In the matter between:

EPHRAEM KAUNDA Applicant

And

THE KING Respondent

CORAM : MAPHALALA J.
MASUKU J.

For the Appellant

For the Respondent

JUDGEMENT
8th February, 2001

MASUKU J.

This is an appeal against an eighteen-year sentence imposed on the Appellant (to whom I shall continue to refer to as the accused), by the learned Senior Magistrate Mr. S. Mngomezulu, as he then was. The accused had appeared before the learned Magistrate charged with rape, it being alleged that the accused was guilty of rape with aggravating circumstances in that on or about the 27th June, 1997, and at or near Mantabeni area, he had unlawful and intentional intercourse with Sibongile Gama, a female juvenile of 17 years without her consent.

The aggravating circumstances alleged by the Crown in terms of the provisions of Section 185 *bis* of the Criminal Procedure and Evidence Act, 1938, as amended, are the following:

1. That the complainant is still a juvenile (under 21 years) of 17 years.
2. The accused used a knife to threaten the complainant to submit to his act.

3. The accused continually assaulted and throttled the complainant during the rape.
4. The rape took place during the night in a forest from 18h00 to 03h00 .So the complainant was held in terror all the while.
5. After the rape, the accused throttled the complainant until she was unconscious and further threw her into a donga and/or a pit and left her for the dead.

Initially, the appeal lodged had been against both conviction and sentence. When the matter was called this morning, the accused indicated that he wished to pursue the appeal against sentence only. He further referred the Court to a letter which he wrote to the Registrar of this Court indicating that he was abandoning the appeal against conviction. The decision by the accused was wise in that there were no prospects of success whatsoever as the Magistrate properly convicted him. The judgement will accordingly be in respect of the appeal against sentence.

The Crown's evidence in a nutshell is as follows: The complainant states that on the 27th June, 1997, at or about 14h00, she was sent by her sister, Cindy Gama, to a shop at Mantabeni, where Cindy resided. The complainant had come to visit her sister. On her way to the shop, she met the accused, who was carrying a slasher and a big knife. The accused, whom she knew, walked with her. The time then was around 17h00. When they approached a ditch, the accused threw away his slasher and told the complainant that he wanted to kill her. He pulled her away from the road to a nearby veld and there ordered her to lie down, remove her underwear, which the complainant did in fear for her life. He then proceeded to have sexual intercourse with her. It was her evidence that she had had sexual intercourse with her boy friend the previous day.

Having satiated his sexual appetite for that time, the accused ordered the complainant not to put on her underwear. He told her that when the moon set, he would then kill her, whereupon she pleaded with him not to kill her. She undertook not to report her ordeal to the Police. He again ordered her to lie down facing upwards and had a violent bout of sexual intercourse with her again as a result of which the complainant states that she had a burning sensation in her womb during this sexual encounter. He was at the same time repeatedly plunging the knife into the ground next to the complainant. The accused then told her to sit up and to put her underwear on, with which orders she complied. He then asked her to choose how she wanted to die- whether by strangulation or by him slitting her throat with the knife. The complainant opted for the former. He the ordered her to lie down again and he began to throttle her until she frothed in the mouth became weak and eventually lost consciousness. Her canvass shoes and her headscarf were left at the scene. Having regained consciousness, she was weak and had difficulty walking. She had sustained injuries on her forehead and her neck was swollen and painful. With great difficulty, she walked to the nearest home, i.e. that of Maria Mbetse, who assisted her get warm as she was shivering. The complainant, according to Mbetse, could not even open her mouth to take a cup of tea. Her dress was soiled and she had bruises on her arms, knees and behind both ears. The time was around 03h00. The complainant told Mbetse of her ordeal and that the accused threw her into a donga after she fell unconscious, leaving her for the dead. Mbetse tried to warm the complainant with a cloth and warm water, which had the desired effect as the complainant

thereafter managed to sleep.

