IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

CA&R 51/2023

In the matter between:

SONGEZO MTETANDABA Appellant

and

THE STATE Respondent

JUDGMENT

RUSI J

[1] The appellant was convicted of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) by the Mt Frere Regional Court on 09 June 2022 and sentenced to undergo 10 years' imprisonment.

[2] The sentence imposed on the appellant is the minimum sentence prescribed for this type of offence in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Act). He now appeals against his conviction and sentence.

[3] His application for leave to appeal against his conviction and sentence was refused by the court *a quo*, whereupon he petitioned the Judge President of this Division for such leave. This appeal is with the leave of this Court.

[4] The appellant was legally represented during the proceedings against him in the court *a quo*. In this Court, he was represented by Mr *Dorfling*, and Ms *Mbunye* represented the respondent.

A preliminary issue

[5] The respondent's heads of argument were filed out of time and Ms *Mbunye* applied for condonation of their late filing. That application was granted, unopposed by the appellant.

The factual background

[6] On 03 March 2019, the complainant had gone to a local tavern called 'Zetman' to buy alcohol. She left the tavern with the appellant who took her to his home where he had sexual intercourse with her. The complainant asserted that the sexual intercourse was without her consent. She subsequently reported to her boyfriend named Thabiso, her friend named 'Sito' or 'Siko',[1] and her sister, that she was raped by the appellant.

[7] Having reported the alleged rape, she went to the Mt Frere police station where she laid a criminal charge of rape against the appellant. From the police station, she went to Madzikane Hospital where she was examined by Seitlhelo who compiled a medico-legal report detailing his clinical observations and conclusions relating to his examination of the complainant.

[1] The record of proceedings in the court a quo interchangeably makes reference to the complainant's friend as "Sito" or "Siko".

[8] Even though the medico-legal report indicates that vaginal swabs were taken from the complainant, the record before us reveals that no results of a scientific analysis of the vaginal swabs were relied on at trial. This must have been because the appellant admitted having had sexual intercourse with the complainant on the night of 03 March 2019, but contended that it was consensual.

The grounds of appeal

[9] In appealing against his conviction, the appellant contends that the court *a quo* erred in the following respects:

(i) Failing to give reasons for rejecting the appellant's version as not being reasonably possibly true.

(ii) Adopting the approach that it adopted in rejecting the appellant's version, which is indicative of lack of impartiality on its part.

(iii) Failing to take into consideration that even where the version of the state stands on a completely acceptable and 'unshaken edifice', a court must still investigate the defence case in order to discern whether it is demonstrably or inherently so improbable that it ought to be rejected as false.

[10] As regards his sentence, these are the grounds of appeal that the appellant relies on:

(i) That the court *a quo* erred in finding that there are no substantial and compelling circumstances present which would warrant deviation from the prescribed minimum sentence; and

(ii) It erred in not showing mercy in sentencing the appellant.

[11] Below I set out a summary of the evidence that was adduced at the trial in the court *a quo*.

The evidence of the complainant

[12] The complainant told the court *a quo* that during the evening of 03 March 2019, she went to Zetman's tavern to buy alcohol. Before she made her purchase at the tavern, she was assaulted by a person named Yongama. The appellant came to her rescue and told her that he would take her to her boyfriend, Thabiso. She accepted this gesture and went along with the appellant.

[13] Before the rape incident, she did not personally know the appellant but used to see him next to *'Mashajize's* homestead. She did not know his name but saw it on a 'student card' that had his photo which was affixed on his clothing on the chest area. It is not clear from the complainant's evidence at what stage she saw this 'student card'. Asked in cross-examination whether she knew that the appellant was Thabiso's friend, she testified that she used to see him in Thabiso's company.

[14] The complaint went further and told the court that while walking with the appellant from the tavern, she noticed that he was taking a route that took them elsewhere than to the home of Thabiso. She asked him why he was not taking the path to Thabiso's home. The appellant responded that Thabiso had in fact asked him for a place to sleep that night, hence, they would go to his place and not to Thabiso's home. She accepted this explanation and went along with the appellant to his home believing that that is where Thabiso would be.

[15] She did not find Thabiso at the appellant's home upon their arrival, and she asked the appellant where he was. The appellant told her that Thabiso was in fact on his way there. It was at that point that the appellant became aggressive towards her, ordered her to undress herself and to sit on the bed. He used a knife to threaten her, and she complied with the instruction to sit on the bed but did not undress herself.

[16] The appellant switched off the light of the room. In response, she stood up in order to switch the light back on, but the appellant blocked her and pushed her onto the bed. He climbed on top of her, took off her trousers and panty with one hand while pressing her down on her chest with the other. They struggled as she resisted being undressed, telling him to stop what he was doing. The appellant silenced her by placing his hand over her nose and mouth and poked her ears and ribs with the knife but caused her no injury. He threatened to kill her if she screamed. Having undressed himself as well, he penetrated her with his penis vaginally without her consent and without using a condom even though there was a condom next to the bed.

[17] She felt pain as the appellant raped her and asked to urinate. The appellant told her to urinate in a washing basin that was placed in the room. While urinating, she heard the appellant snoring. She took that opportunity to escape and took with her the knife that the appellant used to threaten and subdue her. On the way out she observed that there were other people in the house. It was around 12 midnight when the rape took place.

[18] After leaving the appellant's home, she proceeded to Thabiso's home where she jumped over the gate and went to report the rape to Thabiso. Thabiso told her that he did not know what to do with the report and instead took her to her friend 'Sito' or 'Siko'. She slept over at Sito's/Siko's place. In the morning, she went to her home where she told her sister about the rape, after which she went to the police station where she laid a charge of rape. From the police station she was conveyed by the police to Madzikane Hospital where she was examined by Dr Seitlhelo. It was the complainant's evidence further that when she left the appellant's home after the rape up to the time of examination by Dr Seitlhlelo, she had not bathed.

