IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: A13/17

DATE: 31 January 2019

JULIUS NGWATO **Appellant**

V

THE STATE **Respondent**

JUDGMENT

MABUSE J: (Mokose J, concurring)

[1] This is an appeal against both conviction and sentence. That the appeal is against both conviction and sentence is clear from the notice of appeal dated 23 December 2016 filed by the appellant at Rooigrond Correctional Services. We will deal with the grounds of appeal later in the judgment.

[2] On 28 August 2018 the appellant appeared before a regional court magistrate at Ventersdorp arraigned on three counts of contravention of section 3 read with certain sections of the Criminal Law Amendment Act 32 of 2007 read also with certain sections of the Criminal Procedure Act 31 of 1977 ("the CPA"). The said counts were furthermore read subject to the provisions of sections 51 and 5 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended as well as sections 92(2) and 94 of the CPA

[3] The allegations against the appellant were, in each of the three counts,

that on or about 6, and 7 March 2012 and at or near Tshing, Ventersdorp, in the regional division of North West he did unlawfully and intentionally commit an act of sexual penetration with a female, namely S M, 32 years of age, by inserting his penis inside her vagina and also inside her anus.

[4] Having confirmed that he understood the three charges against him, the appellant pleaded not guilty to all three of them. Through his then legal representative, a certain Mr I Kruger, the appellant chose to remain silent. He therefore did not, as enjoined by the provisions of s 115 of the CPA, make any statement in which he disclosed the basis of his defence. That he had chosen to remain silent was confirmed by the appellant. Despite his plea of not guilty, he was convicted accordingly on all three counts and was, upon conviction, sentenced, in respect of all three convictions, to one term of life imprisonment. It is therefore the said convictions and sentence that are the subject of this appeal. Leave so to appeal having been granted by the trial court.

[5] In his application for leave to appeal against his conviction, the appellant has set out good grounds on the basis of which he challenges his conviction by the trial court. I do not deem it necessary to set such grounds out. It is however sufficient to observe that at the heart of such ground is a belief by the appellant that the court *a quo* erred in finding that the State had proved its case beyond reasonable doubt.

[6] The charges against the appellant have their origin from the following circumstances. On 6 March 2012 the complainant, S M ("M"), was at her place of residence when she received a cell phone call from a friend of hers, a certain M S ("S"), who invited her to come over to a tavern. She accepted the invitation and immediately went there. While they were there she and S induldged in drinks. While sitting there, S called a certain Big John and his cousin on her cellular phone. This Big John was in fact the appellant and the cousin was a certain A.

[7] After 22h00 she told S that she wanted to go home. S then asked the appellant to take her home. The appellant was known to her as S's younger brother and a friend to her. She had known him since 2008. The

appellant took her up to her gate.

[8] When they reached her gate, she told the appellant that, seeing that she had reached her gate safely, the appellant could go back. But the appellant told her that he wanted to see to it that she got into the house safely and that he would only go back only after he had satisfied himself that she was safe in the house. Reluctantly she allowed him to take her up to the door of her house.

[9] Upon reaching her house she unlocked the door, got into the house, switched on the lights and closed the curtains and the windows. The appellant followed her into the house. After closing the windows and curtains she told him once again to leave seeing that she was safe in the house.

[10] After she had told him that she was safe in the house and that he could go, the appellant surprisingly told her that she was crazy. He asked her why he should leave. He instantly walked to the door, closed it and locked it with a latch.

[11] She asked the appellant why he had labelled her as crazy and secondly why he locked the door. Instead of responding to the questions, the appellant became aggressive. For inexplicable reasons he hit her several times with both open hands on the side of the face. She tried to fight back but the appellant continued unabated to hit her. The appellant pulled her to the bedroom. Once they were inside the bedroom he ordered her to undress. She refused. The appellant hit her again with both hands. He instructed her once more to undress and threatened to kill her if he were to undress her himself. Under pressure she undressed herself. He was very aggressive.

[12] He ordered her to get unto the bed. She refused. The appellant hit her again with open hands in the face. She then obliged and got into the bed. The appellant instructed her to lie on her back. He then removed his clothes by pulling them down up to his knees. He ordered her to put his penis inside her vagina. She tried to but was too slow. When he realised that she was too slow in doing what he had asked her to do he took over

himself. He put his penis inside her vagina.

[13] She asked him why he did what he was doing and even tried to push him away. He warned her against asking him too many questions. He told her that she had always wanted to have sexual intercourse with him. She tried to scream while the appellant was on top of her and having sexual intercourse with her.

