birth to a child in 2007 and that the child was taken away from her. She said that she knew the father of the child, who had been in a relationship with the complainant. She further said that when the complainant first came to her, she had met the complainant in the street when she, Ms. J[….], had returned from having her hair braided and that the complainant was in the company of their mutual female school friend, Ms. M[….]. Both of them cried after the complainant reported to Ms. Jonas what the appellant

had done to her. Ms. Jonas said that the complainant told her that after the appellant had assaulted her boyfriend and herself, he took her back home and said that, if she could have sex with the boyfriend, she must also have sex with him. She confirmed that the complainant told her that she had been raped twice by the appellant, once in the middle of the night and once in the morning before she got up.

[8] The complainant was the next witness to testify. She said that she was five years old when her mother passed away. Her father then went to fetch her from her mother's parental place in Coligny . At that stage, a lady by the name of D[….], to whom the complainant referred as her first stepmother, was living with the appellant. The complainant had a good relationship with D[….], but she and the appellant parted ways. A second lady by the name of T[….], to whom she referred as her second stepmother, then came to live with the appellant. T[….] passed away during 2003 or 2004, where after only the complainant lived in the house with the appellant. The complainant said she was in grade 10 at the time.

[9] The complainant testified that a week after T[….]'s funeral, the appellant started touching her in an indecent manner when she was inside the house. One night he came into her bedroom. He was only wearing his underpants and he removed the complainant's underwear. She asked him what he was doing, but he did not respond. He then undressed himself, held her hands and got on top of her. He opened her thighs and inserted his penis into her vagina. The complainant kept on pushing him away and asking him what he was doing. The appellant continued until he ejaculated. He then told her that if she told anybody about this he would kill her and would commit suicide. In the morning, the appellant poured water for her to take a bath. She remained in the house for the whole week and did not go to school. She did not speak to anyone about the incident because the appellant had said that he would kill her if she did and would commit suicide.

[10] The complainant said that another incident transpired in 2007. She said that the appellant continued to sleep with her before 2007, but did not provide any further details about that . What she did say, was that in 2006 she had a boyfriend of which the appellant was aware. He assaulted her with a sjambok and

with his fists and open hands on her face. But even before 2006 he used to assault her with the sjambok when he came home drunk late at night. She did not know why he was assaulting her. She used to run to her uncle 's place. She first ran to an old lady who was their next-door neighbor, Ms. M[….], to whom she referred as a grandmother. She also fled to a Mr. M[….]'s place. When these people came to speak to the appellant, he would tell them that she was selling her vagina.

[11] The complainant fell pregnant in 2006 and gave birth in 2007. The appellant took the child to his sister in Lichtenburg. At that stage, the complainant had a boyfriend by the name of P[….]. One day, the appellant found her at P[….]'s home where she was having intercourse with P[….]. The appellant took the complainant home and on arrival he locked the door and assaulted her with his hands and a sjambok. She said he pulled her to his bedroom and said that he was going to sleep with her just as she had been sleeping with Pana se. He had a knife in his hand. When she lift ed her hand, presumably to defend herself, she got stabbed by the knife on a finger. He pulled off her panties, undressed him self, threw her to the floor and inserted his penis into her vagina. She tried to push him away, but he threatened to kill her with the knife if she screamed. When he finished, he told her to wash the blood from her finger.

[12] When the appellant went to sleep, the complainant took all the appellant's pills that were inside the house and put them inside a jug of water and waited for them to dissolve. She wanted to commit suicide. She however fell asleep. When the appellant woke up, he came int o the room and saw the jug which he then emptied. He proceeded to assault the complainant and told her that she should not sleep on the bed which he had bought with his money. She then went to sleep on the floor. The appellant later, after midnight, came out of his room to her room, pulled up her dress, removed her panty and again raped her.