[19] In the course of her appearances in court, the appellant requested her to withdraw the rape charge and sent someone else to her to convey the same request. She denied the version of the appellant that was put to her during cross-examination

that she was the appellant's girlfriend. She also denied that she consented to have sexual intercourse with the appellant and that she was visiting his home for the second time on that day as his girlfriend.

[20] The medico-legal report that Dr Seitlhelo compiled in relation to the complainant's examination (the J 88 report) was admitted in evidence by agreement between the prosecution and defence without the evidence of the treating doctor. According to Dr Seitlhelo, the complainant was traumatized. Dr Seitlhelo recorded the manner of causation (history) of the rape on the J88 report as follows:

> *"27 yrs female victim brought by Mt Frere Police Officer. Victim reports being raped by her boyfriend's friend at 02h30 at Badibanise location. The victim narrated that they met at the tavern with the perpetrator who said he is taking her to her boyfriend's house but instead took her to his house and raped. The perpetrator used a condom and took off at times. The perpetrator threatened the victim by putting a knife on the* [word not legible]*."*

[21] Under "clinical evidence of drugs or alcohol", the doctor records "admitted to using alcohol". It is further recorded in the J88 report that "sperm/semen was collected for from the complainant's vagina for analysis". This concluded the case for the prosecution.

The evidence of the appellant

[22] The appellant's version was that he found the complainant and her friends at Zetman's tavern around 20h00 and they were drinking alcohol. She asked him to buy her alcohol which he acceded to. They made an agreement to leave together afterwards. At some stage he indicated to the complainant that he had had enough alcohol and therefore it was opportune for them to leave. He knew that the complainant was Thabiso's girlfriend. They went to his house by agreement and on arrival there they

had consensual sexual intercourse. He used a condom during the intercourse as the complainant requested so.

[23] Around 02h00, Yamkela Masentse, arrived to ask for a cigarette. He and Yamkela are not friends, but he knows him from his neighbourhood. According to the appellant, Yamkela gained knowledge of his relationship with the complainant when he came to ask him for a cigarette. He found him and complainant in bed. The complainant was a bit nervous when Yamkela arrived, and he assumed that it was because Yamkela was Thabiso's friend. He surmised that complainant feared that Yamkela would inform Thabiso of their affair. While he and Yamkela smoked, Yamkela asked him why he was sleeping with Thabiso's girlfriend and his response was that they had a secret love affair.

[24] After Yamkela's departure he and the complainant had sexual intercourse for the second time and conversed. The complainant asked him for money telling him that she wanted to pay rent and buy groceries. Their interaction turned sour when he could not give the complainant the money that she asked for. They slept around 03h00 to 04h00. When he woke up, the complainant had left, and he does not know when she left. According to the appellant, this was not the first time that the complainant asked him for money after a sexual encounter with her. His affair with the complainant was clandestine since he knew that she was Thabiso's girlfriend. He denied that he took the complainant to his home under the false presence that he was taking her to Thabiso's home.

[25] The court *a quo* further heard from the appellant that Thabiso phoned him the next day and advised him to give the complainant what she wanted because 'she was going to the police'. After the appellant's testimony, Yamkela was called as his witness.

[26] When Yamkela gave evidence he first told the court *a quo* that he did not know of a love relationship between the complainant and the appellant. He confirmed that the appellant and complainant were at Zetman's tavern during the night of the alleged rape,

and they were drinking. He further told the court *a quo* that while at the tavern, the appellant and complainant would dance together at times and the mood was jovial. The appellant would also accompany the complainant outside whenever she wanted to relieve herself. He further explained that the women at the tavern usually asked males to accompany them when they wanted to go outside to urinate, and the appellant was not the only one who accompanied the complainant outside to urinate.

[27] Yamkela confirmed that he went to ask the appellant for a cigarette and found him and the complainant in bed naked. He and the appellant went outside to smoke, and he asked him why he was sleeping with the complainant when she was Thabiso's girlfriend. His response was that they had a secret affair. In his observation the complainant was joyful and showed no signs of discomfort when she found her and the appellant in bed. He also observed condoms next to the bed.

The findings of the court a quo

[28] The magistrate gave a summary of the evidence adduced, and having set out the applicable principles of law on the evaluation of evidence, he found that the appellant's version of the circumstances under which he had sexual intercourse with the complainant was not reasonably possibly true.

[29] He remarked that it was improbable that the complainant left the appellant's room, took the trouble of reporting the rape to her boyfriend and the police, and even subjected herself to an examination by a doctor in her private parts all because, on the appellant's version, he refused or failed to give her money after the sexual intercourse when she demanded it.

Submissions on appeal

[30] In addressing the court *a quo*'s misdirection in evaluating the evidence, which the appellant contends for, Mr *Dorfling* submitted that the court *a quo* impermissibly accepted the J88 report as confirmation of the fact that the complainant was raped.

[31] It was his submission in this regard that since the complainant gave no evidence pertaining to that report, which was not the first report she made, and the circumstances under which it was made, it was not available to the court to accept it as proof of its contents. The purpose of a previous consistent statement, so the submission went, is to rebut consent and to prove consistency.

[32] It is further submitted in the appellant's heads of argument that the complainant's testimony as a single witness was contradictory regarding her familiarity with the appellant, and therefore, it did not meet the standard that would qualify as the basis of the appellant's conviction.