[14] The appellant warned her against screaming as that would have alerted people in the street as to what was going on in the house. He ended up ejaculating into her vagina.

[15] After ejaculating the appellant got off her and lay on the bed next to her. She was crying. He ordered her to stop crying or making noise. She got out of the bed and went to drink water in the kitchen. Gingerly she walked to the door, unlocked and opened it, walked out and ran away into the street. She was still naked. The appellant ran after her, caught up with her, grabbed her and pulled her back to the yard. Once inside the yard he tried to pull her into the house. She held onto the door frame. When he realised that he could not pull her into the house he grabbed her by her legs and thereby managed to pull her into the house.

[16] As soon as he had succeeded in pulling her into the house, he ordered her to lie on the floor between a sofa and a coffee table. While she was tying there he again pulled his trousers and underwear up to his knees and took out his penis and inserted it into her vagina.

[17] He took her to the bedroom. In the bedroom he ordered her to bend over and to hold on to the bed. She refused. He hit her with open hands. He then put his penis inside her anus and had anal sexual intercourse with her. She asked him to stop so they could talk. The appellant told her that as she was not his sibling, he did not care. He ejaculated into her anus. Once more he told her he did what he had always wanted to do. He told her that if she reported the incident to the police he would kill her.

[18] The appellant then climbed on the bed in order to sleep. He invited her to join him on the bed. She refused. He told her that whether or not she liked it she would join him on the bed. Much against her will she then climbed

on the bed. She was crying. He warned her against crying and told her that she was making noise.

[19] While they were still lying on the bed there was a knock on the window. It was M, a friend of hers and N who were knocking on the window. There were also T and B. M kept on screaming "M are you okay?" while she continued knocking at the window. She rose from the bed, got into her pajamas, tiptoed to the door and opened it. As soon as she was outside the door she screamed, while at the same time she was pointing to her house. She ran off to T's parents' house. As she was running away her friends, who were knocking at her door, followed her.

[20] She was taken into the house where she told the people in there that Big John had sexual intercourse with her against her will. T then called the police. Later she accompanied the police to the police station where in the charge office she saw the appellant. The police took down her statement whereafter they released her and asked her to come back in the morning at 08h00.

[21] She went back to the police station the same day at 08h00. The police took her to the local hospital where she was examined medically by a medical doctor, a certain Dr Kofi Kwan Asante ("Dr Kofi"). She also went to consult a Dr Steyn at Potchefstroom Hospital the day after she had been medically examined by Dr Kofi.

[22] She has not been well since the incident. She has nightmares, and above that does not sleep well. Her left ear was painful. She has bad memories of the incident. She has lost trust in men. She is still afraid that the appellant may carry out his threat of killing her.

[23] Her left eye and left foot were swollen. She could not walk properly. She was injured on her left foot and left side of her head and had bruises on her thighs. She was swollen on the left side of her head. The inside of her thighs were black and blue. These injuries were caused by the appellant when he forcefully tried to opened her thighs. She also had injuries at her vagina and anus.

EVIDENCE OF TSELOFELO MARTHA BIYANA

[24] T M B ("B"), a 24 year old female at the time, stayed at house number [….]. She was the complainant's neighbour. She told the court that the night of 6 March 2012 and the morning of 7 March 2012 she was sitting in her boyfriend's motor vehicle with her boyfriend. Her boyfriend dropped her at home and she was about to enter her house when she saw M, in other words, the complainant, in the street. At that time she was being assaulted and dragged by a male person. The assault was with open hands and clenched fists. She walked to the house and woke up her sister. She told her sister about the assault.

[25] The sister woke up. Both of them stood at the window of their house and through the window looked outside. When they were looking outside the window they saw the complainant and the male person still in the street. That male person was still assaulting the complainant. They saw him pick the complainant up and go to the door of the complainant's house. During the said assault, the complainant was screaming and crying.

[26] She saw the complainant holding onto the door frame while the male person tried to push her into the house. She confirmed, after an objection by the appellant's legal representative, that the person who assaulted the complainant and pulled her and pushed her was the appellant. The appellant managed to push the complainant into the house. Thereafter the door was closed and the lights were switched off.

[27] Both of them decided to go and wake up a certain L M ("L"), their neighbour and the complainant's friend. Upon their arrival there, she explained the assault that she had just witnessed upon the complainant by the appellant to L. All three of them decided to go to the complainant's house. L woke up her father and he accompanied them to the complainant's house. At the time, the complainant was staying alone. She, the witness, knew it. Upon arriving at the complainant's house they knocked at the door. There was no response. They knocked again. The complainant responded in a subdued voice. One of them then screamed to the complainant to open the door. Eventually the door opened. When it

opened the complainant came out running and pointing to the house that there was someone in there. She ran into her parent's yard and into the house. They followed her. She was crying and screaming. In the house she told them that someone had raped her twice.