[13] The appellant went to work in the morning and she then went to the next-door neighbor Ms M[....]. She showed her the wound on her finger and told her that her father had assaulted her the previous night and had slept with her. She asked Ms. M[....] not to mention this to anyone. Ms. M[....] said she was afraid of the appellant. The complainant thereafter went to the house of a friend called

T[….] D[….] M[….], and requested her to accompany her to the house where another school friend, L[….] J[….], the first witness who testified, lived. On the way there, the complainant told Ms. M[....] what had happened and they both started crying. They found Lilly in the street on her way back from some place where she had her years plaited. The complainant then explained to Lilly what had happened to her and showed her the stab wound on her finger, whereafter Ms. M[....] departed.

[14] The complainant went back home the same day but returned to Lilly's place the following day. Lilly then contact ed P[....] to come over and the complainant explained to him what had transpired. Lilly and the wife of one M[....] then took the complainant to the Child Protection Unit where they met with Mr. Pit so. While obtaining a statement from the complainant, he received a call. He then requested two male officers to continue taking her statement and he left. After signing the statement, the two officers said that they would get back to them and requested her and Lilly to *leave* their contact numbers, which they did. She and Lilly then left.

[15] When the appellant return ed from work, he told her that he was aware that she had been to the Child Protection Unit, that he had friends in the police and that whoever she told the story to would not believe her. He then took her to Lichtenburg. She said that this was during the March school holidays of 2007 and that she thereafter returned and went back to school. At that stage, she was in Grade 11. She did not receive any communication from the Child Protection Unit because the appellant had taken her cell phone away. She was, however, told by L[….] and P[....] that Mr. P[….] was looking for her. She was afraid to go back to the Child Protection Unit because the appellant would tell her that he knew that she went back.

[16] The complainant testified that the appellant continued having sexual intercourse with her until 2011 when she fled from home and went to D[….]'s place. As previously mentioned, D[….]had been an earlier girlfriend of the appellant.

[17] The complainant went to the magistrates' court during 2011 to apply for a protection order against the appellant. The officials contacted the appellant and asked him to come to court. After the matter was discussed with the appellant, a

lady official told her that the protection order which had been granted should be withdrawn so that the appellant could take the complainant to the Park Med hospital as she had depression. The complainant was given a document to fill in as proof that she had withdrawn the charges against the appellant. The complainant and the appellant then proceeded to the hospital where they saw a psychologist, Ms. Marlene Booysen, who said that she must come back the following day to be admitted to hospital, which she did. The complainant returned to D[….]'s place where she had been staying for less than a month after running away from home. She told D[….] that the appellant had assaulted her and had also had sexual intercourse with her. D[…..] said that when the complainant was discharged from hospital, they should go and lay charges against the appellant at the police stat ion.

[18] The complainant was taken back to the hospital by the appellant and was admitted and overseen by a Dr. Naidoo. She had told Marlene Booysen the previous day that the appellant was assaulting her and showed her where she had been stabbed by the appellant. She told Ms. Booysen that she did not want to go back home because she had decided to commit suicide. She did, however, not tell Booysen that the appellant had been having forceful sexual intercourse with her because she did not trust Booysen and because the appellant had contacts everywhere. She explained in cross-examination that the reason why she did not trust Booysen was because she, Booysen, was also communicating with the appellant. She also did not tell Dr. Naidoo for the same reason.

[19] After the complainant was discharged from hospital, she went back to D[....]'s place. D[....] took the complainant to the police stat ion during April 2012 to lay a charge against the appellant. Warr ant officer Disepe was called from the Child Protection Unit and took down a statement from the complainant . In her statement, about which the complainant was cross-examined, she said that she only opened up to D[....] during January 2012. The reason why she waited three months to go to the police after opening up to D[....] was because the appellant had connections everywhere and she was afraid that he would find out that she had approached the police. The complainant confirmed in cross- examination that she was 15 years old when the first incident occurred. She was asked about the assaults. She said that the appellant used to hit her with a sjambok and

sometimes with his open hands and clenched fists on her face. On one occasion this resulted in a lump above her right eye which she showed to her uncle. The complainant was examined by a medical doctor on 4 April 2012 and the J88 report completed by the doctor was handed in by agreement. The clinical findings noted on the report were, firstly, an old scar on the complainant's fifth left finger. However, in the doctor's schematic illustration it is indicated as being on the fifth finger of her right hand as was testified by the complainant. The report further noted old whip lesions on the appellant's posterior thigh.