[33] As regards the alleged state of sobriety of the complainant at the time of the rape, it was submitted that if, as suggested by the prosecution, the appellant could not have obtained consent from the complainant since she was drunk, then, the same state of drunkenness ought to have adversely affected the weight of her evidence.

[34] Mr *Dorfling* further submitted that the court *a quo* committed a misdirection in not giving reasons why it rejected the version of the appellant as against that of the complainant who was a single witness. He took the view that the court's approach in making a finding that the appellant's guilt was proved beyond reasonable doubt was flawed and indicative of lack of impartiality as it failed to take into account his version in circumstances where there was a reasonable possibility that it was true. This submission was made in relation to the court *a quo*'s remarks regarding the improbability of the appellant's version based on the circumstances under which she left the appellant's home.

[35] Concerning sentence, it was submitted that the court *a quo* ought to have found that the mitigating factors that were presented on behalf of the appellant, taken cumulatively with the circumstances of the offence, constituted substantial and compelling circumstances which justified a lesser sentence than the one imposed.

[36] On behalf of the respondent, Ms *Mbunye* submitted that it was incorrect that the court *a quo* accepted the J88 report as evidence of a previous consistent statement in the context envisaged in section 58 of SORMA. In developing this argument, she further submitted that the court *a quo* made reference to the J88 report as part of the evidence that was adduced by the state, and its admission was, in any event, in terms of section 212(4) of the Criminal Procedure Act 51 of 1977 as amended (the CPA).[2]

[37] It was further submitted on behalf of the respondent that the contention that the court *a quo* failed to give reasons for its rejection of the appellant's version cannot be sustained in that the record of the proceedings in the court *a quo* reveals that the court embarked on a careful evaluation of the evidence and weighed the version of the appellant against the probabilities. In this regard, Ms *Mbunye* referred to *Director of Public Prosecutions: Limpopo v Molope and Another*,[3] in which the Supreme Court of

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[2] Section 212(4) of the CPA provides as follows: 'Whenever any fact established by any examination or process requiring any skill—
(i) in biology, chemistry, physics, astronomy, geography or geology;
(ii) in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics;
(iii) in computer science or in any discipline of engineering;
(iv) in anatomy or in human behavioral sciences;
(v) in biochemistry, in metallurgy, in microscopy, in any branch of pathology or in toxicology; or
(vi) in ballistics, in the identification of fingerprints or body prints or in the examination of disputed documents,
is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or of a provincial administration or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the *Gazette*, and that he or she has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be *prima facie* proof of such fact: Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall *mutatis mutandis* apply with reference to such certificate.'

[3] 2020 (2) SACR 343 (SCA), para 55.

Appeal held that it does not follow that because the judgment of the trial court does not mention certain aspects, they were not considered.

[38] On the score of the court *a quo*'s finding that the appellant's version was not reasonably possibly true, Ms *Mbunye* highlighted the appellant's failure to cross-examine the complainant on the crucial aspects of the case. She submitted that this undermined the credibility of the appellant's version, hence, the court *a quo* was entitled to reject his version as a recent fabrication. Added to this, so the submission went, were the contradictions inherent in the versions given by the appellant and his witness, Yamkela on the events that took place at Zetman's tavern before the departure of the appellant with the complainant.

[39] Regarding the appeal against sentence, *Ms Mbunye* submitted that in as much as the prosecution held the view that a sentence lesser than the one prescribed in terms of the Act was appropriate in the present case, the court *a quo* was not bound by those submissions.

[40] The court *a quo*, said Ms *Mbunye*, evaluated the personal circumstances of the appellant, the offence and interests of society, and guided by the Act and relevant legal principles as expounded in case law, found that there existed no substantial and compelling circumstances which justified a deviation from the prescribed sentence of 10 years' imprisonment. Accordingly, so the submission continued, the court *a quo* correctly exercised its discretion when it imposed the sentence sought to be appealed against.

The law

[41] It is settled law that a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court and will only interfere where the trial court materially misdirected itself insofar as its factual and credibility findings are concerned.[4]As held in *S v Francis*[5]:

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[4] *R v Dhlumayo and another* 1948 (2) SA 677 (A).

"The powers of a court to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness's evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness's evidence a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony."

[42] In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.[6]

[43] It bears restating that the standard of proof against which the court evaluates evidence in a criminal case is that of proof beyond reasonable doubt. All that the accused needs do in order to displace a case *prima facie* made against him by the prosecution is to put forward a version that is reasonably possibly true. In this regard, the Court, in *S v Shackell*[7], held as follows:

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent

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[5]1991 (1) SACR 198 (A) at 198j – 199a.
[6] *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f. See also: *S v Monyane and Others* 2008 (1) SACR 543 (SCA) at para 15; *S v Francis* 1991 (1) SACR 198 (A) at 204e.
[7] [2001] 4 All SA 279 (A), para 30.

probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step.'

[44] In *S v Trainor*[8], it was held that in determining whether the accused's version is reasonably possibly true, the court must consider the conspectus of all the evidence. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must, of necessity, be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus of any particular issue or in respect of the case in its entirety.[9]

[45] I must interpose to state that one of the instances of the procedural inadequacies in the South African common law regarding sexual offences, in particular, rape, was how it dealt with the absence of a previous consistent statement made by a rape victim regarding the alleged rape, or the delay in making such a statement. The common law position in this regard was influenced by the regrettable notion that complainants in sexual offences were more likely to lie than other complainants, and therefore their evidence was to be treated with circumspection.

[46] SORMA which codifies the common law on sexual offences, was an attempt by the legislature, *inter alia* to prevent secondary victimization of rape victims in various sectors including the criminal justice system. To this end, it provides, in section 58, among others, that evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements.

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[8] 2003 (1) SACR 35 (SCA).
[9] Id, para 9.