[28] Only after the arrival of the police did she say that it was Big John who had raped her. The police were called. The complainant told them that the appellant was in her house. The police went there, found the appellant and arrested him.

EVIDENCE OF LENAH MOKGOTSI

[29] Save for testifying that to her knowledge the complainant did not have any love relationship with the appellant, her evidence confirmed, in many respects, the evidence of B.

EVIDENCE OF PULE TOTSE ("TOTSE")

[30] He testified that she was a member of the South African Police Services for 19 years. At the time he was the investigating officer of this case. He was a police officer stationed at Potchefstroom and held the position of a warrant officer.

[31] On 7 March 2012 and at the police station he noticed that the complainant was not walking properly. After receiving the case dossier, he perused the medico-legal examination report (J88) contained in the case dossier. He also noted that the complainant had a blue eye. The eye itself was red. He then asked the complainant what happened. The complainant made a report to him. The complainant told him furthermore that she had other injuries on her body which she sustained while she was being assaulted by the appellant. To his surprise those injuries were not reflected in the J88 in the case docket. This was the J88 that had been completed by Dr Kofi. He then called a certain Dr Francois Rossouw Steyn ("Dr Steyn") and made arrangements with him to examine the complainant. At that time Dr Steyn was working at Potchefstroom Hospital. He explained to Dr Steyn that he had a rape victim and furthermore that he was not satisfied with the

J88 that had been completed by a certain doctor at Ventersdorp Hospital. They arranged that he should bring the concerned victim to Potchefstroom Hospital the following day i.e. 8 March 2012. He did not go there himself. The complainant was taken to Potchefstroom Hospital by her relatives that had come from Potchefstroom and who undertook to do so after he had made arrangements with them to stay. He only received a telephone call from the complainant after she had gone through Dr Steyn's examination that she had finished. He then travelled to Potchefstroom Hospital to collect the J88 that had been completed by Dr Steyn.

[32] The reason for taking the complainant to Dr Steyn was that Dr Steyn was a specialist in sexual offence cases. He was a medical doctor they were using in Potchefstroom for such cases. Dr Steyn was a medical doctor that was used for a period of four years around Potchefstroom.

EVIDENCE OF DR FRANCOIS PETRUS ROSSOUW STEYN ("DR STEYN")

[33] He testified that he was a medical doctor. He qualified on 1 October 2007 as a medical doctor. He did his internship at Ventersdorp, and Potchefstroom hospitals. After placing his qualifications, which were not in dispute, on record he was given the J88 that he had completed on 8 March 2012.

[34] He testified that he consulted with a victim, the complainant, S M, on a March 2012 at 11h00. The complainant told him at the outset that she had been assaulted and raped on 6 March 2012.

[35] He then testified from the J88 and told the Court that on examination the complainant had suffered the following injuries:

35.1 a swollen left eye;

35.2 a left skull bruising and tenderness;

35.3 six penny bruises on the side of the thighs. He explained that a penny bruise is what a victim suffers if someone forcefully presses the legs apart. A penny bruising is a round bruising. As a

consequence of such penny bruising and the tenderness she was limping as she walked into the investigation room.

[36] He came to a conclusion that the complainant was most likely hit with a blunt object on the left eye, skull and leg and that the legs were most likely forcefully opened.

[37] Furthermore, the complainant had:

37.1 a swollen urethra orifice:

37.2 a bruise on the fossa naviqularis at 6 o'clock;

37.3 the hymen appears multiparous which means that she had delivered many times and more than once at least. She had no fresh tear on her hymen. He passed the speculum and found a white discharge with mucosal tears;

37.4 there was a blue spot on the cervix. This is caused by forceful penetration. He came to a conclusion that forceful penetration had taken place. He explained that the fossa naviqularis is the opening between the lips of the vagina or the labia before you get to the hymen and it is also called the landing spot. The reason why women get bruises there at the fossa naviqularis is that they are forcefully penetrated. In normal sexual intercourse where you get two consenting partners a woman gets aroused and gives off some lubrication from the Bartholin's cyst which are sitting on both sides next to the vagina. This makes the vagina wet to facilitate penetration by a male organ.