[20] The next witness for the state was Ms. M[....], the appellant's elderly neighbour. She was 79 years old at the time of trial. She testified that the complainant ran to her place on several occasions when she was assaulted by the appellant. The first time that the complainant ran to her, the appellant also appeared. She asked him what the problem was, and he said that the complainant did not wash the dishes. The second time that the complainant ran to her, the appellant again followed her. He went into the kitchen and switched the kettle on. She asked him what he was doing, but he did not respond. She could see that he was very angry. She was concerned about what he wanted to do with the kettle and ordered him to leave. When the appellant left, the complainant told her that the appellant had accused her of sleeping with a boy inside the house, which the complainant denied. When the complainant left, she did not return to the appellant's house.

[21] Ms. M[....] said that she did not observe any injuries on the complainant's face or body and that the complainant also did not tell her that she was injured. The prosecutor put it to Ms. M[....] that it appeared that she, Ms. M[....], was afraid of something, which she denied. When she was asked whether there was any other occasion that the complainant came running to her, she said that she could not remember but when she was asked whether she was forced to kneel before the appellant and beg him she admitted that when the complainant on one occasion came shouting and screaming to her for help, she went to the appellant's place and knelt before him and begged him to stop assaulting the complainant. She said that everything then returned to normal. She denied that the complainant ever confided to her about sexual encounters wit h the appellant.

[22] The next witness called by the state, was Ms. M[....] who had been a friend of the complainant since 2003 . She knew the appellant and said that he did not want the complainant's friends to visit the complainant . They only used to visit her when the appellant was at work. She was asked whether the complainant confided in her during 2007 about something that happened to her. She said she could not remember in which year it was, but it was during the years when they were still at school. She said that on a day, early in the morning, the complainant came to her place and knocked on the door. She went outside and found the complainant crying. She was emotional and could not speak. When she calmed down, the complainant told her that the appellant had found her sleeping with her boyfriend, that the appellant then took her back home and forced her to have sexual intercourse with him while holding a knife. She said that the appellant again had sexual intercourse with her in the morning. Ms. M[....] then went with the complainant to the house of their friend, Lillian Jonas, the first state witness. There the complainant told Ms. Jonas what had happened to her. Ms. M[....] and Ms. Jonas then suggested that they should go to the police. They did, however, not go because the complainant said that the appellant had told her that he knew some police officers who were his friends and that nothing would happen if a charge was laid. After this incident, the complainant did complain about her father beating her up for coming back late from school.

[23] During cross-examination , Ms. M[....] said that when she testified that the complainant had said that the appellant had found her sleeping with her boyfriend, she meant that they were having sex. She said that from 2003 up to the incident in 2007 the complainant did not mention to her about being raped by the Appellant. After 2007, Ms. M[....] and the complainant parted ways and lost contact as they then went to different schools.

[24] The last witness called by the state was Mr. Tomi who is a brother of the complainant's mother. He is there fore the complainant's uncle. He testified that, after the complainant's mother passed away, the complainant came to his place crying and complaining that she had been beaten by the appellant. He said that he thought that this happened during 2012 and 2013, but then said it happened while the complainant was still at school and before she had a baby. The

complainant asked him to speak to the appellant and asked him why he was beating her. He went to the appellant who said that he had beaten the complainant because she had a boyfriend. Mr. Tomi reprimanded the appellant and the appellant agreed not to do that again. He also reprimanded the complainant and told her to listen to her father. After some time, the complainant again wanted to see him about the appellant assaulting her. When the complainant arrived, she complained again that she had been assaulted by the appellant and had a bump on her forehead. He arranged for a family meeting to take place at the appellant's home and for the appellant 's grandmother or mother to be present. During the meeting, both the appellant and the complainant refused to tell the truth about what was actually happening between them. The family then said that this should not happen again.

