THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 482/07

REPORTABLE

In the matter between:

MALCOLM WILLIAM EGGLESTONE **APPELLANT**

v

THE STATE **RESPONDENT**

Coram: Farlam, Mlambo JJA, Mhlantla AJA

Heard: 28 February 2008

Delivered: 30 May 2008

Summary: Criminal Law – appeal against multiple convictions and sentence – consent – what is – indecent assault – what is – *S v F* still the law – owner of escort agency having sexual intercourse with and indecently assaulting prospective prostitute during on-the-job training – participation in training not amounting to consent – convictions for rape and indecent assault confirmed.

Order in para [29].

Neutral citation: This judgment may be referred to as *Egglestone v The State* (297/2005) [2008] ZASCA 77 (30 May 2008).

JUDGMENT

(Dissenting Judgment p 16)

MLAMBO JA

[1] This is an appeal against convictions for rape, kidnapping, common assault, indecent assault and a sentence of 10 years' imprisonment. The appellant was originally arraigned in the Cape Town Regional Court where he faced a total of 11 charges made up as follows: rape (count one); indecent assault (count two); assault (count three); kidnapping (count four); indecent assault (count five); kidnapping (count six); indecent assault (counts seven, eight, nine and ten) and rape (count eleven). The offences were allegedly committed during March to May 1997 save for those in counts eight to eleven which were alleged to have taken place in February 1998. The trial started on 9 April 1999 and was concluded three years later on 22 May 2002 when the appellant was convicted on counts one to five and eight to ten.

[2] On 30 October 2002 the regional court sentenced the appellant to 12 years' imprisonment structured as follows: 10 years on counts one and two taken together for purposes of sentence; six months on count three, two years on count four, one year on count five and six months on counts eight to ten all taken together for purposes of sentence. It was ordered that the sentences imposed on counts three, five and eight to ten were, in terms of s 280(2) of the Criminal Procedure Act 51 of 1977, to run concurrently with the 10 year sentence imposed on counts one and two.

[3] In an appeal before the Cape High Court (Ngwenya J and Wille AJ), heard on 18 March 2005, the appellant's conviction on counts nine and ten was set aside as well as the 12 year sentence. The High Court imposed a 10 year imprisonment sentence structured as follows: 10 years' imprisonment on counts one to four all taken together for purposes of sentence and six months imprisonment regarding the convictions on counts five and eight which was ordered to run concurrently with the 10 year sentence. On the same day the High Court granted the appellant leave to appeal to this court regarding the conviction on counts five and eight and the six month imprisonment sentence imposed in respect of those counts. Leave was refused regarding the conviction on counts one to four and the sentence imposed in that regard but on 27 July 2005 this court granted the appellant special leave to appeal to this court regarding his conviction on those counts and the sentence

imposed in respect thereof.

[4] The charge sheet alleged that during April and May 1997 the appellant raped N.L. (count one); assaulted her indecently by pulling down her panties, touching her vagina and having anal intercourse with her as well as forcing her to put his penis in her mouth (count two); assaulted her with his open hand (count three); deprived her of her liberty of movement by preventing her from leaving his premises at Erf 851, Somerset-West, Cape Town (count four) where all the offences save for the one in count eight were allegedly committed; that he indecently assaulted M.W. by taking off her bra and touching her breasts (count five) and that on or about 22 February 1998 at or near Cape Town the appellant indecently assaulted Lee-Ann dos S. by touching her leg, rubbing her stomach and trying to touch her breasts as well as kissing her on her mouth (count eight).

[5] All the complainants were high school teenagers from the impoverished communities around the Cape Peninsula recruited by the appellant to work for him as escort agency prostitutes. The recruitment took place by means of pamphlets distributed by other female employees of the appellant. The job advertised in the pamphlets was however that of lingerie modelling. N.L. (L.), the complainant in counts one to four was walking home from school when she was handed one of the pamphlets. She showed interest in the job but preferred to seek her parents' permission to go for an interview. The appellant personally spoke to her mother who gave her consent for N. to attend the interview. It is not clear from the record whether the appellant was candid with N.'s mother about the true nature of the job. N. and her younger sister Nicolette, who was also a potential recruit, were interviewed at a restaurant.