[38] He continued examining the anus of the complainant. There he found that the complainant had a fissure at 6 o'clock. He testified that the complainant had redness around the anus. On further examination of the orifice he noted that the fissure kept on going into the orifices at6 o'clock. She had reflex dilation with absent winking or twitching. He explained that this is usual if you examined a normal anus and you pull it apart. It closes as a reflex. He continued with his explanation that if it has been forcefully

penetrated the reflex is absent for a time. He noticed furthermore that the complainant had a thickening of the rim and finally funmelling and a discharge. His conclusion was that the fissure at 6 o'clock at the bottom also indicated that she was most likely anally penetrated from her back like somebody bending forward and being penetrated from behind. The first point the penis touches as it penetrates the anus is the perineum and then it moves in. The damage the penis causes is again at the back before it slides in. So if you got the penis coming forward and there is no lubrication the woman will try to close her external sphincter and that is where usually the damage comes from. The anus got two sphincters. The internal sphincter which is the one that you cannot control and the outer one, the external sphincter, that is the one that you can control if feel you need to go to the toilet. You can keep your anus and you can still run two minutes and get to the toilet. But if you do not get there in time you will then make a mess in your pants. He testified that, as a doctor, you could only say whether a forceful penetration took place or not.

[39] The appellant testified in his defence and called one witness, a doctor Kofi Kwan Asante, to testify on his behalf. The appellant testified that on the evening of 6 March 2012 he and the complainant were at a certain tavern where they were drinking alcohol. From the said tavern he and the complainant ended up at the complainant’s house. He testified furthermore that when he was about to go home the complainant asked him not to leave but to take her home. When they reached the complainant's gate, he wanted to turn back but the complainant asked him not to leave but to make sure that she was safe in the house.

[40] At that stage he and the complainant already had an agreement. He and the complainant were having an affair secretly. It is for this reason that she did not want him to leave. They had agreed that they would spend the night together. After they had had sexual intercourse he told her that it was time for him to go to his girlfriend. He denied that he had sexual intercourse with the complainant against her will. The complainant had consented to the sexual intercourse, so he testified.

[41] He denied that at a certain stage the complainant ran out of the house; that he grabbed her outside on the street, and that he assaulted her and took her back into the house. He testified that it did not happen. He admitted that he had sexual intercourse with her thrice. He testified furthermore that he hit the complainant once with a flat hand following a verbal argument. He used both hands. He denied that he assaulted the complainant in any other manner. He denied that the complainant sustained any other injuries as a result of the sexual intercourse or the assault with both hands. He was woken up by the police.

[42] He did not know nor could he find any reason why the complainant could have accused him of having raped and assaulted her.

DR KOFI KWAN ASANTE

[43] He testified that he was a qualified medical doctor. He had obtained his degree at Tukkies University, that is the University of Pretoria, in 2009. At the time of completing the J88 in question he was practising medicine at Ventersdorp as a district surgeon. He told the Court in his testimony that on 7 March 2012 at about 11h00 a woman was brought to his consulting room. This woman's name was S M. He examined her and having done so completed the J88. The document was given to him. He was able to identify it.

From paragraph 8 thereof he read the following:

"Alleged history of sexual assault without any physical obvious injuries."

He confirmed that when he completed the J88 a medical doctor fills in what he sees on the victim and that if there are any complaints from the victim he records such complaints in the J88.

[44] The complainant , according to him, had no visible injuries at all. At the material time of the examination he took all the necessary steps to look all over the victim's body to see if there were any noticeable injuries. In his

professional assessment of the complainant she did not appear as if she had been raped thrice. He told the court that when he wanted to leave and go to his girlfriend the complainant told him that he would not leave, but they had agreed to spend the night together. This evidence concluded the evidence of the appellant.

[45] The State argued that the witnesses that it had called were very credible witnesses. The prosecutor singled out the complainant as a credible witness. They all gave evidence. He labelled the complainant's evidence as false and asked that it be rejected. He submitted that the injuries seen on the complainant and recorded on the J88 corroborated the complainant's version.

[46] He argued furthermore that Totse testified that immediately after the complainant had returned from the hospital he viewed the medico-legal report filled in by Dr Kofi. He went through it and as a layman in the medical field started to have doubts in it. He immediately went to see the complainant. The complainant noticeably walked with an impaired gait. She was noticeably in pain. She also complained to him that the observations he made were not recorded in the J88. He expected it to be so recorded and captured. For these reasons he was unhappy about the manner in which Dr Kofi had completed the J88. So he decided that the complainant needed to be examined by another medical doctor.

[47] Mr Kruger argued that:

"The chain of custody has been broken. "

Whatever this chain is and what role it played in the whole matter could not be explained . He argued furthermore that if the Court were to admit and accept the J88 signed by Dr Steyn there was no way in the world that we could say that there was nothing that happened to the complainant from the time that she left the presence of the appellant until the time that she was examined by Dr Steyn.