[25] The third time that the complainant came to Mr . Tomi, she was afraid to tell him what was happening. He decided to take her to her aunt and his brothers in Coligny in the hope that she would tell them what the problem was between herself and the appellant. He took her there during a weekend and the feedback which he got on the same day was that the complainant had said that the appellant had been having sexual intercourse with her, which she was afraid to tell Mr. Tomi about. He confirmed this with the complainant. He then told the complainant to lay a charge against the appellant. He said in cross-examination that she told him after three or four days that she had gone to the police and that her aunt that told her that she should also see the social workers. Mr . Tomi said that he was afraid to go back to the appellant because the appellant had promised to shoot him should he see him again.

[26] The appellant testified in his own defense. His version was a complete denial of all the allegations against him. He denied that he raped the complainant a week after the death of his wife and said that his wife's mother came to stay with him in the house for a month of mourning. According to the appellant, his relationship with the complainant was fine and it was only after he realised that the complainant was involved with boyfriends that everything turned around. No one ever reported to him that the complainant had complained about his sexual abuse of her and said that he heard this for the first time when the police

approached him about this. He knew the two girls that usually accompanied the complainant and said that they did not enter his house. He did not know why. He did not remember ever locking the complainant in the house as she testified . Upon becoming aware that the complainant was involved with boyfriends, he started to intensify discipline. He realised that she was involved in a love relationship with a boy who lived in the same street and became suspicious when she went to his house for a long time. He denied that he assaulted the complainant with a sjambok and said that he did not physically punish the complainant. Up until 2011 he never assaulted the complainant with a sjambok.

[27] The appellant said that his relationship with the complainant's uncle who had testified had been fine until he appeared in court. He was asked whether the uncle ever approached him about the complainant having reported to the uncle that the appellant had assaulted her with a sjambok and had slapped her and beat her with his fists. The appellant said that the uncle came to his place and that they sat down with the complainant and that they reprimanded the complainant about what she was doing . He denied that the complainant had gone to the uncle to complain about his treatment of her. The obvious question to ask is why the uncle would have gone to the appellant to discuss anything about the complainant if the complainant had not reported anything to the uncle. The appellant denied that the uncle ever said that the complainant had reported to him that the appellant had beaten her with a sjambok and physically abused her or raped her. He denied that he told the uncle that the complainant was selling her vagina.

[28] The appellant denied that he ever found the complainant and her boyfriend P[....], who he confirmed was the one living in a house in the same street, having sexual intercourse. He denied that he assaulted the complainant with a sjambok on that day. He also denied that he threatened and stabbed complainant with a knife on that day.

[29] The appellant remembered the day when his neighbour Ms. M[....] came to his house when he told her that he was reprimanding the complainant for not washing the dirty dishes. He said that Ms. M[....] asked the complainant why she did not do that. He denied that Ms. M[....] ever asked him about the injury on the

complainant's finger or about raping the complainant.

[30] The appellant also denied that he became aware that the complainant had gone to Mr. Pitso and thc;1t he had then threatened to kill her and taken her to Lichtenburg. The appellant was asked whether the complainant stayed with him until 2011. He said that he could not remember whether it was 2007 or 2008, but that the complainant left his house at that stage after she became involved with a second boyfriend. At that point, he said, his relationship with the complainant was fine. I find this statement surprising in light of the appellant's strong feelings about the complainant having boyfriends.

[31] The appellant was asked about the complainant's admission to the Park Med hospital. He said that he was contacted by the domestic violence officer to come to court. He testified that the complainant then said to the domestic violence officer that she wanted the appellant to allow her boyfriend to sleep with her in his house, that he had refused because she was not yet married and that the complainant said that she was suffering from depression and wanted to be admitted to hospital, to which he agreed. He denied that he was ever involved in any of the sessions with the psychologist Ms. Booysen or Dr. Naidoo. The appellant was reminded that the complainant had testified that he had been contacted to take part in a first session. The appellant then said that he and the complainant did have a session with Dr. Naidoo but that no mention was made about him raping the complainant. He said that the complainant was admitted to the hospital for two weeks.