In the morning, around 06h00, she woke up and was taken by Mbetse to her sister's house. Mbetse explained to Cindy what she had been told by the complainant. She then went to the Police Station to report that the accused had raped her. The Court went for an inspection *in loco*at the scene of the alleged rape. She was able to point out all the places that she had made reference to in her evidence. The accused never denied having raped the complainant during his brief cross-examination. He alleged that the complainant had visited him at his home, which she vehemently denied. He stated that he had been playing a game of cards. The Magistrate found that he was hopeless as a witness and that his witnesses did very little to advance his case. It became clear that his father, who featured as a witness had been schooled. I agree with these findings as they are borne by the record.

1. The docket allegedly lost.

I have great difficulty with this ground of appeal because a docket contains statements and other documents which the Crown collects with a view to using them in support of the conviction of the accused person. If the docket did get lost as alleged, and there is nothing to confirm that it did get lost, then it's loss would have occasioned difficulty for the Crown in relation to the documents therein contained and which they were desirous of using. This, in my view does not in any way affect the accused person and cannot, in anyway result in a failure of justice, which would necessitate an intervention by this Court. The Court, in conducting proceedings has regard to the evidence led. Very little attention, if at all, is normally given by the Court to statements contained in the docket. This would be where a witness is sought to be impeached by the side that has called that witness. It is abundantly clear that such an event never took place. The conviction was based solely on the evidence led in Court. It is also unclear as to how the loss of the file actually affected the accused.

What is of particular interest to me is what appears at page 30 of the record, at line 10, where the accused was being cross-examined by the Crown. I quote:

> Q: Did you write a statement to the Police?
> A: No.

Clearly, this is at variance with what the accused is now alleging in his heads of argument. The accused is bound to the record, which clearly shows that the evidence recorded above was under oath. The accused cannot and should not be allowed to run with the hares and hunt with the hounds, as it were. This ground has no substance in my view is and liable to be dismissed.

The order of witnesses

The accused further alleges that the Court erred by bringing in the other witnesses first before allowing the complainant to adduce her evidence. I must at the outset state that this ground is ill conceived. Firstly, the Court is

not responsible for calling the witnesses. This is the duty of the Crown, which is the ***dominis litis.*** Crown is at liberty therefor, to call the witnesses that it considers necessary for it to prove its case and in the order that it deems appropriate. The Court cannot interfere in this regard.

Secondly, I do not find anything wrong in the manner that the Crown chose to call its witnesses. In my view, the order in which the witnesses were called did not in anyway affect the accused or cause a failure of justice. The accused has not himself been able to demonstrate how the sequence in which the witnesses were called affected him in the conduct of his defence. The authorities that I consulted do not prescribe the order in which the witnesses ought to be called, this being left entirely to the person calling those witnesses. There may be different preferences and considerations of convenience regarding the order in which witnesses should be called but failure to follow these do not *per se*amount to a failure of justice. This ground is likewise liable to be dismissed and it is so ordered.

2. Absence of medical report.

The accused further alleged that the absence of the medical report is sufficient to justify this Court nullifying the conviction. In dealing with this issue, in his brief judgement, the learned Magistrate held the view that the complainant had a steady boy friend and knew what sexual intercourse was and reasoned that the absence of the medical report did not adversely affect the Crown's case. Was he correct?

Unfortunately, the learned Magistrate did not furnish any reasons for his conclusion. Had he done so, this Court would be aware of those and would be able to evaluate the correctness thereof. Full reasons for any decision are to be encouraged as they inform the accused as to why he was convicted and also assist the Appeal Court in following the reasoning of the Court *a quo* in eventually deciding whether the Court *a quo*was correct in its conclusion. When full reasons are given, the appellant on a full appraisal of the same may wisely exclude some of his grounds of appeal. Alternatively, the Magistrates should, as soon as they become aware of the appeal provide reasons without undue delay.

In this case, the complainant clearly submitted herself to a medical examination but the report thereof was not produced in Court, nor was an effort made to call the Doctor who attended to the complainant to testify. record does reflect that the prosecutor did go to the Police Station to look for the medical report but no reasons were furnished as to the same was not produced in Court. The only basis, upon which this matter has to be decided in my view, is whether the complainant's evidence was corroborated insofar as the issue of sexual intercourse is concerned.