[48] With the greatest of respect to Mr Kruger, this observation is devoid of any

merit and, in my view, surreal. In the first place the version in his argument was that the Court, in its assessment and evaluation of the evidence, should engage in conjectures and speculation. In other words, because the medico-legal examination report completed by Dr Kofi, the first doctor who examined the plaintiff, did not record the injuries on the complainant while the J88 completed by Dr Steyn, the second doctor who medically examined the complainant, recorded serious injuries, the court must speculate about the source of the injuries observed by Dr Steyn. The appellant should have laid a foundation for a *novus actus intervenience* or it must have come to the fore as a reasonable possibility from the State's evidence. A Court should refrain from indulging in speculations and conjectures. Secondly, it was never put to the complainant, as a reasonable possibility, that she sustained those injuries after having been examined by Dr Kofi Asante but before she was examined by Dr Steyn. Any suggestion, in my view, that she might have suffered those injuries in between the examinations amounts to faulty reasoning.

[49] This being an Appeal Court, this Court, sitting as it was, was guided by the principles according to which a Court of Appeal should consider an appeal as set out in R v Dhlumayo 1948 **(2) SA** 677 **(A),** 696. When an appeal is lodged against a trial court's findings, the Appeal Court, like the present one, takes into account the fact that the trial court was in a more favourable position than itself to form a judgment, because it, the trial court, was able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial from the beginning to the end. Initially, therefore, the Appeal Court must assume that the trial court's findings are correct. Under normal circumstances a Court of Appeal will accept those findings unless there is some indication that a mistake was made. See S v **Tshoko 1988** (1) **SA 139 (A).**

[50] The court *a quo* was aware that the duty lay on the State to prove its case beyond reasonable doubt. It was aware, furthermore, that no duty lay on the appellant to prove his case. It accepted the principle that it was enough if his version was reasonably possibly true.

[51] It is quite clear that the court *a quo,* and quite correctly so, accepted the evidence of the State witnesses. In my view, there existed valid grounds for doing so.

[52] The appellant's legal representative did not challenge Dr Steyn's findings and his reasons for such findings. He did not ask Dr Steyn to juxtapose those findings against the findings of Dr Kofi and express his opinion why there was a marked difference. In my view, he should have placed the J88 completed by Dr Kofi before Dr Steyn and asked him to comment. The state and the defence could still have asked the two doctors to speak to each other, compare notes and draw joint minutes for the benefit of the Court. It must always be remembered that the purpose of the expert witness is to assist the Court. No party owns any witness.

[53] Having failed to challenge the findings of Dr Steyn it was unfair for Mr Kruger to argue that he should not be believed. It is unfair to leave the evidence of a witness unchallenged and then later argue that such a witness should be disbelieved. A party who has called such a witness is entitled to accept that such a witness has told the truth. In Small v Smith 1954 (3) **SA 434 SWA at 438** the Court had the following to say:

"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence unchallenged in cross-examination and afterwards argue that it should be disbelieved

Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct. More particularly is this the case if the witness is corroborated by

several others, unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever. "

[54] Failure to cross-examine a witness on any aspect of his evidence may accordingly prevent a party from later disputing the truth of its evidence. A party who calls a witness is entitled, in the absence of any challenge to his evidence, to assume that a witness's testimony has been accepted as correct. See in this regard **Browne v Dunn (1893) 6R 67**(HL.)

[55] When one analysis the cross-examination of the witness by the appellant's legal representative it becomes as clear as crystal that he failed to:

55.1 put the appellant's case to Dr Steyn;

55.2 put the appellant's defence to Dr Steyn;

55.3 put it to him that the appellant and Or Kofi will contradict his evidence;

55.4 put the J88 completed by Dr Kofi before Dr Steyn and invite him to comment particularly with regard to the difference.

See also The President of the Republic of South Africa v South African Rugby Football Union 2000(1) SA 1 CC at pp 61 to 76 where the court had the following to say:

"[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the w11ness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness- box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Brownev Dunn and has been adopted and consistently followed by

our courts."

[56] Finally, in my view, the trial court was entitled in the absence of any challenge to his evidence to accept the evidence of Dr Steyn as the truth. The opinion of Dr Steyn was founded in logical reasoning. An opinion to be acceptable must have a logical basis. See Michael and another v Linksfield Park Clinic Pty Ltd and Another 2001 (3) SA 1188 (SC A.) Apart from the fact that the evidence was unchallenged during cross examination there were other cogent considerations why the court a quo accepted the evidence of Dr Steyn. The evidence was founded as logical reasoning.