[6] During this interview N. and Nicolette learnt that the job did not just entail modelling lingerie but working in an escort agency as prostitutes where they would be expected to perform certain sexual acts and provide sexual favours to clients. It appears that they were informed that they were at liberty to choose what part of the job they would prefer for instance as receptionists and/or lingerie models excluding sexual activities. However, irrespective of the job they preferred, it appears that they were informed that they had to be trained as all inclusive escort agency prostitutes,

encompassing the whole spectrum of a prostitute's work, such as rendering private shows and different kinds of sexual favours to clients.

[7] After the restaurant interview the L. sisters were taken to the appellant's premises in Somerset West called the Stables. The premises were highly secured and structured in the form of a reception area, negotiation rooms, private rooms as well as show rooms for private shows and modelling. There the appellant instructed the sisters at intervals to undress and provided them with lingerie to put on. He then proceeded to fondle their breasts and their genitals which was apparently a continuation of the interview. Afterwards the sisters were taken to their home where Nicolette declined the job offer whilst N. accepted and was fetched the next day to start working for the appellant. It is not in dispute that during L.'s stay at the Stables she participated in so-called training sessions carried out by the appellant during which he would have touched and fondled her breasts and genitals, led her to perform a pelvic massage and to have normal sexual intercourse as well as oral and anal intercourse with him.

[8] M.W. (W.), the complainant in count five, also went through the restaurant interview. On arrival at the Stables she was also instructed to undress and it was during this incident that the appellant fondled her breasts. She, however, never took up the job offer despite expressing interest. In so far as L. dos S. (D.S.) (the complainant in count eight) is concerned, she participated in the selling of teddy bear gifts for the appellant at restaurants and other public places. It was during one of such jaunts that the appellant kissed her on her mouth and rubbed her on her leg and stomach.

[9] The issue before us is whether the court *a quo* was correct in dismissing the appellant's appeal and in upholding the trial court's view that the state had succeeded in proving his guilt on the remaining counts.

[10] It is appropriate to start by briefly considering what amounts to indecent assault. An authoritative discussion of the nature and meaning of the offence is found in *S v F* 1982 (2) SA 580 (T) where it was held that indecent assault is committed even though the violence is not directed at the complainant's sexual organs. It is the accused's intention, manifested in words or conduct, that is

important and not necessarily the act. In order to constitute the offence, it is not necessary, however, that the complainant's sexual organs should actually have been touched. Any action whereby the accused aims with some part of his or her body at the sexual organs of the complainant is sufficient. In this regard Ackermann J stated that (at 585):

'Ek is gevolglik van mening dat daar wel gekyk kan en moet word na die uitgesproke bedoeling van 'n beskuldigde soos oorgedra aan die klaer (hetsy deur woorde, gedrag of by implikasie) om vas te stel of 'n aanranding 'n onsedelike aanranding daarstel.'

[11] In *S v Kock* 2003 (2) SACR 5 (SCA) at p 10 par 9 Heher JA remarked that:

'Indecent assault is in its essence an assault (not merely an act) which is by its nature or circumstances of an indecent character.'

Counsel for the appellant sought to persuade us that in this passage this court overturned *S v F* in so far as the definition of indecent assault is concerned. I do not agree. In my view *S v Kock* only introduced an objective test of indecency and left the position expressed in *S v F* intact. In fact no exhaustive discussion of the offence was done in *S v Kock* nor was there any reference to *S v F*. I have no doubt that the position in this regard remains as authoritatively set out in *S v F*.

[12] Perhaps some comment is also apposite regarding the required approach to evidence in sexual offence cases. As already mentioned, in *S v Jackson* 1998 (1) SACR 470 (SCA) this court discarded the so-called cautionary rule which was the norm in sexual offence cases. In that case this court ruled that the burden on the state is to prove the case beyond a reasonable doubt – no more, no less. The evidence may, however, call for a cautionary approach but that is a far cry from the application of a general cautionary rule. Hot on the heels of *S v Jackson* came *S v M* 1999 (2) SACR 548 (SCA) where *S v Jackson* was reinforced.[1]

[1]At p 555b-c: 'The factors which motivated this Court to dispense with the cautionary rule in sexual assault cases apply, in my view, with equal force to all cases in which an act of a sexual nature is an element. The reasons given by Olivier JA at 474f-477d in *S v Jackson* therefore require no elaboration or qualification in relation to the crime of incest and I proceed to consider the evidence without the restraints imposed by the cautionary rule.'