There is a cautionary rule, which has become salutary in our Courts pertaining to how the Courts

should treat the evidence of victims in sexual cases. The learned authors Hoffman and Zeffert, in their work entitled, " The South African Law of Evidence", Fourth Edition, Butterworths, 1988, state as follows at page579:

> "Experience has shown that it is very dangerous to rely upon the uncorroborated evidence of the complainant unless there is some factor reducing the risk of a wrong convictiollen cases which involve a sexual element-… The cautionary rule is not an inflexible rule of evidence, but a practice, tested by time and experience, that is aimed at avoiding a possible injustice to the innocent. What is required is that the trier of fact should show awareness of the special dangers of convicting upon the evidence of the complainant in a sexual case."

This rule has sustained incessant attacks from many quarters, particularly those in the vanguard of protection of women's right. As a result, the cautionary rule has been abolished in South Africa, since it violates the basic tenets of that country's constitution, e.g. the principle of equality before the law. See **S V J 1998 (2) SA 984 SCA.**Whether there is a need for us to adopt a similar stance is a matter that will not be pronounced upon in this judgement as it is not in issue.

The factors, which are regarded as reducing the risk of false incrimination, include the following:

(a) the presence of a motive falsely to implicate the accused;
(b) the difficulty of refuting a charge of sexual immorality;
(c) wounded vanity and spite against a person who has rejected one's advances; and
(d) the wish to protect a friend or to implicate someone of more affluent means than him.

Corroboration therefor provides the most satisfactory indication that the complainant is truthful, but false evidence by the accused or his failure to testify may also be taken into account, as may, any other feature of the case which shows that the complainant's evidence is reliable and that of the accused is false. Factors in this case, which in my view constitute corroborative evidence include:

(a) the complainant's physical condition and the state of her clothing;
(b) that she reported to the nearest homestead and the evidence of Mbetse confirmed the complainant's story;
(c) the report made to her sister, which also confirms the two pieces of evidence above. There is also the evidence of a Police Officer, who attended the complainant;
(d) the inspection *in loco* the complainant's evidence of the places she adverted to in her testimony;
(e) the complainant's canvass shoes which were found at the scene;

(f) the complainant's head scarf pointed out by the accused at the scene alleged by the complainant;

(g) the accused's patent failure to cross-examine on crucial issues. In particular, it was never put to the complainant that the accused had not raped the complainant

(h) the accused story was confusing and did not receive confirmation of the defence witnesses;

(i) the accused was found by the learned Magistrate to have been a hopeless and evasive witness. This is borne out by the record of proceedings; and

(j) she knew the accused and identified him by name as her assailant.

It is my considered view, that in the light of the foregoing, there was sufficient corroboration of the complainant's story, notwithstanding the absence of the medical report. It is also my considered view that the accused was properly convicted on the basis credible evidence, which formed a corroborative chain. It is also clear from the evidence that the complainant had previous sexual experience and stated that the accused penetrated her. I entertain no doubt that there was no risk that the accused could have been falsely implicated. This ground of appeal should also fail.

Regarding the issue of sentence, I am of the view that the learned Magistrate erred in imposing the sentence of 18 years. Being a Senior Magistrate at the time, the maximum jurisdiction he enjoyed in terms of sentence was 7 years. See **SIZA GANGADVU THWALA V REX CRIMINAL APPEAL CASE NO. 41/99** (unreported) and the authorities therein cited. In **PAT BHIBHI MNGOMEZULU AND ANOTHER V REX APP. CASE NO. 12/98**(unreported), Tebbutt J.A. stated as follows, regarding an Appeal Court's power to interfere with a sentence meted by the Court *a qou*:

> "This Court will only on appeal, interfere with the trial Court's sentence, if there has been an irregularity or misdirection by the trial Court, or if there is a striking disparity between the sentence passed by the trial Court and the sentence which the Court of Appeal would itself have passed."