THE EVIDENCE OF THE COMPLAINANT

[57] No part of the complainant's evidence was challenged. Her credibility as a witness was never called into question. It was never put to her that she was inconsistent and that she did not tell the truth. She denied all the statements that were put to her. It was put to her that she drank more than nine bottles of Brutal Fruit. She disputed this statement. Furthermore, it was put to her that the appellant would also testify that she asked him to take her home. She denied that she asked the appellant to take her home. It was furthermore put to her that there at her house she invited him to come in. This she disputed. In my view, the evidence of the complainant was beyond reproach. Her evidence that she had sustained some visible physical injuries was corroborated by both Dr Steyn and Totse. Her evidence that she fled into the street, chased by the appellant who caught up with her and assaulted her in the street was corroborated by T and L.

THE EVIDENCE OF PULE TOTSE

[58] During cross examination of this witness a strange statement was put to him by the appellant's legal representative. The following question was put to him :

"Did any stage came up in your mind that between the time the victim saw

Kofi and the time that you saw her she could have been injured. "

I find this question somewhat opaque in the light of the following factors. Firstly, it was never the complainant's evidence that she sustained any injuries between the two medical examinations. Secondly, it was never put to her that she lied. Thirdly, it was never put to her by the appellant that she sustained any further injuries between the two medical examinations. Fourthly, and as pointed out by Ms Harmzen, the evidence of Totse corroborates the complainant's evidence insofar as it related to certain injuries.

[59] No question to justify his dissatisfaction with the report by Dr Steyn was put to him. No question asked through doubt on his assessment of Dr Steyn's expertise in the completion of the J88. The fact that, according to him, the J88 had not been correctly completed already threw a devious light on Dr Kofi Kwan Asante's expertise.

THE EVIDENCE OF T M A AND L M

[60] The evidence of these two witnesses is beyond reproach. An impression was created by Mr Kruger that there was inconsistency in respect of whether the knocking was at the door or at the window. This was fully explained by the witnesses. I find nothing wrong in their evidence as to where they knocked at the complainant's house. At any rate if that is regarded as an inconsistency, it is an immaterial one. They corroborated the complainant that the appellant assaulted her in the street; that he dragged her back to the house and that he forcefully pulled her into the house.

[61] I agree with the court *a quo's* finding that the appellant's version of events was not reasonably possibly true. In a few words, the appellant's version is a pure fabrication. He lied to the trial court. The court *a quo* was correct in rejecting his version. Examples of the lies that he told the court are as follows. He testified that at the time he wanted to leave the tavern the

complainant stopped him from doing so and asked him to take her home. Later he testified that he and the complainant had an agreement to spend the night together. If his evidence carries any weight, why would he want to leave when he had an agreement to spend the night with the complainant. He testified furthermore that when they reached the complainant's gate he wanted to go away but it was the complainant who stopped him from leaving and asked him to make sure that she was safe in the house. This statement cannot be true. Why would he want to turn back at the gate if he had any agreement with the complainant to spend the night with her. He told the court that after sexual intercourse with the complainant, he told her that he would leave and go to his girlfriend but the complainant refused. Why would he go to his girlfriend after they had agreed to spend a night together. His version that he had a special affair with the complainant was a fabrication. It was never put to the complainant that they had an affair. The evidence of L M that there was no love relationship between him and the complainant was never disputed. The appellant was evasive. He told the court that the complainant was the one who inserted his penis into her vagina. The question was whether the complainant was correct in testifying that he had anal sex with her. The question was not answered. When he was pressed for a direct answer he said that he did not know what happened on the day. He was steadfast that it was the complainant who inserted his penis into her vagina. This statement was not even put to the complainant and the appellant admitted that. He denied that he ever assaulted the complainant.

EVIDENCE OF DR KOFI KWAN ASANTE

[62] At the outset I must point out that Dr Kofi did not furnish any reasons for his opinion as contained in the J88. In the first place it must be recalled that the issue is whether a witness has proof of sexual intercourse and whether she presented any physical injuries. If the evidence shows that there was sexual intercourse irrespective of the presence or absence of the injuries the complainant's evidence is corroborated on the aspect of

sexual intercourse. Whether there was any rape is a matter from the evidence of the complainant. During cross examination the Dr Kofi admitted that dealing with rape victims was not his speciality. In other words, he was a tyro with regard to this field. The case of the complainant was the third or the fourth case that he dealt with. But in training he testified that they are exposed to a set of rape victims. It is understandable why he did not complete the J88 properly. It is because he was inexperienced. On his examination of the complainant he could not find any evidence that supported the history that the complainant had given him. This evidence was, in my view, strange and fiction considering that even the appellant had testified and admitted that he had had sexual intercourse with the complainant thrice. It must be recalled that in examining the complainant the medical doctor's duty is to establish as to whether such sexual intercourse took place. In his conclusion there was no such sexual intercourse.