[32] The appellant said that during the period of nine years from 2003 until 2012 no police, doctor, psychologist or anyone ever contacted him. He thought that the reason why the complainant lied about what he had done to her might be that he did not agree that she could sleep with her boyfriend in his house and that she may have assumed that he did not like her or love her.

[33] The appellant was asked in cross-examination whether he had ever given the complainant a hiding. He said that he once used a belt. This was when the neighbour, Ms. M[....], came to ask what they were fighting about. He was asked why he had, in answer to a question by the court, the said that he only disciplined the complainant verbally and never mentioned that he had used a belt. His

unconvincing answer was that there had been many questions.

[34] The appellant denied that the complainant had sought a protection order against him because of the fact that he was assaulting her. He said that the protection order was about her depression and that she was asking to be referred for medical attention. He was surprised that the complainant did not approach him to ask for medical help as they had a good relationship. It appears from the application for a protection order, which was handed in and admitted in evidence, that the complainant reported to the domestic violence officer that the appellant had since the death of her mother been abusing her by assaulting her with a sjambok, that he had stabbed her with a knife in 2007 and had threatened to kill her.

[35] The trial court was critical of the fact that the state had not called the complainant's boyfriend P[....], the police officer Mr. Pitso, the domestic violence clerk, the psychologist Ms. Booysen or the complainant's aunt or aunts to testify. The court, however, found that the complainant's evidence was corroborated by those witnesses who did testify. The court then proceeded to deal with the evidence of each of those witnesses.

[36] In regard to the denial by Ms. M[....] that the complainant had showed her her cut finger and had told her that the appellant had raped her, the court found that Ms. M[....] 's position must be understood. Having to give evidence incriminating the appellant put her in a very difficult position. She is a 79-year-old sickly woman who resides next to the defendant with whom she was on good terms. The learned magistrate said in his judgment that Ms. M[....] seemed to be reluctant to volunteer information about what happened and to disclose information that the complainant came running and crying to her one day as a result of which she went and knelt down before the appellant and begged him not to assault the complainant. She only revealed that information after it was exhorted from her by the prosecutor.

[37] In regard to Ms. Jonas and Ms. M[....], the court found that their evidence was plain and straightforward and that they were not shaken by cross-examination. It found that they sufficiently corroborated the evidence of the complainant in so far as her interact ion with them was concerned and that it had no reason to doubt the veracity of the evidence of both Ms. Jonas and Ms. M[....].

The court further found that, although warrant officer Pitso was not called to testify, it was satisfied on the available information that the complainant did report the alleged rape to the Police Child Protection Unit in 2007.

[38] The court was not impressed with the appellant's evidence that the reason why the complainant's uncle, Mr. Tomi, had come to his house was to help him reprimand the complainant for having love relationships. The court referred to Mr. Tomi's evidence that the complainant had come to his house crying and complaining that the appellant had beaten her up and that he had gone to the appellant's house to reprimand him to stop doing that and that there was a second time that the complainant again came to him to complain that the appellant had beaten her up. The court also referred to his evidence that, after the complainant 's aunts told him in the presence of the complainant that she had just told them that the appellant had had sexual intercourse with her, he convened a family meeting, including the appellant, where this was discussed and when the appellant threatened to shoot him. The courts found that it was improbable that Mr. Tomi would go to the accused to help him reprimand the complainant if the complainant had never complained to him about the Appellant 's conduct.

[39] The court found that the appellant 's claim that what the complainant wanted by applying for a protection order was that he should allow her boyfriend to sleep with her in his house was untrue. The learn ed magistrate pointed out that the application for the protection order nowhere indicated that the complainant asked for what the appellant said she was demanding. What the application reflects, was that the complainant had been assaulting her.