[47] When it comes to sentencing, it must be emphasized that it is a matter for the discretion of the trial court, which discretion will only be interfered with on appeal if it has not been exercised properly and judiciously, the test being whether the sentence meted out is vitiated by an irregularity, or a misdirection, or is disturbingly inappropriate.[10]

[48] The Criminal Law Amendment Act 105 of 1997 prescribes discretionary minimum sentence to be imposed on persons convicted of various categories of serious offences including rape. These prescribed sentences may be departed from only where there are in existence in a given case substantial and compelling circumstances justifying the deviation. This is in terms of section 51(3) of the same Act.

[49] In the discussion that follows I consider whether there are any grounds for this Court to interfere with the court *a quo*'s findings of fact and the appellant's conviction and if not, whether, in any event, the court *a quo* committed any misdirection in sentencing the appellant warranting this Court's interference with the sentence of 10 years' imprisonment that it imposed.

Discussion

[50] It is by now an incontrovertible fact that the offence of rape is a particularly difficult one for the prosecution to prove by reason of the fact that it is usually committed surreptitiously with only the victim and the perpetrator at the scene. This perforce requires of the prosecution to be meticulous in its presentation of evidence on which it seeks to rely in seeking the conviction of the accused. In this regard the credibility of the evidence given by and on behalf of the complainant is crucial in order to found a conviction against the accused.

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[10] *S v Rabie* 1974 (4) SA 855 (A) at 857 E; see also *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12.

[51] The court, on the other hand, is required to consider the evidence holistically in making its finding that the guilt of the accused has been proven beyond reasonable doubt.[11]

[52] What is clear from the record of proceedings before us is that the court *a quo* was faced with two conflicting versions. In assessing the evidence before it, it was enjoined to weigh all the elements that point towards the guilt of the appellant against those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides. Having done so, the court was required to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the appellant's guilt.[12]

[53] The judgment of the court *a quo* is by no means a perfect one and this is not something unheard of, for there is indeed no such a thing as a perfect judgment which encompasses every conceivable aspect of the case. With this said, it is discernible from the record before us that the court *a quo* was alive to the fact that the complainant was a single witness whose evidence was to be treated with caution not because she was a complainant on a rape charge, but because this is the general position in law regarding evidence of a single witness. It is also accepted, as a trite principle of the law, that the exercise of caution must not be allowed to displace the application of logic or common sense.[13] The court must still consider the totality of evidence in deciding whether the single witness' evidence is credible.

[54] The complainant's evidence is far from being perfect. She gave the court the impression that she had not consumed alcohol when she left the tavern with the appellant. Dr Seitlhelo's medico-legal report, on the other hand, makes mention of the fact that 'she admitted using alcohol'. A literal interpretation of this recordal would be that this was the general position, i.e. the complainant generally took alcoholic beverages. However, considered in context, when regard is had to the section of the

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[11] *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448.
[12] *Tshiki v S* (358/2019) [2020] ZASCA 92 (18 August 2020) para 23.
[13] *S v Sauls and Others* 1981 (3) SA 172 (A) at 180 G – H.

report wherein this is recorded by the Dr Seitlhelo, viz, “clinical evidence of drugs and alcohol”, the recordal must have been in relation to her intake of alcohol prior to her medical examination.

[55] An issue that arises from this recordal is that it ought to have been canvassed with the complainant, at least, what was meant by Dr Seitlhelo when she recorded that “she admitted to using alcohol” considering her testimony that when she left the tavern after her assault by Yongama, she had not consumed alcohol. It is regrettable that this was not done.

[56] On the appellant’s version, taken in its true context, even though the complainant had taken alcohol, she was still able to appreciate what was happening around and concerning her, hence according to him, she was just tipsy.

[57] This being so, the prosecutor, for reasons that are difficult to fathom, put to the appellant that “he had sexual intercourse with a drunk person”, and continued with this line of cross-examination even in circumstances where the complainant herself had told the court that she had not consumed any alcohol. This line of cross-examination was at no stage corrected by the court, and regrettably, it also did not express itself on what it made of it in its judgment.

[58] I acknowledge the need for deference to the court *a quo*’s factual findings, but this Court is not bound by the court *a quo*’s evaluation of evidence.[14] In as much as the court *a quo* made no finding in its judgment on the complainant’s state of sobriety and its effect on the consent that the appellant alleged she gave him to have sexual intercourse with her, it is necessary to mention that the appellant’s own evidence was that the complainant was not very drunk in addition to the complainant’s evidence that she had not drunk alcohol when Yongama assaulted her. It is also for that reason that it is difficult to understand the suggestion that the appellant had sexual intercourse with a drunk person. In its simplest formulation, the purpose of cross-examination is to test the

[14] *Marx v S* [2005] 4 All SA 267 (SCA) at 326b.

credibility of a witness and elicit evidence that will enable the court to have appreciation of all the facts in establishing the truth.

[59] A further inconsistency in the evidence of the complainant relates to the time of the rape as recorded by Dr Seitlhlelo under the 'history' to the rape. It appears from what Dr Seitlhlelo recorded that the complainant narrated that she was raped at 02h30 on 03 March 2019. This was not dealt with during the trial in the court *a quo*, either by the prosecution, the defence or the magistrate.

[60] With this said, the discrepancies between the evidence of the complainant and the recordal of Dr Seitlhelo regarding the time of rape and her consumption of alcohol, cannot, on their own, lead to a conclusion that the complainant's entire testimony lacked credibility. I elaborate below.