[63] Paragraph 22 of the J88 had recorded a normal anus without any tears or abnormalities. He continued with his evidence and stated that he had observed a normal anus. According to him, if there were any penetration of the anus the complainant would have been able to visualise signs like anal tracks or fissures or there might be evidence of bleeding. On a the complainant he testified that he did not find any abnormalities. He did not find anything to support anal sexual intercourse. On a statement to him by the court that both the complainant and the appellant had told the court that they had sexual intercourse twice he testified that there was no prove of it. He continued and testified that where a victim had sexual intercourse before it becomes very difficult to establish that. According to him that there was sexual intercourse can only be established through the presence of semen or trauma to the sexual genitals or blood or cracks in the anus or vaginal walls. He also testified that he did not smell liquor. This, despite the evidence of the appellant that the complainant was drunk. According to him at the time he examined the complainant she did not have any blue eye. He would have seen it as a blue eye would have

constituted hard clinical evidence and he could not miss it. He spent three hours with the patient. If there was anything visible in the face he would have been able to see it. He could not comment on the observations made by warrant officer Totse that he saw the complainant walking with some difficulty the same day after he had examined her. I accept the finding of the trail court that Dr Kofi Asante was not a credible and reliable witness. He was correct in his observation that the doctor did not apply his mind to what he was doing. His evidence generated an opprobrium, in my view, quite correctly so, on the part of the court *a quo.*

[64] In his heads of argument counsel for the appellant stated that the trial court erred in not attaching sufficient weight to the evidence of Dr Kofi. It was argued furthermore by the appellant's counsel that Dr Kofi's J88 corroborates the version of the appellant. This argument, in my view, lacks merit. I already have dealt with the evidence of Dr Kofi somewhere *supra.* The case of Coopers {South Africa Limited) v Deutsche Gesellschaft which the evidence of an expert should be assessed. It had the following to say:

"As I see it, an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of its opinion is not of any real assistance. Proper evaluation of his opinion can only be undertaken if the process of reasoning which led to conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert. Even bearing in mind that the addressee of the summary is probably also an expert, I am of opinion that the addressee may not be able to evaluate the opinion, so as to enable him to advise the party consulting him thereon, if he is not informed in the summary of "the reasons" for the opinion. Having regard to the above meaning of the word "reasons" in the context of the sub-rule as a whole and the purpose thereof, I am of the opinion that the summary must at least state the sum and substance of the facts and data which lead to the reasoned

conclusion (i.e., the opinion). Where the process of reasoning is not simply a matter of ordinary logic, but involves, for example, the application of scientific principles, it will ordinarily also be necessary to set out the reasoning process in summarised form. The addressee should then be in a position to evaluate the opinion, and be in a position to advise the party consulting him whether the opinion can be controverted and, if so, what evidence is required to do so."

See also Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA **1188 SCA.**

[65] In my view, the appeal against conviction cannot succeed.

[66] The appellant's appeal against sentence is predicated on the fact that the court *a quo* erred in finding that there are not substantial and compelling circumstances.

[67] I now turn to the appeal against sentence. The record contains the address on sentence by both the State and the appellant's legal representatives. At the same time the court imposed a life sentence on the appellant. This means that the court *a quo* was not persuaded by what was placed before it to enable it to deviate from imposing life sentence. The court *a quo* did not find any substantial and compelling circumstances on the factors placed before it. Accordingly, the duty of this Court is, by looking at the said address, to decide whether the court *a quo* erred in finding no substantial and compelling circumstances or to put it otherwise, whether the court *a quo* should have found substantial and compelling circumstances.

[68] The charges against the appellant were read subject to the provisions of the Criminal Law Amendment Act 105 of 1997 ("the Minimum Sentence Act"). This means that the sentence was prescribed and that if the appellant were convicted accordingly the prescribed sentence would be imposed on him unless the court *a quo* was satisfied that substantial and compelling circumstances were present which militated against the imposition of an ordained sentence.

[69] The appellant's personal circumstances were placed on the record by his legal representative. He told the court that the appellant:

69.1 was born in 1979 and that he would turn 33 years of age in December 2013;

69.2 was not married;

69.3 had two minor children that he maintained; and

69.4 was unemployed.