[13] Against this background I turn to the facts of this case. The basis of the appeal against the convictions on the L. counts (counts one to four) is that the trial court erred in finding that L. was a credible witness; in accepting her evidence; in rejecting the appellant's version of events, and in finding that L. was not in the Stables of her own free will. In this regard it was submitted that L. had voluntarily come to the Stables and had stayed there throughout at her own free will; that at no time did she request or demand to be taken home; that she expressly consented to him fondling and touching her; that she was willing and consented to undergo the training he offered her as an all inclusive escort agency prostitute; that the training he provided entailed his role playing a potential client, necessitating that he perform various actual sexual acts with her, to prepare her for the work ahead and that she consented to all the sexual activity that took place between them. It was submitted that L. understood this fully and any wrongdoing was denied. It was further submitted that there was only one incident of sexual intercourse during training between them during the first week and that further sexual intercourse between them was not related to training but was fully consensual as they had become lovers.

[14] Regarding the W. indecent assault count (count 5) the appellant contends that the trial court erred in finding that W. had not consented to his conduct. It was submitted that when he handled her breasts he had her consent to touch her that way. Regarding the D.S. indecent assault count (count eight) the submission was that the trial court erred in accepting her version and in finding her to have been a credible witness and also finding that the appellant's conduct was objectively indecent. It was submitted that the appellant intended to congratulate her by kissing her on her cheek but she suddenly turned to face him and he thereby accidentally kissed her on her mouth. As far as rubbing her leg and stomach was concerned, it was submitted that he did this simply to congratulate her on making good teddy bear gift sales and that he meant nothing other than just to express his appreciation for her good performance.

[15] It is well established that as an appeal court we are at large in the event of a misdirection on fact by the trial court, to 'disregard the trial court's findings of fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case; . . .' and arrive at our own

conclusion.[2] As always the correct approach in the assessment of an accused's guilt or innocence is that all the evidence must be taken into account.[3]

[16] The trial court accepted L.'s evidence and found that she was kept at the Stables against her will by the appellant and that during her stay there he raped her, assaulted her by slapping her on her face, as well as indecently assaulting her when he penetrated her anally. It is not clear however from the trial court's judgment whether all or some, and if so, which of the incidents of sexual intercourse that took place between the appellant and L. gave rise to the rape conviction. I mention this because L. testified that on the Wednesday of the first week at the Stables, the appellant raped her and that during the second week she had sexual intercourse with him on two further occasions. It is, however, apparent from the trial court's judgment that the reasoning that primarily led to the conviction of the appellant on the L. counts was its finding that there was no evidence that the appellant was in the process of starting an escort agency business. The trial court reasoned that it could also find no evidence of the appellant's other businesses such as the selling of gifts at restaurants and other public places.

[17] In coming to this finding the trial court overlooked objective and uncontested evidence which established as a matter of fact that the appellant was in fact engaged in the establishment of an escort agency. For instance the recruitment *modus operandi* and the structure of the Stables fitted in with the business that he said he was establishing which, he testified, was how it was done in the industry. The appellant's evidence in this regard is undisputed. In my view, the trial court misdirected itself when it overlooked this evidence about the appellant's business activities.

[18] It is also clear that the trial court also misdirected itself when it accepted L.'s evidence that she had been kept at the Stables against her will. In arriving at this conclusion the trial court ignored common cause evidence to the effect that L. had come to the Stables voluntarily and had at no stage requested and/or demanded to be taken home. There is also uncontested evidence that L. had a number of

[2] *R v Dhlumayo* 1948 (2) SA 677 (A) at 706. See also *S v Heslop* 2007 (1) SACR 461 (SCA) at 472c.
[3] *S v Gentle* 2005 (1) SACR 420 (SCA) at 433h-l; *S v M* 2006 (1) SACR 135 (SCA) at p 183 para 189.

opportunities to escape or simply walk away if she was so inclined but she did not. Clearly the State had failed to prove beyond reasonable doubt that L. was kept at the Stables against her will and was deprived of her freedom throughout her stay there. The kidnapping conviction can therefore not stand.