[61] The J88 report was admitted in evidence by consent between the prosecution and the defence. There was no indication by the defence of its desire to cross-examine Dr Seitlhelo on what she recorded on the J88, nor was the complainant cross-examined on the time that she appeared to have given to the doctor as the time of rape. This, as I will demonstrate later in this judgment, is besides the fact that the version that the appellant later advanced regarding the events that led to him taking the complainant to his home and the circumstances under which he had sexual intercourse with her, was not put to the complainant.

[62] Apart from this, the complainant's version that she had not yet consumed alcohol when the assault by Yongama took place was not challenged in cross-examination. For these reasons, these discrepancies I have afore enumerated pale into insignificance.

[63] The complainant's evidence in chief regarding her familiarity with the appellant was that she did know him or his name before the rape incident. It was only in cross-examination that she was asked if she was aware that he was Thabiso's friend, to which she answered that she used to see him in Thabiso's company. To my mind, there is a

difference between knowing a person by sight and knowing that person closely. The issue of the complainant's prior familiarity with the appellant was not traversed in her cross-examination, for what it was worth.

[64] It therefore does not assist the appellant to contend that the complainant gave contradictory evidence in this regard without any basis being laid for this assertion. Furthermore, it cannot be said that Yamkela's evidence is corroboration of what the appellant told the court *a quo* regarding the alleged secret affair between him and the complainant. Yamkela did not have independent knowledge of any relationship between the appellant and the complainant besides what he was told by the appellant while they were smoking outside after, on his version, he found them in bed naked. He confirmed as much when he told the court *a quo* that he had no prior knowledge of such a love relationship between them.

[65] Not that it would be a defence, in any event, that the appellant and the complainant were in a love relationship. Section 56(1) of SORMA confirms this position by providing that whenever an accused person is charged with an offence under section 3, 4, 5, 6 or 7, it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant. However, the relevance of the existence or otherwise of a love relationship between the appellant and the complainant, in the context of the present case, is in regard to probabilities. This, in my view, is what the court *a quo* considered in the following excerpt of the record: *(sic)*

> 'Then one had to ask himself, why is the complainant falsely implicating the accused? If they were secret lovers, why did they part ways in that fashion? If they were secret lovers as the accused said, why did he . . . [inaudible] the same, he said the same Sunday she went to the police station to report? This is a very serious offence of rape. Could it be said it is because the complainant demanded money and the accused person had no money and this is why complainant had to undergo all these steps, reporting to his boyfriend, reporting to the police

station and all these medical J88, her private part being examined by the doctor because she did not get the money she demanded from the accused? Why? Is it a reasonably possible true story or version of the accused?'

[66] I must at this point deal with the ground of appeal that the magistrate did not state why he rejected the evidence of the appellant. After his evaluation of the evidence given by all the witnesses, the magistrate pronounced that the version proffered by the appellant was not reasonably possibly true, hence his conviction. The approach followed by the court *a quo* cannot be faulted when regard is had to the fact that the court *a quo* was, as a matter of law, entitled to measure the evidence adduced before it against the probabilities in order to determine where the truth lies.

[67] I agree with the submission made on behalf of the respondent that the fact that the magistrate did not enumerate his reasons for rejecting the appellant's version individually, does not mean that he did not consider his version in the light of the conspectus of the evidence before him before making the finding that it was implausible. In any event, those reasons are discernible from the record of proceedings before us.

[68] On the appellant's own showing, the reason why the complainant laid the rape charge against him was his failure or refusal to give her money when she demanded it, and this was not the first occasion on which the complainant demanded money after a sexual encounter with him. I am unable to agree with the submission made on behalf of the appellant that it is, as a general rule, unfair to expect the accused to speculate reasons why a criminal charge has been laid against him or her and to draw a negative inference against that accused on the issue of credibility where those reasons are not convincing to the court. The holding of the court in *S v Lotter*,[15] a case that we were referred to as authority for the submission made in the appellant's heads of arguments indicates otherwise.

[15] 2008 (2) SACR 595 (C).

[69] In *Lotter*, Erasmus J, evaluated several cases where the accused's credibility was impugned after failing to give an explanation as to the possible motive behind him being falsely incriminated. In those cases,[16] the accused had denied the commission of those offences and there was not sufficient evidence from which their guilt could have been inferred. Mr Lotter, as the accused, had been charged of rape and denied having had sexual intercourse with the complainant. There was no other corroborative evidence of sexual intercourse which was placed before court. The complainant further did not report the alleged rape timeously. The prosecutor in that case repeatedly asked the accused to state the motive behind the complainant falsely incriminating him. The magistrate rejected his speculative reasons as 'making no sense'. In criticizing the magistrate's approach, the court said:

> 'In the circumstances of this case, the magistrate was not entitled to draw any inference adverse to the appellant's credibility from the fact that he had offered explanations as to the complainant's possible motives which she found unacceptable.' (my emphasis)

[70] It follows from the above quoted passage that the circumstances of each case and the conspectus of all the evidence ought to determine the appropriateness of drawing an adverse inference on the credibility of an accused where the explanation he or she gives as to the motive behind his/her incrimination in a criminal case is found not to be convincing to the court. I hold the view that any explanation that the accused furnishes is to be measured against what, in the exercise of logic, is probable and that which is not, upon a holistic evaluation of all the evidence.

[71] In the present case, the appellant admitted having sexual intercourse with the complainant. He painted a picture of him and the complainant having reached an

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[16] *S v Lesito* 1996 (2) SACR 682 (O) at 687H-I; *Rex v Roga* 1935 TPD 101-102; *R v Mthembu* 1956 (4) SA 334 at 335H – 336B.

agreement to leave the tavern together to his home. The Supreme Court of Appeal in *Coko,*[17] interpreted 'consent' in the context of section 3 of SORMA as follows:

> 'Turning to s 3 of the Sexual Offences Act, we first deal with the concept of 'consent' as defined in s 1(2) with special reference to the word 'agreement'. To our mind, such a word entails the meeting of the minds of the willing participants to engage in penetrative sexual intercourse. The Sexual Offences Act explicitly requires that consent must be 'given consciously and voluntarily, either expressly or tacitly by persons who have the mental capacity to appreciate the nature of the act consented to. Moreover, for the consent to avail a person who commits a penetrative sexual act, such consent must be based on true knowledge of the material facts relating to the act in question.'

[72] No further details were placed before court for the purposes of establishing the alleged prior agreement between the appellant and the complainant apart from the appellant's assertion when he gave his version under oath (which was never put to the complainant), that he and the complainant had a prior agreement to go to his home. It was not unreasonable to ascertain from him the reasons why the complainant acted in a manner that was inconsistent with that agreement by laying a charge of rape against him. For these reasons, *Lotter* is distinguishable from the present case on the facts.

[73] The complainant was not confronted with the content and circumstances of the alleged agreement to go with the appellant to his home and the rest of what the appellant stated in his testimony regarding the friendly encounter he had with her at the tavern. These are crucial allegations which would establish that the complainant either had an arrangement with the appellant that he would pay to her money for sexual intercourse, or that the complainant, on two occasions extorted money from him. All of this becomes important for the purposes of weighing up probabilities, among which

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[17] *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko* (main and supplementary judgment) (248/2022) [2024] ZASCA 59; 2024 (2) SACR 113 (SCA); [2024] 3 All SA 674 (SCA) (24 April 2024), para 55.

would be a determination whether the complainant was *ad idem* (of the same mind) with the appellant regarding the reasons why he would take her to his home.

[74] I am alive to the fact that an accused's failure to put his version to the state witnesses does not automatically result in its rejection as a recent fabrication. In *S v Scott-Crossley*[18], the Court emphasized that the failure to put a version, even where it should have been put, does not necessarily warrant an inference that the accused's version is a recent fabrication. It further affirmed what was held in *S v Van As*[19] that the circumstances of a given case will guide the court's decision to draw an adverse inference against an accused for failure to put a version to the state's witnesses during cross-examination.

[75] In the present case, the appellant sought to impeach the complainant's credibility by stating that she cried rape after a sexual encounter (that only the two of them were witness to) presumably to spite him for refusing or failing to give her money when she demanded it.

[76] The Constitutional Court, in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others,*[20] explained the implications of failure to cross-examine a witness as follows:

> [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 witness'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

[18] *S v Scott-Crossley* (677/06) [2007] ZASCA 127; 2008 (1) SA 404 (SCA); 2008 (1) SACR 223 (SCA) (28 September 2007), para 26.
[19] 1991 (2) SACR 74 (W).
[20] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999).

unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness' testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.

[62] The rule in *Browne v Dunn* is not merely one of professional practice but is essential to fair play and fair dealing with witnesses. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.

[64] The rule is of course not an inflexible one. Where it is quite clear that prior notice has been given to the witness that his or her honesty is being impeached or such intention is otherwise manifest, it is not necessary to cross-examine on the point, or where a story told by a witness may have been of so incredible and romancing a nature that the most effective cross-examination would be to ask him to leave the box.

[65] These rules relating to the duty to cross-examine must obviously not be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case. But their object must not be lost sight of. Its proper observance is owed to pauper and prince alike. In the case of the President of this country there is an added dimension. Not only are his personal honour and

dignity at stake. He, as head of state, is representative of all the people. That being so, the rule needs to be observed scrupulously.

[77] I searched the record before us to ascertain if the complainant was confronted with what, according to the appellant, took place at the tavern before she and the appellant left. This relates, in particular, to what the appellant and Yamkela told the court *a quo* that the complainant and the appellant had a prior friendly encounter at the tavern and danced together, with the appellant even buying her alcohol. There is not a discernible inkling from the complainant's cross-examination regarding the appellant's intention to impugn her credibility regarding this aspect and the circumstances under which he had sexual intercourse with her. Mr *Dorfling*'s concession regarding the appellant's failure to put his version to the complainant was well made.

[78] In *Mkhize and Others v S*[21] the Court restated the principle of law that it is the duty of the cross-examiner to put all contested points to the witnesses in cross-examination. It went further and held that a cross-examiner who fails to do so runs the risk of having his witness criticized of recent fabrication when that witness later testifies. Leaving contradictions, improbabilities or lies undisputed is dangerous. Failure to do so would in appropriate cases lead to an adverse inference being drawn from the failure to cross-examine on the contested issues.[22]

[79] Therefore, on the facts of the present case, it was important that the appellant's version be put to the complainant while she was in the witness stand, that she willingly left the tavern with the appellant after the prior arrangement they made that they would leave together and would both sleep at the appellant's house. I say it was important because if the complainant's version was accepted as the truth, it followed from the appellant's deviation from his undertaking that he was taking the complainant to the safety of Thabiso's presence that he had a pre-contrived plan to take advantage of her. This in turn negates the appellant's assertion that he and the complainant were lovers

[21] *Mkhize and Others v S* (390/18) [2019] ZASCA 56 (1 April 2019).
[22] Id, para 15.

and thus renders his version that he had agreed with the complainant that they would go together to his home so improbable as to be false.

[80] It is rather surprising that the appellant told the court *a quo* that when Yamkela arrived in his room the complainant appeared anxious or nervous presumably because she feared that Yamkela would tell her boyfriend Thabiso about their tryst, while according to Yamkela, the complainant was joyful and showed no sign of discomfort. This inconsistency is compounded by the fact that the complainant was not cross-examined regarding the arrival of Yamkela while she was still in the appellant's room. Nor was it put to her that she and the appellant continued to converse and fell asleep around 03h00 to 04h00.

[81] The appellant's version was that when he woke up later that morning the complainant was not there, and he had no idea when she left. It was important, therefore, that the complainant be confronted with the fact that she voluntarily remained in the appellant's room to a point that when Yamkela arrived she was in bed with the appellant.

[82] I am alive to the fact that not every contradiction in the evidence of witnesses signifies falsity, as some contradictions might be indicative of error.[23] However, the nature of the contradiction and its effect on the witness's evidence may, in an appropriate case, lead to a finding that one or both witnesses lied. In the present case, the nature of the contradictions between the evidence of the appellant and Yamkela is such that it must lead to a finding that the version of the appellant was conveniently presented to escape a finding of guilt.

[83] I turn do deal with the appellant's contention that the court *a quo* misdirected itself in accepting the J88 report as a previous consistent statement that corroborated the evidence of the complainant.

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[23] *S v Mkhohle* 1990 (1) SACR 95 (A) at 98F-H, with reference to *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C.

[84] We do not understand the court *a quo*'s finding to be that the complainant's evidence regarding the rape was corroborated by the doctor's recordal of the history on the J88. In his judgment, the magistrate repeats the contents of the J88 report and states that the recordal by the doctor that she collected sperm or semen from the complainant's vagina was consistent with the complainant's evidence that she had not bathed after the sexual intercourse.

[85] Significantly, nowhere does it appear from the J88 that the complainant told the doctor that she was raped by the *appellant*. The clinical observations and conclusions of the doctor stood as objective evidence of facts as were observed by him during his examination of the complainant. I may reiterate that the defence consented to the admission of the J88 report in evidence upon its mere production. Nothing prevented the defence from challenging the clinical observations and findings made by Dr Seitlhelo in the report.

[86] Furthermore, the defence posited by the appellant was never that he did not have sexual intercourse with the complainant, but that he had consensual intercourse with her. Apart from this, it was the complainant's evidence that when the appellant penetrated her vaginally and had sexual intercourse with her, he did not use a condom even though she had seen a condom next to his bed. This evidence was never challenged.

[87] It can hardly be said, therefore, that the magistrate accepted the J88 report as a previous consistent statement made by the complainant. I hasten to state that nothing prevents the court from accepting proof of a previous consistent statement concerning the commission of a sexual offence where proper basis was laid for the acceptance of that report and evidence adduced by the person to whom that report was made. I am fortified in this view by the provisions of section 58 of SORMA which are as follows:

> ‘Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements.’

[88] By contrast, and as far as we could have ascertained from the record before us, the J88 report was handed to court in terms of the provisions of section 212(4) of the CPA, whereupon it would become admissible to the court upon its mere production subject to the right of the accused to challenge any aspect of the report if so advised.

[89] For all the foregoing reasons, there is no basis for interference with the court *a quo*’s evaluation of evidence. The grounds of appeal relied upon by the appellant, cannot be sustained.

[90] I deal next with whether there are any grounds for interfering with the sentence that the court *a quo* imposed on the appellant. The narrow issue in this regard, gleaned from the grounds of appeal relied on, is whether the court *a quo* erred in finding that no substantial and compelling circumstances existed which warranted deviation from the minimum sentence prescribed for the offence of which the appellant was convicted.

[91] At the trial in the court *a quo*, both the appellant and the prosecution contented themselves with making submissions from the bar in mitigation and aggravation of sentence, respectively.

[92] It was submitted on behalf of the appellant that he was 23 years of age with two school going children aged 6 and 8 years, respectively. The two children were born of different mothers who were also school going, hence they are looked after by the appellant’s aunt. The appellant was employed in a construction company as a construction worker and used his income to support his children and younger sister. Both his parents are deceased. No previous convictions were proved against him.

[93] The prosecution submitted that even though the appellant was convicted of a serious offence which constituted gender-based violence, and which warranted a custodial sentence, the fact that the appellant had two children and the offence was committed 'while people were drunk', constituted substantial and compelling circumstances. Based on this, the prosecution submitted that there were grounds for the court *a quo* to deviate from the minimum sentence of 10 years imprisonment that was ordained for the category of rape that the appellant was convicted of. The prosecution submitted that a period of 6 years imprisonment was appropriate in the circumstances.

[94] In imposing the prescribed minimum of 10 years' imprisonment, the magistrate, after considering the appellant's personal circumstances, reasoned that the conduct of the appellant amounted to taking advantage of the complainant who had as much a right to be at the tavern as he did. He further considered the prevalence of the offence in that court's area of jurisdiction and the fact that rape undermines the victim's human rights. It was his finding that there were no substantial and compelling circumstances which justified a departure from the prescribed minimum sentence of 10 years' imprisonment.

