KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

REPORTABLE

Case No: AR48/2012

In the matter between:

SIHLE JULIUS CELE APPELLANT

Vs

THE STATE RESPONDENT

APPEAL JUDGMENT

DELIVERED ON: 17 July 2012

MADONDO J

[1] The appellant was convicted of rape of a three year old child in the Ixopo Regional Court and sentenced to life imprisonment. With the leave of the court *a quo* he now appeals against both conviction and sentence.

[2] The conviction was based on the evidence of a five year old single witness A M; the complainant, implicating the appellant with the offence. Her evidence was that on a Saturday, the 9th of August 2008, she was on her way alone from Bonelo's place to her home. The foot path ran through a bush or thicket. Whilst walking there she met up with the appellant who accosted her, grabbed her by the hand, pulled her to the bush or forest, removed her pants and panties and penetrated her. Whilst the appellant was

raping her she felt pains in her vagina. When her grandmother examined her at home, she told her that it was the appellant who had raped her.

[3] As to the rape incident, the complainant's evidence finds corroboration in the evidence of Thulelani Beatrice Ntsendani her grandmother, Thandekile Mnguni, the appellants' aunt, and Dr A Narula. Her grandmother testified that on Saturday the 9th of August 2008 she had been away from her home attending a funeral. On her return a report was made to her that the complainant was experiencing pains when she urinated. On examining the genitals of the complainant she discovered that she had been sexually abused. She saw blood and semen emitting from the complainant's vagina. When she asked the complainant who had done that to her, she responded saying that it was the appellant. The grandmother got shocked and she sent for Thandekile Mnguni to come and witness what she had discovered.

[4] On receipt of the message Mnguni proceeded to the complainants' homestead. On her arrival there the complainant's grandmother enquired from the complainant in the presence of Mnguni, the appellants' aunt, as to who had sexually molested her and she replied saying that it was Sihle, the appellant. The appellant's aunt also examined the complainant and discovered that she had been raped since she saw blood and semen on the outside of her vagina and when she asked the complainant who had done that to her, she said that it was the appellant. Appellant's aunt also testified that in the afternoon on the day in question she saw the appellant walking alone past her homestead. However, she stated that when she saw the appellant walking past her homestead, it was before sunset. She confirmed that Mpume was her daughter and

related to the appellant. Mnguni also testified that her homestead was situated just above the complainant's homestead and that the appellant used to visit her homestead.

[5] On examining the complainant on 11 August 2008 Dr A Narula made the following findings: abrasions and bruises on her inner thighs and concluded that this could have been sustained as the result of the blunt force trauma. Her clitoris was red, tender and swollen. The doctor also found fresh tears at 9 'o' clock. In conclusion, the doctor found definitive evidence of penile penetration of the complainant's vagina. The doctor also stated that a penile penetration of anus could not be excluded.

[6] On conclusion of the evidence of the state, the appellant testified that on Saturday, the 7th August 2008, he was in the company of Sphamandla Sanele and Sihle Cele at Ntombela's homestead where there was a traditional ceremony. He remained there until sunset and when he left Ntombela homestead it was already dark. On 11th August 2008 the appellant was arrested at school. The blood as well as pubic hair samples was obtained from him for the purposes of analysis.

[7] Under cross-examination the appellant confirmed that on the previous day in court he had been wearing a white jacket, pair of jeans and black shoes. At the time there was only Sihle from Pongola. The appellant also confirmed that he was a brother to Mpume. The appellant conceded that the other Sihle was known as Ryce and that the complainant also knew him as such. The appellant stated that he used to see the complainant at his aunt's place in the afternoons on his return from school. The

appellant admitted that the complainant knew him. The appellant mentioned it for the first time under cross-examination that in the afternoon on the day in question he went to Ntsendani homestead (where the complainant resided) to buy four cigarette sticks and that he was told by those who were selling there that they were running short of change.

[8] Under questioning by the court it was put to him that the 9th of August 2008 fell on a Saturday. The appellant was adamant that it fell on a Monday. However, he stated that should it be proved that it fell on Saturday he would withdraw his assertion. Notwithstanding that, when the calendar was later shown to him, the appellant persisted with his claim. The appellant closed his case without calling further evidence.