[19] However, in so far as L.'s rape and indecent assault is concerned, my view is that the court *a quo* was correct in upholding the trial court's conclusion in that regard. Regarding the Wednesday rape she testified that after the rape, she took a shower, staying there for a whole hour contemplating what had just happened to her. Thereafter, when she had an opportunity she telephoned Nicolette and reported the rape. Nicolette confirmed that her sister had reported the rape to her in that telephone conversation. She testified that she did not know what to do, but decided to phone her sister's boyfriend, Bradley, to tell him of the telephone call from her sister. It is common cause that in the early evening of that Wednesday, Bradley called L. on the appellant's cell phone. Bradley could however not be called to testify about the content of the telephone conversation he had with Nicolette and with L. as he could not be located.

[20] The appellant denied that he had sexual intercourse with L. on that Wednesday. Whilst he disputed this rape allegation he admitted the telephone call with Bradley. His version is that the first sexual encounter between him and L. where he actually penetrated her was on the Thursday of the first week and that this was purely part of her training as an all inclusive escort agency prostitute. He stated that he was role playing a client when he penetrated her. This also was his explanation regarding his penetrating her anally the next day. This, he stated was also part of her training and that she was a willing and consenting trainee, so to speak. Furthermore he testified that the sexual intercourse between them on the Monday and Tuesday of the next week was fully consensual and that it had nothing to do with training. His version was that he had become estranged from his girlfriend, Tamsyn, and as he had been sleeping in L.'s bed during that time a relationship had arisen between them leading to their having sexual intercourse on the stated occasions. He admitted though that she was reluctant at first, during training, to participate in explicit sexual activity with him. In fact he stated, with regard to the anal intercourse, that he realized after penetrating her for the first time that she was uncomfortable and he

stopped. He testified that he realized at that stage that this was an activity she could simply not perform and that it would have to be excluded from her tasks. He also stated that she could not perform pelvic massages, having failed, apparently, to perform one on him during training.

[21] It is so that as far as the Wednesday rape is concerned L. contradicted herself about when this rape would have happened. She stated in her examination-in-chief that the rape happened during the day, but in cross-examination she said it happened in the evening. Furthermore in her first police statement about her ordeal at the Stables she did not mention the Wednesday rape at all. In relation to the sexual intercourse incidents of the next week, L. was clear that the respondent had relentlessly tried to have sexual intercourse with her but she had steadfastly resisted. She testified that she succumbed to his advances during the second week because she had lost the will to resist him anymore and allowed him to have sex with her so that he could leave her alone. She was unshaken in cross-examination that from the second day of her stay at the Stables, she was confronted with the appellant's advances for sexual intercourse. These, she said, were aided by Ronel Dunbar and Tamsyn who took turns in trying to persuade her to give in to the appellant's demands. At some stage Tamsyn slapped her on her face because of her continued refusal to give in to the appellant's demands.

[22] It is clear from the evidence that the appellant was astute in what he was doing because he would come into L.'s room and get under the blankets of her bed without saying a word. She testified that he would then fondle her but she would stop him. This happened for a couple of days until the Wednesday when he forced himself on her. I do not doubt that the Wednesday rape occurred despite the contradiction about when it took place. Her call to Nicolette that afternoon and Bradley's telephone call to her in the evening is uncontested. That is the one and only night that Bradley called her and, in my view, this was no coincidence, it is because Nicolette had reported to him what her sister had relayed to her. I am further of the view that the appellant's version of L. and him having become lovers leading to their having sexual intercourse on the second week, was also correctly rejected. L. had, by the second week clearly become worn out by the pressure to give in to the appellant's advances, and did so on the Monday and Tuesday. She

was correctly believed when she stated that no relationship had materialised between her and the appellant.

[23] The appellant's submission that L.'s willingness to dress in lingerie and take part in training was proof of her consent for him to have sexual intercourse with her cannot be accepted. No mention of actual sex during training was mentioned during the interviews and anyway the appellant was her employer and not a client who had paid for sexual favours. This notion that as an employer he was entitled to have sexual intercourse with her as his trainee employee, as part of job training, is fallacious. It amounts to a situation where the trainee employee, in order to get the job, has no choice but to submit to his sexual exploits irrespective of her feelings and inclination. In my view, the appellant's conduct is a classic illustration of a power situation where as an adult twice L.'s age and in control of the Stables he simply did as he pleased with her. One important manifestation of this is his brazen conduct of simply sleeping in her bed, uninvited. He was clearly in a dominant position and simply asserted this dominance by forcing himself on her.[4] His appeal on the rape and indecent assault convictions (counts one and two) cannot succeed. One must further not forget that L. was clear that she had agreed to work as a receptionist and that her willingness to take part in training was because the appellant had told her that she nevertheless had to do it. She was unshaken in cross-examination that she did not consent to sexual intercourse even though she took part in training.

[24] It was also submitted that L.'s continued stay at the Stables, despite the activities she was supposedly coerced into, is clear evidence that she was a willing

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[4] *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre For Applied Legal Studies And Another, Amici Curiae)* 2007 (2) SACR 435 (CC) para 36: '. . . historically, rape has been and continues to be a crime of which females are its systematic target. It is the most reprehensible form of sexual assault constituting as it does a humiliating, degrading and brutal invasion of the dignity and the person of the survivor. It is not simply an act of sexual gratification, but one of physical domination. It is an extreme and flagrant form of manifesting male supremacy over females. (See *S v Chapman* 1997 (2) SACR 3 (SCA) (1997 (3) SA 341) at 344I-345B (SA). This Court has said in *S v Baloyi* 2000 (1) SACR 81 (CC) (2000 (2) SA 425; 2000 (1) BCLR 86) at para [12] that rape, like domestic violence, is "systemic, pervasive and overwhelmingly gender-specific . . . [and] reflects and reinforces patriarchal domination, and does so in a particularly brutal form".'
See also *S v Ferreira* 2004 (2) SACR 454 (SCA) para 40 where the following is stated: 'Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women. It also, therefore, means having regard to an abused woman accused's constitutional rights to dignity, freedom from violence and bodily integrity that the abuser has infringed. (*S v Chapman* 1997 (2) SACR 3 (SCA) at 5b-f (1997 (3) SA 341 at 344J-345E); the Constitution, ss 10, 12(1)(c) and 12(2)).'

participant in those activities. This is besides the point. L. was not contradicted when she testified that she accepted the job because her family was struggling financially and she actually left school to do it. There is nothing to gainsay the suggestion that her continued stay at the Stables was influenced by the appellant's promises to her and her mother that she would make a lot of money working for him. Furthermore, in so far as the supposedly consensual sexual intercourse with her during training is concerned, it cannot be stated that she was a novice in sexual matters and as such needed to be 'trained' on how to have sexual intercourse with potential clients. L. was, on the facts of this case, a teenager who had a boyfriend and knew exactly what sexual intercourse was. As I have already stated, the notion that training as a prostitute encompassed actual sexual intercourse with one's employer is besides me, more so when one is dealing with a person who knew what sexual intercourse was.

[25] It was further submitted on the appellant's behalf that L.'s conduct after she left the Stables is not consonant with someone who had, amongst other things, been raped. It is true that she testified that she reported to her mother that she had been raped but nothing was done about her report. The argument was that one would have expected her to have insisted on going to the police or even her mother would have gone to the police when she heard this, neither did so, instead they went to have a Mothers' day lunch. It was only after L.'s mother discussed the matter with a neighbour a few days later that the neighbour encouraged them to contact the police, which they did. I do not agree that this demonstrates that no sexual wrongdoing had taken place. On the facts of this case, I cannot accept the suggestion that L. should be disbelieved simply because she did not behave in the manner suggested. This approach, in my view, unfairly puts her, as a rape complainant, in the position of an accused in which the appellant, as the real accused, stands to profit should it be found that the complainant's failure to conduct herself in a certain manner means she either consented or is simply falsely implicating the appellant. Judicial pronouncements against this approach have been unfortunately few and far between. See, however, *S v M* (supra) where Cameron JA in my view, aptly expressed the correct approach.[5] In this case the fact that there was no urgency in

[5] At para 272: 'Accused persons are entitled to be acquitted when there is reasonable doubt about their guilt. That does not make it necessary or permissible for motives to be freely imputed to sexual offence complainants at appellate level when these were not fairly and properly explored in their

reporting to the police can never be a basis to find that no rape had occurred. It must also be stated that the conviction for assault involving L. cannot stand. No such evidence was led. The only assault on her was the slap she got from Tamsyn.

[26] As far as W. is concerned, she was clear when she testified that although she was surprised, she did not object to the appellant undressing her and helping her loosen her bra and touching her breasts. In her evidence she stated that 'dit was snaaks' but she just wanted him to do what he had to so that she would leave. He had given her no prior warning that he was going to fondle her breasts. The test relating to indecent assault is an objective one.[6] It has nothing to do with the fact that the complainant objected or not. Clearly, the appellant's conduct of touching W.'s breasts, a total stranger at that time, is clearly objectively indecent. The same goes for the appellant's conduct of rubbing D.S.'s leg and stomach. The same cannot, however, be said about the kiss. His version of how this happened is sufficiently plausible.

[27] Finally I am of the view that taking all the evidence into account, the State had succeeded in proving the guilt of the appellant regarding all the rape incidents involving L. as well as the indecent assaults on her and on W. and D.S.. Those convictions were therefore properly arrived at and the court *a quo* cannot be faulted in upholding them. A factor that, I think, must not be lost sight of in this case is that even though L., W. and D.S. voluntarily went to the Stables, this did not mean that this was a licence for their dignity and integrity to be violated at will by the appellant. It appears from the appellant's evidence that this is what went on in his mind. He had

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testimony. To permit this would threaten return to the indefensible days when complainants were treated as inherently unreliable, inherently inclined to false incrimination, and inherently disposed to destructive jealousy in relation to their consensual male sexual partners.'
See also *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 778 where the following was stated: 'However, rape is an experience of the utmost intimacy. The victims or survivors thereof are largely confined to the female sex. I have heard the response of such survivors generically described as "a scream from silence". The result has been a paucity of South African legal and judicial understanding and commentary on the full parameters and implications of this phenomenon. Rape is an experience so devastating in its consequences that it is rightly perceived as striking at the very fundament of human, particularly female, privacy, dignity and personhood. Yet, I acknowledge that the ability of a judicial officer such as myself to fully comprehend the kaleidoscope of emotion and experience, of both rapist and rape survivor, is extremely limited.'
[6] *S v Kock* (supra).

targeted vulnerable young women who would respond to the prospect of making money due to their poverty. To him, immediately they came to his premises and were willing to go through with the interview and training, he was at liberty simply to do with them as he pleased. This, in my view, betrays the appellant's real intention that as long as they were on his premises they were his chattels to violate at will. Their dignity and integrity irrespective of the job they enlisted for, should have been respected at all times.[7]

[28] In so far as sentence is concerned, I am of the view that the sentence imposed for the rapes was lenient. Rape has been described as a horrific offence deserving of appropriately severe punishment which sends out a clear message to would be offenders.[8] Despite my view about the leniency of the sentence imposed for the rapes, I am not at large to interfere in that regard merely because I would have imposed a different sentence. There is no cross appeal in this regard and besides the fact that the sentence is lenient does not necessarily mean that it is so light that it induces a sense of shock. However, the setting aside of the kidnapping conviction means that sentence has to be reconsidered as the court *a quo* imposed one sentence for the kidnapping, the rapes and indecent assault on L.. Taking all the circumstances of the matter into account a sentence of eight years for the rapes and indecent assault of L. appears appropriate when taken together for purposes of sentence. I would also order that the sentence of six months' imprisonment imposed for the indecent assaults on W. and D.S. should run concurrently with the sentence of eight years.

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[7] Mahomed CJ in *S v Chapman* 1997 (2) SACR 2 (SCA) at 5b-e stated: 'The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

[8] *S v Chapman* (supra) at 5b: 'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.' See also *S v Mojaki* 2006 (2) SACR 590 (T) at 591: 'Rape is a very serious offence, so serious that I doubt whether those who are not women will ever be able to fully understand its effect on the victim. It violates the dignity of the person being raped. More so when it is perpetrated on young, defenceless and innocent ones. Children are entitled to be children.' See also *Chapman* (supra) at 5e: 'The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.'

[29] In the circumstances the following order is made:

29.1 The appeal against the convictions on count three and four succeeds and those convictions are set aside.

29.2 The appeal against the convictions on counts one, two, five and eight is dismissed.

29.3 The sentence of 10 years imposed by the court *a quo* is set aside and in its stead is substituted a sentence of eight years' imprisonment.

29.4 The sentence of six months imposed for the convictions in count five and eight is confirmed. It is ordered that this sentence shall run concurrently with the sentence of eight years.

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JUDGE OF APPEAL

CONCUR:

MHLANTLA AJA

FARLAM JA

[30] I have had the advantage of reading the judgment of my colleague Mlambo JA in this matter. I agree with his conclusion that the appeal against the convictions on counts three and four should be upheld and that the appeal against the convictions on counts five and eight should be dismissed. As far as the conviction on count one is concerned I agree that it should be upheld but only in respect of the rapes committed on the Monday and Tuesday of the second week of N.L.'s stay at the Stables: I do not think that a rape on the previous Wednesday has been proven. I also think that the appeal against the conviction on count two should be upheld. I

further do not agree regarding the sentence to be imposed.

[31] At the outset it must be pointed out that, as my colleague has found, the magistrate misdirected himself materially to such an extent that this court is obliged to decide the case purely on the record (without having the benefit of seeing the witnesses) with the result that the question of onus becomes all-important (see *R v Dhlumayo* 1948 (2) SA 677 (A), principles 11 and 13).

[32] As far as count one is concerned I am satisfied, having read and re-read the relevant parts of the record and having had regard to what was put in cross-examination to the complainant and what the appellant said in his evidence, that the complainant submitted to his advances without actually consenting and that he was reckless as to whether she consented or not. His evidence as to the way she responded to his lovemaking, which was not put to her in cross-examination, was, in my view, false and reinforces my conclusion that he was in fact reckless. As far as the alleged rape on the Wednesday is concerned the complainant's boyfriend was not called and it is dangerous to speculate as to what he would have said if he had given evidence. The complainant contradicted herself as to when on the Wednesday the rape occurred and did not mention it at all in her first police statement. Obliged as we are to decide the case on the record I do not think we can be satisfied in the circumstances that the complainant was raped on the Wednesday of the first week.

[33] As far as count two is concerned it is common cause that the complainant agreed to undergo training as what was euphemistically called an all-inclusive lingerie model, ie as a prostitute. It is also clear, in my view, from the record that at each stage in the training he asked the trainee if he could proceed and made it clear to her that if she did not want to carry on he would stop. In those circumstances I do not see how it can be found that in doing what he did he realised that she was not consenting or that he was reckless as to whether she consented or not. It follows that in my view the appeal against this conviction should succeed.

[34] As far as the appeal against the sentence is concerned, I think that the trial court and the court *a quo* erred in failing to take into account that the appellant had been in custody as an awaiting trial prisoner for four and a half years and that his

health deteriorated badly during that period. He had also lived in daily fear of assault and rape. Counsel for the appellant referred in this regard to Schutz J's approving reference (in *S v Stephen* 1994 (2) SACR 163 (W) at 168f) to the Canadian decision of *Gravino* (70/71) 13 Crim L Q 434 (Quebec Court of Appeal) in which it was said: 'Imprisonment whilst awaiting trial is the equivalent of a sentence of twice that length.'

[35] While I would hesitate to give general approval to that statement, I think that the circumstances of the appellant's pre-conviction incarceration justify its application here. I fully endorse what was said in the cases cited in my colleague's judgment regarding the seriousness of the crime of rape but I think that the factor to which I have just referred should have been taken into account and that the sentence of ten years' imprisonment imposed by the court *a quo* should be replaced by a sentence of six years' imprisonment.

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IG FARLAM

JUDGE OF APPEAL