[95] The difficulty in formulating a straitjacketed definition of the phrase 'substantial and compelling circumstances' is generally recognized by the courts.[24] It bears emphasizing that the advent of minimum sentence legislation has not done away with the traditional factors that are relevant to sentencing. Those are the personal circumstances of the offender, the crime committed and the interests of society.[25]

[96] It has been held that the prescribed minimum sentences are not to be departed from for flimsy reasons that would not withstand scrutiny;[26] and that in cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. In *S v Vilakazi,*[27] it was held that once it becomes clear that

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[24] *S v Dodo* 2001 (3) SA 382 (CC) at para 10; *S v Malgas* at para 20.
[25] *S v Zinn* 1969 (2) SA 537 (A).
[26] *S v Malgas,* supra, para 25.
[27] 2009 (1) SACR 552 (SCA).

the crime is deserving of a substantial period of imprisonment, the questions whether the accused is married or single, whether he has two children or three, and whether or not he is in employment, are in themselves largely immaterial in the light of what that period should be, and that those seem to be the kind of 'flimsy' grounds that, according to *Malgas,* should be avoided.[28]

[97] Regarding the effect of intoxication, I acknowledge what the court said in *S v Ndhlovu (2).*[29] In that case it was held that intoxication is one of humanity's age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do.[30]

[98] However, the learned author Terblanche,[31] states that the intake of alcohol or drugs is not necessarily a mitigating factor; the circumstances of the case will determine whether it is. Generally, however, once the court is satisfied that the offender was intoxicated, his intoxication will be a mitigating factor. The reason for this is that "[liquor] can arouse sense and inhibit sensibilities which may diminish the responsibility of the offender. However, it has to be shown that the intoxication actually impaired the mental faculties of the offender; only then can his blameworthiness be regarded as diminished.

[99] These views also found expression in *Director of Public Prosecutions, Grahamstown v Mzukisi Peli*[32], a case where the accused (and respondent on appeal by DPP, was 24 years old victim 6 years old) in which the Court held:

> 'It is trite, that for intoxication to be considered as a substantial and compelling circumstance in mitigation, it must be shown that the consumption of alcohol had

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[28] *Vilakazi*, at para 58.
[29] 1965 (4) SA 692 (A).
[30] Id, at 695C-D.
[31] Guide to Sentencing in South Africa, 2nd Edition (Lexis Nexis) 2007, at paragraph 7.3.9.
[32] *Director of Public Prosecutions, Grahamstown v Mzukisi Peli* (533/2017) [2018] ZASCA 40 (28 March 2018).

impaired or affected the respondent's mental faculties or judgment and thereby diminished the respondent's moral blameworthiness: see *S v Cele* 1990 (1) SACR 251 (A) at 254*h-i* & 255*b-c;S v Makie* 1991 (2) SACR 139 (A) at 143*c-d* and *S v Eadie* 2002 (1) SACR 663 at 673*j*-674*f* together with the cases mentioned therein. . . That the respondent appreciated the wrongfulness of his conduct and was accordingly able to distinguish right from wrong, but nevertheless proceeded to rape the complainant, cannot on the facts of this case serve to diminish his moral blameworthiness to the extent that it may be regarded as a substantial and compelling circumstance.'[33]

[100] There is no indication from the facts of the present case that the appellant's consumption of alcohol impaired or affected his mental faculties or judgment and thereby diminished his moral blameworthiness. In his own words *'he was moderately drunk or tipsy'* when he left the tavern with the complainant. Furthermore, it was not suggested at any stage during the trial in the court *a quo* that appellant did not appreciate the wrongfulness of his conduct and was accordingly unable to distinguish right from wrong.

[101] I note that no submissions were made by the appellant's legal representatives regarding the existence of substantial and compelling circumstances. That being the case, from the personal circumstances of the appellant and the circumstances of the offence as they appear from the record before us, there are indeed none.

[102] It is as well to mention that despite the minimum sentence legislation, the centrality of proportionality in sentencing has not changed. The absence of substantial and compelling circumstances from the personal circumstances of the appellant is not in and of itself the end of the inquiry. A prescribed sentence cannot automatically be assumed to be proportionate in a particular case. Disproportionate sentences are not to be imposed as the courts are not vehicles for injustice.[34]

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[33] At para 9.
[34] Id, at para18.

[103] In *S v Dodo*[35], the Court held that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. This the court does by considering all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. Can it therefore be said that the term of imprisonment of 10 years is disproportionate to the offence of which the appellant was convicted, notwithstanding the absence of substantial and compelling circumstances?

[104] The repulsive and humiliating nature of the crime of rape can never be overstated. It is indeed an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity. It diminishes or renders nugatory the legitimate claim of women that the court referred to in *S v Chapman*[36]*,* 'to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go to and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminish the quality and enjoyment of their lives.'

[105] The appellant contrived a plan to allure the unsuspecting complainant who placed her trust in him when he rescued her from the assault by Yongama at the tavern. He carefully executed his plan by continuously misleading the complainant when he left the tavern with her by making her believe that he was taking her to her boyfriend. This, he did in order to secure his control over the complainant so that his pre-contrived plan to take advantage of her may come to fruition.

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[35] Footnote 24, supra, at para 37; *S v Vilakazi* para 15.
[36] *S v Chapman* 1997 (3) SA 341 SCA.

[106] It must perhaps be stated that not every rape incident will be marked by evidence of injuries on the victim, nor is it necessary in every instance that the perpetrator subjects his victim to gruesome violence and terror in order to subdue her and retain control over her while carrying out the despicable act of rape.

[107] The importance of this observation is that the appellant's stratagem in taking the complainant with him in order to have his way with her is far more perilous as it is bound to go undetected until the victim is absolutely at his mercies at the surreptitious scene of the rape. Society deserves protection from persons of the calibre of the appellant. This can only be achieved by a substantial period of imprisonment which will hopefully afford the appellant an opportunity to reflect long and hard on his conduct and the need to respect the rights of other individuals who must co-exist with him in society.

[108] It has not been demonstrated that the court *a quo*'s judgment on sentence was so wrong that this court must interfere with it. The period of imprisonment imposed by the court *a quo* is proportionate to the offence committed by the appellant when regard is had to the circumstances under which he committed it. The appeal against sentence must accordingly fail.

[109] In the result, I would make the following order:

1. The appeal against conviction and sentence is dismissed.

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L. RUSI

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

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M. S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

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Date heard : 04 November 2024

Date delivered : 21 January 2025