[9] On the close of the defence case the prosecutor stated that the DNA comparison could not be done because when the complainant came to the clinic on Monday she had already washed herself and as a result the sperm could not be found in her vagina. The affidavit to that effect by the Head of Forensic Science Laboratory was handed in by consent.

[10] On conclusion of the trial the Learned Magistrate after taking all the relevant factors into account found the complainant to be a credible witness and accepted her evidence as true and correct, and rejected the version of the appellant as false beyond reasonable doubt.

The Evidence of a Single Witness of Tender Age.

[11] In *S v J 1998(1) SACR 470 (SCA),* it was stated that the cautionary rule in sexual assault cases was based on an irrational and outdated perception. It unjustly stereotyped complainants in sexual cases (overwhelmingly women) particularly women as unreliable.

[12] The evidence in a particular case may call for a cautious approach. However, it will depend on the facts and the circumstances of each individual case as to whether such an approach is necessary or not.

[13] In *S v V 2000(1) SACR 453 (SCA)* the following was said:

> "The cautionary rule applicable to complainants in sexual assault cases is no longer part of our law. However, evidence in particular cases potentially is still requiring cautionary approach despite the abolition of general cautionary rule that means evidence of young children to be treated still with caution."

[14] In *S v Van der Ross 2002 (2) SACT 362(C) 365 f-g,* Thring J said:

> "Soos ek die gewysde verstaan, beteken dat difinitief nie dat dit verhoorhowe van nou af vrystaan on op 'n onverskildig of roekelose skuldig bevindings in sake in te bring waar die aanklag van 'n seksuele aard is nie; dit beteken ook nie meer versagting hoef te wees; inteendeel, ek sou dink dat strafhowe liewers aangemoedig behoort to word om die uiterste versigtigheid aan die dag te lê voordat hulle mense aan 'n ernstige aanklag soos verkragting skulding bevind, veral na die invoer van die baie swaar verpligte vonniisse wat die Wetgewer nou met die strafregwysingswet 105 van 1977 vir oa sekere seksuele oortredings voorgeskryf het."

[15] In *S v Hones 2004(1) SACR 420(C) at 427f-h,* Van Reenen J said the following:

> "Omdat die klaagster 'n enkelegetuire is en omdat daar eienaarsdighede in haar getuinis is wat daarvour smeek (Sien S v J 1998(1) SASR 470(HHA) 1998(2) SA 984) vind die vesigtig heidsreël in onderhawige aanwending:
>
> Die versigtigheidsreël verlis dat 'n hof bedag moet wees of faktore wat die onkritiese aanvaardig van getuinis riskant maak, byvoorbeeld, die verbeeldingsrykheid en die beïnvloed baarheid van kinders en dat dit deurentyd voor oë gehou moet word (Sien S v M 1992 (2) SASV 188(W) te 193 c-e). die versigtigheids reël vereis egter nie dat getuinenius knitiekloos moet wees nie, maar slegs dat dit substansieel bevedigend teen

> opsigte van wesenlike aspekte moet wees of gekorroboreer word (Sien S v Ganie and others 1967(4) SA 203 (N) te 206H) verder moet daar nie slegs lippediens aan die reel getoon word nie. Dit moet uit die hantering van die getuienis blyk dat dit indaradaad deur dit hof toegepas is. (Sien S V F 1989(3) SA 847 (A) te 852H- 853C)".

Imaginativeness and Pliability of Children

[16] The evidence of a young child has been said to be unreliable because of the child's inexperience, imaginativeness and suggestibility to influence. In *S v Jackson* case, *supra,* the court dispensed with the cautionary rule in sexual cases on the ground that the application of the cautionary rule to sexual assault cases was based on irrational and outdated perceptions. Therefore, it follows that the state is simply obliged to prove the accused's guilt beyond reasonable doubt. However, a particular case may call for a cautionary approach, for instance, where imaginativeness and pliability of a young witness is a potential risk.