Then the appellant's legal representative submitted that the appellant's charges were "not an extreme one". Presumably he wanted to submit that the charges against the appellant were not one of the worst ones. He then referred the Court to a few authorities in support of his submission. It must be recorded that each case is dealt with on its own merits and furthermore that no two cases are ever the same.

[70] On the other hand the public prosecutor urged the court to consider the seriousness of the offences the appellant had been convicted of; the prevalence of such offences in that area; I must pause here and recall the words of the Court in **R v** Mapumulo and Others 1920 AD 56, 57 where the Court said that:

"The infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal. And we should be slow to interfere with its discretion. "

In addition the public prosecutor urged the court to take into account the fact that the appellant and the complainant knew each other. Life would be difficult for the complainant seeing that despite the fact that he and the complainant knew each other and also stayed in the same area. Furthermore, the public prosecutor urged the court to consider the manner in which the offences were committed. The fact that the appellant was not a first offender.

[71] The court *a quo* was aware that in imposing sentence on the appellant it

had to have regard to the triad as expressed in S v Zinn 1969(2) 537 (A). Indeed it took into account the personal circumstances of the appellant, the seriousness of the offence, lack of penitence by the appellant, weighed them, according each one of them equal weight, and found no substantial and compelling circumstances. It was aware, as had been pointed out by the public prosecutor, that the special sentences were not to be departed from lightly and for flimsy reasons that could not withstand scrutiny. Although there is no definition of "substantial and compelling circumstances", and furthermore although one factor or a combination of factors may amount to substantial and compelling circumstances , the court *a quo* found no such circumstances in what was placed before it.

[72] Ms Van Wyk, counsel for the appellant, submitted in her heads of argument that the trial court failed to bear in mind that a sentence of life imprisonment was the ultimate sentence that the court could impose. Before us she argued furthermore that even if the trial court did not find substantial and compelling circumstances it must still ask itself whether it is justified to impose the prescribed sentence given the specific circumstances of a particular case. The law prescribes a sentence and details the circumstances in which the prescribed sentences may be diverted from.

[73] On the other hand, Ms Harmzen, counsel for the respondent submitted that the offence of which the appellant was convicted was a serious offence. She furnished reasons why, in her consideration, the offence was serious. This was in keeping with S v Banda and Others 1991(2) SA 352 BGD, at page 355 I - 356 C where the court had the following to say:

"(d) The crime. In passing sentence the trial court must take into account the moral and ethical nature of the crime, and the gravity of the offence. It is accepted and is indeed logical that a more serious crime will carry with it a greater moral blameworthiness than a minor or less serious offence. This involves a moral and value judgment A process of arid intellectualism is insufficient. Mere theorising is not sufficient. What matters finally is how the Court views the crime on its own merits, and all the relevant proven facts and circumstances must be

carefully considered and assessed. Merely to find that a crime is by itself serious without regard to its setting and its factual context, and thereby concluding that the crime committed by the offender is therefore also serious, is not appropriate, and may result in a serious misdirection. The Court does not and cannot rely on a catalogue of crimes. To do so would result in a purely mechanistic approach, whereby the Court, in its judicial discretion, would fail to pay due regard to the facts and circumstances of the particular crime. Conjoined to the nature of the crime are also the consequences of the crime. If the consequences are serious or indeed incalculable, the aggravating circumstances will be viewed more seriously by the Court. On the other hand, if there were no serious consequences or results flowing from the crime, the aggravating circumstances recede. The sentence therefore must be commensurate with the gravity or otherwise of the crime, and is a necessary concomitant of punishment See Du Toit Straf in Suid Afrika at 89-91; S v Zinn (supra); S v Haasbroek 1969 (1) SA 356 (E)."

She submitted furthermore in her heads of argument that the court *aquo* did not misdirected itself or did not commit any irregularity in its assessment of the relevant factors with regards to sentence. Before us she submitted that the court *a quo* was correct in finding that there were no substantial and compelling circumstances. I agree with her. Accordingly the appeal against sentence cannot succeed.

[74] Accordingly we make the following order:

1. The appellant's appeal against both conviction and sentence is hereby dismissed.
2. The conviction of the appellant by the court a quo and the sentence imposed on him are hereby confirmed.

PM MABUSE

JUDGE OF THE HIGH COURT

SNI MOKOSE

JUDGE OF THE HIGH COURT

Appearances :

Counsel for the Appellant:	*Adv LA van Wyk*
Instructed by:	*Legal Aid South Africa*
Counsel for the Respondent:	*Adv GP Harmzen*
Instructed by:	*Director of Public Prosecutions*
Date Heard:	*28 January 2019*
Date of Judgment:	*31 January 2019*