In this case, it is proper to interfere with the sentence imposed for the reason stated above. The sentence imposed by the learned Senior Magistrate be and is hereby set aside for lack of jurisdiction to impose the same. I am of the view that this Court is at large to impose a sentence that is in its view appropriate, having regard to the facts of the matter. Section 327 of the Criminal Procedure and Evidence Act 67/1938, sets out the powers of an Appeal Court, including the High Court when sitting in it's appellate capacity. According to that Section the Court may:

(a) confirm the judgement of the court below, in which case if the accused, having been convicted and admitted to bail, is in court, the Appeal Court may forthwith commit him to custody for the purpose of undergoing any punishment to which he may have been sentenced;

(b) order the judgement to be set aside notwithstanding the verdict, which order shall have for all purposes the same effect as if the accused had been acquitted;

(c) give such judgement as ought to have been given at the trial; or impose such punishment (whether more or less severe than or of a different nature from the punishment imposed by the court below) as ought to have been imposed at the trial; or

(d) make such order as justice may require:

Provided that notwithstanding that the appeal court is of the opinion that any point raised might be decided on favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to such appeal court that a failure of justice has in fact resulted therefrom.

I am of the view that the purposes of justice would clearly be defeated if the sentence would be allowed to remain at that which the Magistrate had jurisdiction to impose, namely, seven years. I say this in consideration of the facts of this case. This to me appears to be a case that merits this Court exercising the powers set out in sub-section (d) above. Remitting the matter or ordering it to be tried before a Court with appropriate penal jurisdiction would be inappropriate as it may result in the complainant having to relive her ordeal and the passage of time may have a negative effect on the evidence and the accused would be prejudiced in that he would have to be kept in custody this being a non-bailable offence until such time that the matter could be ready for hearing, which, in view of experience may be more than fifteen months from now. .

The sentence that this Court is minded to impose is one of eighteen years imprisonment without the option of a fine. In the case of REX V MAJAHA MNISI AND ANOTHER CRIM. CASE NO. 73/98 (unreported), I had occasion to comment on the crime of rape as follows, at page 2 of the sentence. I find those remarks quite apposite:

> " Rape is an innately degrading and dehumanising crime, the effects of which can hardly be quantified. It violently robs the victim of her self-esteem, self-worth and confidence. It constitutes a flagrant violation of the woman's femininity and relegates her to an object, devoid of feeling and entirely lacking in her God-

given right to say " NO".

The crime you committed on this young lady was not only heinous but was accompanied with brute force and violence only to be expected from a maniac. Having satisfied your gargantuan sexual appetite, you decided to kill her by throttling her until she became unconscious.You thereafter threw her into a donga, suspecting that she had died and would never live to tell her tale. Your conduct and attitude towards the complainant calls for great retribution which will serve as a balm to the womenfolk in this nation that the Courts are there to protect them from ravenous wolves like you. Other similarly minded predators must also know that they will not be treated by the Courts with kid gloves once the Courts adjudge them guilty. As a matter of fact, you should have been charged, both with rape and attempted murder and your matter brought before this Court for trial, in which case an even stiffer sentence may have been imposed.

Lastly, we wish to appeal, as we have done before that the Director of Public Prosecutions should ensure that such cases are brought for trial before Judicial Officers who not only have jurisdiction to hear the matters but also the necessary penal jurisdiction, particularly once the provisions of Section 185 *bis*are brought into play. It is however heartening to note that the alleged aggravating circumstances were brought to the accused's attention in the charge sheet as was ruled to be the proper procedure by this Court in other cases.

In sum, the appeal against conviction is dismissed and the Magistrate's 18 year sentence is set aside and this Court substitutes the said sentence with an even sentence.

T.S. MASUKU
JUDGE

I agree.

S.B. MAPHALALA
JUDGE

These principles are equally applicable in this case as we are here sitting as a Court of Appeal.