[17] In dealing with the evidence of a young child it has been said that where the complainant is in respect of a sexual crime is a child under the age of six, corroboration linking the accused to the crime may be sought. If the circumstances eliminate the reasonable possibility of a false identification or motive to lie, the desirability of a particularly cautious approach diminishes or disappears (R v J 1966(1) SA 88(SRA) 94-95).

[18] In *S v V supra,* it was held that while there is no statutory requirements that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution. In *S v S 1995(1) SACT 50(25),* it was stated that the purpose of requiring corroboration is to guard against false implication

as far as possible. The court went on to state that it was well established in various cases that it is advisable to require corroboration of the testimony of young children because their youth indicates an immature mind which may cause them to give ill-considered or misleading evidence. See also *R v Judson 1966(1) SA 88 (RA); S v Mupfudza 1982(1) ZLR 271 (C); S v Santos SC 138/85 (not reported); and S v R 1990(1) SACR 413 (ZS).* At 55c-i the court in S v V case, *supra,* stated six objections to relying on children's evidence, as *viz* that (a) children's' memories are unreliable; (b) children are egocentric; (c) children are highly suggestible (d) children have difficulty in distinguishing fact from fantasy; (e) children make false allegations, particularly of sexual assault, and (f) children do not understand the duty to tell the truth.

[19] The child rape in particular is fundamentally suspect as stated above, under South African Law there is no statutory requirement demanding corroboration of a child's evidence but in practice a child's evidence must be treated with caution. In *R v S 1948 (4) SA 419(G) 422,* Bok J said:

> "It is however dangerous to convict only on the evidence of a child of tender years and it is therefore the established practice to require corroboration"

In *R v J 1958(3) SA 699(SR) 702,* it was held that the imaginativeness and suggestibility of a little child of four is so great and the tendency of him or her to romance is so marked, that corroboration is in practice essential. If the circumstances are not such as to exclude all substantial risk, corroboration should be required.

[20] Corroborative evidence comes from several sources. Where an allegation in sexual offence is made, there has to be corroboration of a material nature. This can be

medical evidence or may be things seen or heard that could point to the truth of the allegation. The nature of this required corroboration may consist in the child simply telling an adult, if this is done soon after the alleged event and that story reasonably objective – a description of emissions.

[21] In *R v Manda 1951(3) SA 158(A) at 163B,C & E,* the court held that the imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps, to suspicion. The trial court must fully appreciate the dangers inherent in the acceptance of such evidence. The best indication that there was proper appreciation of the risks is naturally to be found in the reasons furnished by the trial court.

Was the Appellant's guilt proved beyond all reasonable doubt?

[22] The only evidence implicating the appellant was that of the young complainant. Therefore, for it to be accepted it must be clear and satisfactory in all material respects. See *R v Mokoena 1956(3) SA 81 (AD) at pp 85 – 6.* In *S v Artman and another 1968(3) SA 339 (AD) at 431B,* it was held that no rule of law requiring corroboration in criminal cases. If some safeguard reducing the risk of conviction is required, the safeguard must not consist of corroboration but if corroboration is relied upon as the safeguard, it must go the length of implicating the accused in the commission of the crime.

[23] The rape incident finds confirmation in the findings of the elderly women being the complainant's grandmother and Thandekile Mnguni, who examined the complainant on the day of the rape and also in the clinical findings by the doctor who examined her

on the third day, ie 11 August 2008. In *Dladla and others 1964(1) P.H.H. 130(AD),* the court held:-

> "where the only evidence implicating an accused is that of one witness, the witness must be treated as a single witness even though the witness`s evidence might be corroborated on other aspects not implicating the accused."

[24] The evidence of the complainant as a single witness of tender age needed a double caution. The learned magistrate must show in his evaluation of the evidence that he appreciated the dangers inherent in accepting the evidence of this nature. The need to treat the evidence of a child's evidence with caution arises from the inexperience of the child and the imaginativeness and the susceptibility to influence of the child's evidence. A guide is provided by Diemont JA in *Woji v Santam Insurance Co. Ltd, 1981(1)SA 1020(A) at 1028A-E,* dealing with a civil case, where the learned judge of appeal said:-

> "The question which the trial court must ask itself is whether the young witness's evidence is trustworthy. Trustworthiness … depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears intelligent enough to observe. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion 'to remember what occurs' while the capacity of narration or communication raises the question whether the child has 'the capacity to understand the questions put, and to frame and express intelligent answers' … . There are other factors … Does he appear to be honest – is there a consciousness of the duty to speak the truth?"

[25] The complainant testified that when the bottom part of her body was not covered the same part of the appellants' body was also not covered. This is suggestive of a sexual act. This was elucidated when she demonstrated by means of male and female dolls what the appellant was doing when he was on top of her by putting a male doll on top of the female doll and causing a male doll to make a slow up and down

movement on top of a female doll. She also stated that whilst the appellant was lying on top of her she felt pain in her vagina, and this is indicative of a penile penetration of the complainant's vagina by the appellant otherwise, there could not have been any pain in her vagina, in particular. The pain she suffered and the sexual act was corroborated by the blood and semen her grandmother and Mnguni saw emitting from her vagina, as well as the injuries the doctor found on examining her on the third day after the rape incident. In addition, the complainant did not have an inkling of what the appellant was doing on top of her. It is therefore unthinkable that she could imagine a thing she had no experience of and did not know what it was. In *S v S 1995(1) SACR 50 (25),* the court held that children do not fantasise over things that are beyond their own direct and indirect experience.

[26] The complainant gave a detailed and logical account of the rape and this was not the type of story that could credibly emerge from the fantasy of 3 year old girl. The details were too graphically realistic and precise. She told her grandmother at the first opportunity when she enquired from her what had happened, after examining her on the complaint that she experienced pains when urinating. Also, when Mnguni, the aunt to the appellant, asked her who was responsible for what she saw come from her private parts she told her without hesitation that it was the appellant. She adhered to her version throughout. The girl remained unshaken throughout the cross-examination to which she was subjected by the defence attorney. Had she invented the story or had been prompted to tell her story it is most unlikely that she would have remained unshaken under cross-examination. To me the complainant has been an intelligent child of five (5) years who gave her evidence in a convincing manner.

[27] With regard to the identity of the person who had raped her it was put to the complainant that there were three Sihle Cele's in her area. The complainant clearly distinguished the Sihle she was referring to from the rest, who could have existed in the case, by stating that the said Sihle was the brother to Mpume and residing at the homestead above hers. Her evidence in his respect finds corroboration in the evidence of Mnguni that Mpume was her daughter and that the appellant frequented her homestead situated above hers. Though the appellant and Mpume were not a brother and sister but they were cousins, therefore related to each other. On appellant's version he and the complainant knew each other very well since the appellant used to find the complainant at his aunts' place on his return from school in the afternoon.

[28] Asked whether she had seen the Sihle she was referring to in court, the complainant answered in the affirmative and that she had seen him the previous day outside court. Asked what the Sihle she had seen the previous day was wearing, she said that he had been wearing a pair of jeans, white jacket and black shoes, and which was common cause. No one could have known or expected that such a question would be put to her. The complainant's apt description of Sihle who allegedly raped her put it beyond reasonable doubt that she knew the person who was the subject of discussion. In the circumstances, it can safely be concluded that the complainants' evidence was of good quality, impeccable and free from any suggestibility of imaginativeness.

[29] I now turn to decide whether the complainant was raped by the appellant as the

complainant alleged or by another person. In *R v 1948(4) SA 419(G) at 422* BokJ said that where the complainant in respect of a sexual crime is a child under the age of six years corroboration linking the accused to crime was required. However, if the circumstances eliminate the reasonable possibility of a false identification or motive to lie, the desirability of a particularly cautious approach diminishes or disappears. See *R v J 1966 SA 88 (SRA) at 94-95.*

[30] The appellant averred that on the day in question he was at Ntombela homestead where there was a traditional function. At the said homestead the appellant was in the company of Sphamandla, Sanele and Sihle Cele. He remained there until sunset and when he left Ntombela homestead for his home it was already dark. Mr Butler for the appellant has submitted that although there was real suspicion that the appellant was the perpetrator, his version was, though weak in some respects, not shown to be false beyond reasonable doubt in the trial court and that therefore he ought to have been acquitted on the charge.