[40] It was argued on behalf of the appellant before the trial court that the complainant had had ample opportunity to report the rape and ask for help, implying that she should not be believed when saying that she was sexually abused as she continued to live and behave normally. The court disagreed with the argument and said that the behaviour of complain ant s in sexual abuse matters differs from one complainant to the other and that it should be appreciated that when the alleged rape incidents started, the complain ant was still a child of about 14 years old. She did report the rape to the Child Protection

Unit in 2007, but nothing came of it because the appellant found out about the report and took her to Lichtenburg and also took a cell phone away. The court referred to the fact that rape is a serious, humiliating and degrading experience and that it cannot be expected of a complainant to open up to everyone, but that the complainant did tell Dr. Naidoo that she had had sexual intercourse with both the appellant and her boyfriend, that she did not know who the real father of the child was and that she was even willing to undergo paternity tests to find out who the father of her child was

[41] The court further found that the appellant's evidence that he had a good relationship with the complainant and that he did not assault her but was only disciplining her verbally not to have a love relationship while she was still attending school, was not the truth. The court considered the possibility of the complainant having an ulterior motive against the appellant and said that it appeared that the appellant was refusing to accept that the complainant was really depressed by what she had experienced over time and that the appellant's claim that she was depressed and wanted to be admitted to hospital because he did not want to allow her boyfriend to sleep with her in his house, was without substance and did not make any sense. The court did not accept that the complainant had an ulterior motive to falsely implicate the appellant.

[42] The court concluded that it was satisfied that the complainant told the truth and that her two friends were credible witnesses whose evidence could be relied upon and in the face of which the appellant's defense could not stand. It found that the evidence against the appellant was so overwhelming that his version should be rejected as false.

[43] It was submitted on behalf of the appellant that the court misdirected itself and erred by finding that the prosecution had established the appellant's guilt beyond reasonable doubt on all counts, alternatively by not finding that the version of the appellant was reasonably possibly true. In this regard, it was argued that the learned magistrate said in his judgment that he was not in a position to hold that the appellant had sexual intercourse with the complainant more than once because the complainant described only one incident of rape between 2003 and 2007.

[44] The argument is based on a misunderstanding by counsel of the judgment

of the court *a quo.* When making the statement, the learned magistrate was not referring to count 2 in terms whereof the appellant was charged for raping the complainant more than once. The magistrate was referring to count 1, in terms whereof the appellant was charged with raping the complainant during the period 2003 to 2007. During her evidence, the complainant described one incident of rape which occurred a week after her mother's death. Although she did say during her evidence in chief that the appellant thereafter continued to sleep with her, she did not give any particulars of any specific incident of rape. That is clearly the reason why the learned magistrate said that he was not in a position to find that the appellant had sexual intercourse with the complainant more than once during that period.

[45] It was further submitted on behalf of the appellant that the evidence of Ms. M[....] was only obtained after the complainant had testified and that the trial court should have been aware that her evidence could have been coached. There is, however, nothing to support the submission. Counsel for appellant did not point out any part of her evidence which could be an indication that she had been coached. Furthermore, she was asked in cross-examination whether she had come to court on the first day of trial, when Ms. Jonas testified, to support Ms. Jonas and the complainant. She confirmed that she was present, but said that she was sitting outside the court during Ms. Jonas' evidence. She was further referred to the fact that her statement was only taken by the police after Ms. Jonas had testified and asked whether the testimony of Ms. Jonas was discussed with her. She said it was not discussed. The point was not taken further.

[46] The approach to be adopted by a court of appeal when considering findings of fact by a trial court was stated as follows in *S v Hadebe and Others*[1] :

"Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short , in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and

[1] 1997 (2) SA C R 64 1 (SCA) at 645

will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate courts to the factual findings of the trial court are so well known that restatement is unnecessary."

[47] I was not able to find any misdirection by the trial court in its assessment of the evidence before it. The learned magistrate dealt fully and comprehensively with all the evidence before court and in my view correctly concluded that the state had proved the guilt of the appellant beyond reasonable doubt on all three counts.

[48] In the result, the appeal is dismissed with costs.

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J W LOUW
JUDGE OF THE HIGH COURT

I agree: