CASE NO: 660/94 IN

THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

C P MKHIZE APPELLANT

and

THE STATE RESPONDENT

CORAM: E M GROSSKOPF, VIVIER et OLIVIER JJA

HEARD: 13 November 1995

DELIVERED: 13 November 1995

TRANSCRIPT OF REASONS GIVEN ORALLY IN OPEN COURT ON MONDAY 13 NOVEMBER 1995 BY OLIVIER JA WITH WHICH E M GROSSKOPF et VIVIER JJA AGREED.

OLIVIER JA:

The appellant, a 30 year old male, was charged in the Regional Court of Natal at Pietermaritzburg with 2 counts of rape,

it being alleged by the State that he had raped the complainant on Wednesday 19th August and again on Monday 24 August 1992. He pleaded not guilty. He admitted having had sexual intercourse with the complainant on the aforesaid dated, but averred that it had taken place with her consent and co-operation. He was, however, convicted on both counts and sentenced to six years of imprisonment on each of them. Four years of the sentence on count 2 was ordered to run concurrently with the sentence on count 1, with the result that for the 2 rapes he has to serve 8 years imprisonment.

The appellant appealed to the Natal Provincial Division of the Supreme Court against the convictions and the sentences. The matter was heard by Judge President Howard and Judge Shearer. In a judgment by the Judge President, with which Judge Shearer

concurred, the appeal against the convictions and sentences were dismissed. The same court granted the appellant leave to appeal to this Court against the convictions and the sentences.

At the trial, the sole issue as regards both charges was whether the complainant had consented to the relevant sexual intercourse. The regional court magistrate believed and accepted the complainants evidence and rejected the appellant's evidence as untrue. As far as the basis of the convictions is concerned, the learned Judge President came to the following conclusions in his judgment in the court a quo. I quote from p139 of the record:

> "There were various gross improbabilities in the appellant's account of the two incidents, and they have been highlighted in the magistrate's judgement. It is unnecessary to say more about his evidence than that I agree with the magistrate that in various material respects it was entirely unsatisfactory. I am unpersuaded that the magistrate's approach to the matter or

> his assessment of the credibility of the complainant and the appellant respectively was erroneous. The sole issue in the case was that of consent, and on that issue I consider the medical evidence of the district surgeon to be decisive. There was no explanation of the bruising and tenderness of her neck muscles, save for her evidence that she had been throttled on both occasions. Mr de Wet had obvious difficulty with this particular evidence, and was driven to suggesting that the neck muscles had been bruised through over enthusiastic kissing. That possibility seems to me to be entirely fanciful. It is suggested too that the abrasion of the complainant's inner thigh might have resulted accidentally in the course of over vigorous sexual intercourse. That seems to me to be almost equally fanciful. In all the circumstances I am not persuaded the magistrate erred in convicting the appellant on both counts.
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> The jurisdiction of this Court to interfere with a credibility

finding of a trial Court is limited. Where there has been no

misdirection on fact or palpable mistake by the presiding officer, the

presumption is that his conclusion is correct; the appellate court will

reverse it only where it is convinced that it is wrong.

I need to say no more than that I agree with the conclusions reached by the learned Judge President in the court a quo and as appears from the above-quoted portion of his judgment. I agree with the court a quo that the appellant's evidence was correctly rejected by the trial court.

As far as the sentences are concerned, it must be emphasized that rape is always a serious crime. In the present case the appellant committed 2 separate rapes, for each of which he received a sentence of six years imprisonment. These sentences were, under the circumstances, not unreasonable or excessive. The cumulative effect of the two sentences was duly taken into account and the effective term of imprisonment for the two rapes was reduced to eight years. I am not persuaded that such sentence was, on the facts of this case,

excessive or inappropriate.

In the result, the appeal against the convictions and sentences is dismissed.

E M GROSSKOPF JA)
)CONCURRED
VIVIER JA)