[31] For an alibi to be rejected as false the evidence adduced must disprove the alibi. The alibi does not have to be considered in isolation. The correct approach as stated in *R v Hlongwane 1959(3) SA 337(A) at 341A* is to consider the alibi in the light of the totality of the evidence in the case, the court's impression of the witnesses. See also *S v Liebenberg 2005(2) SACR 355(SCA) 358 para 14.* In *R v Biya 1952(4) SA 514(A) at 521* Greenberg J said:

> "If on the evidence there is a reasonable possibility that the alibi evidence is true it means that there is the same possibility that he had not committed the crime."

[32] In *S v V 2000(1) SACR 453(SCA) at 455 a-b* Zulman JA said:

> "It is trite that there is no obligation upon an accused person, where the State bears the onus, to convince the court. If his version is reasonably possibly true he is entitled to his acquittal although his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's' version is reasonably true but one subjectively believes him is not the test."

In the present case it is common cause that the evidence of the evidence of the complainant was treated with caution by the court a *quo.* The learned magistrate demonstrated this by seeking and finding corroboration in the evidence of the complainant's grandmother, Mnguni and the gynaecological examination results performed on the complainant two days after the rape incident. The court a *quo* accepted the evidence of the complainant as true and correct and rejected the evidence of the appellant as false beyond reasonable doubt.

[33] On the other hand, the evidence of the appellant was found to have been sharp in contrast to the evidence of the appellant's aunt. She testified that on the day in question she saw the appellant walking alone past her homestead and that at the time it was before sunset. He even shouted at her children telling them that he was not coming to her homestead on the day in question. The appellant mentioned it for the first time under cross – examination that on the day in question he went to the complainant's homestead to buy four cigarette sticks. During his evidence in-chief he distanced himself as far as possible from the complainant's homestead. Had the appellants' aunt not seen him before sunset, she had no reason to lie.

[34] The appellant was arrested on Monday and the rape incident was alleged to have taken place on Saturday and he made no mention of his alibi to the police and the complainant's grandmother at the time of his arrest. If it was true that at the time the complainant was raped he was at Ntombela homestead he would have disclosed this alibi at the first opportunity, not two years after the incident. This would also have afforded the State an opportunity to investigate it, and obtain statements from witnesses in this regard. On his version the appellant was in the company of three persons at Ntombela homestead. In addition, he was a choir conductor and his presence there could not have escaped the sight and the attention of many people who attended the occasion. It is highly improbable that it could not reasonably possibly be true that none of the said persons could have come out at the time of the appellant's arrest or sometime later and told the police or the prosecution that appellant was on the day in question and at the particular time in point at the Ntombela homestead. In *Thebus and another v S [2002] 3 All SA 782 (SCA),* where the alibi was raised for the first time at the trial, similarly, two years after the incident, the court inferred from the failure of the appellant to advise the police at the time of his arrest or the prosecutor at the time he was charged and the failure of other witnesses to do so that his alibi had no truth in it at all. Upon consideration of the totality of the evidence in the present case, I conclude that the alibi by the appellant was a product of a recent fabrication and therefore false.

[35] However, in order to secure conviction the State was obliged to prove the accused's guilt beyond reasonable doubt. The DNA analysis, which could have been of much assistance in linking the appellant to the commission of the crime charged, was

not done on the ground stated above. What now remains is the evidence of the complainant implicating the appellant. Since the case against the appellant rested entirely upon the evidence of a single witness of tender age, her credibility was therefore of utmost importance. In *S v S, supra*, *at 60 a-b* Ebrahim JA stated that a rational decision as to the credibility of a witness (especially a child witness) can be arrived at only in the light of a proper analysis by means of testing it against likely short comings in such evidence.

[36] It was common cause that the complainant and the appellant knew each other very well. And that the complainant was sexually abused. The appellant denied that he raped the complainant. In order to reduce the risk of wrong conviction the court a *quo* applied double caution on the ground that the complainant was a single witness of tender age. When the rape case is made the following requirements should be met: That it was made at the earliest possible opportunity, it must be made voluntarily and the complainant must testify. In the circumstances of the present case the learned magistrate found it unfair to strictly apply these requirements. It was undeniable fact that the complainant took the opportunity offered to her to disclose the rape to her grandmother. In fact she first made a report to the daughter of the Thulelani Ntsendani, her grandmother, on her arrival. The person to whom she first made report had at the time of the hearing passed away. But a report was made to the grandmother that she experienced pains when she urinated. After examining her, the grandmother asked the complainant as to what had happened to her. In my view, a conduct which can reasonably be expected from an adult, after the rape incident, could not

legitimately and reasonably be expected from a rape complainant of tender age. However, it does not follow that the test applicable in determining the guilt of the accused should be dispensed with.

[37] Though it was undisputable in the present case that the complainant's evidence as a witness was clear and satisfactory in all material respects she has been criticised for her failure to comment on the version of the appellant when called upon to do so by the defence attorney. In my opinion her evidence must be treated with understanding that she was a child and most probably not understanding the import of a comment on the version of the appellant.

[38] I fully agree with the learned magistrate that though the complainant did not comment on the appellant's statements, she answered the questions put to her in a clear and straight forward manner, and that most things she said were confirmed by other state witnesses. Her evidence relating to the rape incident is clear, simple and straight forward. In my view it was completely free from contradictions and improbabilities which could reasonably have been expected to be inherent in the evidence of a witness of such a tender age. She narrated the rape incident with remarkable brilliance and intelligence which is often not found even in some of the adult witnesses.

[39] I agree with the learned magistrate that when the complainant referred to the appellant's home, she was in fact referring to the home of the appellant's aunt where she knew the appellant to have been resident. When she referred to Mpume as the

sister to the appellant, she correctly thought that Mpume was the appellant's sister. I have dealt with the relationship of the appellant and Mpume which was not disputed above. That the complainant mistook the relationship between the appellant and Mpume as that of a brother and a sister did not detract from the truth of her evidence and have an adverse bearing on her credibility. Instead, it strengthened her evidence as to the identity of her rapist. She had therefore no doubt as to which Sihle she was referring to. Apart from the appellants version that he used to find the complainant at his aunt's place on his return from school, it was not in dispute that the appellant used to visit Mrs Ntsendani (complainants grandmother) younger children at the homestead where the complainant was also residing.

[40] Both under cross-examination and questioning by court the appellant was adamant that the 9th of August 2008 fell on Monday. Asked if it could be proved that it fell on a Saturday he would abandon his version the appellant answered in the affirmative. However, notwithstanding that the 2008 year calendar was shown to the appellant that the 9th of August 2008 fell on a Saturday, he insisted that it fell on a Monday. This, in my view, revealed the appellant as an incredible and dishonest witness. By so being adamant despite having been shown a 2008 calendar clearly revealed that the appellant had not confused the dates but that he had been deliberately untruthful when he said that the 9th of August 2008 fell on a Monday. The appellant's aunt testified that she saw him walking past her home, whereas the appellant said that he did not see her on that day since when he went past her home it was already dark.

[41] The complainant's failure to comment on certain statements put to her by the defence attorney could not, in my view, be regarded as an implied admission by the complainant of the appellant's evidence on that point but it could rather be attributable to her inexperience with the resultant lack of the appreciation of the import of her comment on the statements put to her by the defence attorney on behalf of the appellant. She was subjected to a lengthy and tough cross-examination but she adhered to her version throughout. Her credibility was not effectively challenged.

[42] The surrounding circumstances exclude any reasonable possibility of mistaken identity or of any potential motive to falsify the identity of the offender, and could not even reliance on the cautionary rule suggest one. Also, all the surrounding circumstances and probabilities exclude any reasonable possibility that someone other than the accused perpetrated the offence. It is apparent from the above that the merits of the complainant and the demerits of the accused as a witnesses were beyond question. See *R v J supra, at 94D.*Threfore, I am satisfied that the guilt of the appellant was proved beyond reasonable doubt.

Sentence

[43] In the present case it was common cause that the charge of rape fell within the ambit of section 51(1) of the Criminal Procedure Act 105 of 1997 (the Act) and that the court was accordingly obliged, subject to the provisions of s 51(3) and (b), to impose a sentence of life imprisonment. The learned magistrate after weighing and considering all the proper factors, concluded that there were no substantial and compelling

circumstances justifying the imposition of a lesser sentence than the one prescribed. In *S v Van Wyk 2000(1) SACR 45(C) 49j-a,* it was held that substantial and compelling circumstances must include those which previously were referred to as mitigating circumstances, and which include all the circumstances which might indicate a diminished moral blameworthiness on the part of the offender.

[44] In *S v M 1994(2) SACR 24(A)* the appellant was 20 years old at the time of the commission of the offences and his youthfulness played a major consideration in reducing his death sentence to life imprisonment. In *S v Gqamana 2001(2) SACR 28(C) 37j-a,* the mitigating factors were the youth of the accused (during the commission of an offence he was 20 years 8 months), the fact that the complainant suffered no real physical injury and that the mental sequelae of her experience were not of great seriousness, nor were they apparently of a long lasting nature complied with the fact that the accused did not use a weapon in the commission of the offence.

[45] In *S v Blaauw 2001(2) SACR 255,* the accused, a 18 year old man had been convicted of the rape of a five year old girl. The medical evidence indicated that the complainant suffered reasonable serious genital injuries and that she appeared very frightened at the time of the medical examination after the rape. There was a possibility that the rape could cause permanent emotional, psychological and/or medical problems in the long term. These were many factors the accumulative effect of which forced the court to reconsider the prescribed mandatory sentence of life imprisonment. These factors included the very unfavourable personal background of the accused, the effect

of liquor on him at the time he committed the offence. In *S v Nkawu 2009 (2) SACT 402 (ECL) para 19,* the factors that the accused was young, gainfully employed, the injuries he caused to the complainant by his act of raping her were not serious or permanent and she experienced no psychological trauma that was out of the ordinary, taken cumulatively, were held to constitute substantial and compelling circumstances that justified the imposition of the sentence other than life imprisonment. (A 21 year old accused had broken into the house of the complainant abducted her and raped her.)

[46] Rape is a crime of utmost gravity, and while accepting that the offence the appellant committed in this case was repulsive and that the interests of community required a severe sentence, there were factors the cumulative effect of which constituted substantial and compelling circumstances that justified the imposition of the lesser sentence than life imprisonment. Such factors included that there were chances of rehabilitation since the appellant is relatively young (19 years old), a scholar and a first offender, he was abandoned by his father at an early age and he apparently grew up without a father figure, the appellant had been detained for a year awaiting trial, and the medical evidence did not show that the complainant's injuries were of a permanent nature, and she sustained any psychological harm. In the circumstances, the desirability or necessity of psychotherapy for his rehabilitation should not have been under emphasized.

[47] The magistrate attached too little weight to the appellant's mitigating circumstances and overemphasised the deterrent element. The judicial officer has to guard against overemphasising the element of deterrence at the cost of the offender's

rehabilitation and return to the community to the benefit of himself, his family and community. See *S v N 1991 (1) SACR 271(C).*

[48] The learned magistrate, in my view, erred in not finding the factors referred to above to constitute substantial and compelling circumstances that justified the imposition of a lesser sentence than life imprisonment, and in which event this court is entitled to interfere with the sentence imposed by the court a *quo*.

Order

[49] Accordingly, the order I propose is the following:

(a) Appeal against conviction is dismissed and the conviction by the court a *quo* is confirmed.

(b) Appeal against sentence is upheld, and the sentence imposed by the court a quo is set aside and replaced by the following sentence:

(i) the appellant is sentence to fifteen (15) years' imprisonment, the sentence is antedated to 19 May 2010 ;

(ii) it is recommended that the appellant must as soon as possible be placed in a psychiatric treatment and rehabilitation programme in prison.

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Madondo J

_____

Seegobin J I agree, it is so ordered.

Date reserved on: 17 May 2012

Date handed down: 17 July 2012

Counsel for Appellant: Adv Butler

Instructed by: Justice Centre Pietermaritzburg

Counsel for Respondent: Adv Ludick

Instructed by: Director of Public Prosecutions Pietermaritzburg