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IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A460/2015

5 **DATE:** 21 OCTOBER 2016

In the matter between:

T D SIBINDI APPELLANT

and

THE STATE RESPONDENT

10

JUDGMENT

BOQWANA, J

15 The appellant was arraigned before the Regional Court in
Paarl for one count of rape and one of assault with intent to do
grievous bodily harm. He pleaded not guilty to both charges
and was convicted on 8 July 2014 on both counts. In respect
of the rape count he was sentenced to 20 years imprisonment,
20 5 years of which was suspended on specific conditions and to
12 months imprisonment in respect of count 2 of assault with
intent to do grievous bodily harm. The sentences were
ordered to run separately, making the effective sentence 16
years imprisonment. Leave to appeal against conviction was

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granted on petition to this Court. For some reason both the appellant and the respondent addressed the issue of sentence in their heads of argument. I will return to this later.

5 The incident giving rise to the conviction occurred on 17 June [2012] near Mbekweni where a 15 year old complainant was allegedly raped and assaulted by a male person whom she alleges was the appellant. Six witnesses including the complainant testified on behalf of the state. The appellant
10 testified in his case and also called Vuyokazi Venge to testify on his behalf.

The complainant testified that on 16 June 2012 she was walking with two cousins and two friends towards a shebeen,
15 known as London. They met a lady known as Vuyokazi who encouraged them to go inside the shebeen. They entered inside the shebeen and Vuyokazi poured a glass of wine for her. As she was about to drink it, another lady known as Thobeka entered. The complainant gave the wine to Thobeka.
20 Vuyokazi poured another glass of wine for the complainant which she drank. Vuyokazi left for a while and came back with an unknown gentleman. This gentleman drank with Vuyokazi after which the police arrived and told them to leave the shebeen as they were closing it.

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As the complainant walked out with friends, after being told by the police to leave, Vuyokazi suggested that they go to a shebeen called Jimbo where they would drink. Vuyokazi left, the complainant did not know where she went and she came
5 back in a white vehicle driven by a gentleman who was later identified as Doctor, the appellant. The complainant told Vuyokazi that she was not going to drink as it was late. Vuyokazi informed the complainant that they would drop her off at her home and pulled her inside the vehicle. The
10 complainant relented and got inside the vehicle and drove off with Vuyokazi and the appellant. The appellant drove past the complainant's house. Upon enquiring as to why they drove past her house Vuyokazi told her that they were going to buy alcohol and bring her back.

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Upon arrival at Jimbo, Vuyokazi went out of the vehicle, when the complainant wanted to follow her she said she would be back soon. As Vuyokazi went inside, the appellant drove off with the complainant inside the vehicle. Upon asking where
20 they were going, the appellant told her that he was going to the garage to put in petrol. The appellant drove past the garage and towards a dirt or gravel road which had lots of trees. He stopped next to the trees and came to the backseat of the vehicle where the complainant was. He then asked her
25 to sleep with him which she refused to do. He then slapped her

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on her face with his hand and hit her on the top part of her body using his fists. After that he took out a knife and stabbed her repeatedly on her pants where the button was, trying to loosen the button until it came off. She tried to fight, blocking
5 him as and was also crying. The appellant pulled her pants down, pushed her and put his arm on her neck (which arm was apparently lame) or disabled. He used the other hand to pull her pants down. He then knelt on the seat, took his penis out and inserted it in her vagina, making sexual movements and
10 funny noises. He then stopped, got off her and threatened that if she told anybody she would be dead. He then drove the vehicle, using another route. On the road they gave a lift to two men, whom they drove to the garage to get petrol. These men got off at Drommedaris.

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The appellant told her that they would go back to the place where Vuyokazi was and she must sit and drink with Vuyokazi. She drank three or four glasses before she came back. The appellant then instructed her to leave with him. When she
20 refused to he hit her on the back and face a number of times. As he was hitting her a man by the name of Mazimandile approached them and asked the complainant to sit next to him in order to shield her from the appellant. It appears that the appellant left and never came back.

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The complainant asked Mazimandile to accompany her home. Whilst waiting for Mazimandile to finish drinking other people came namely Sihle, Pamela and Siphesanda. Sihle noticed that the complainant had been assaulted and asked her what
5 had happened to her. Mazimandile told Sihle that the appellant assaulted her. The complainant then asked Sihle to accompany her to the toilet. At the toilet she told Sihle that the appellant had raped her, Sihle suggested that they go home and tell others at home about what the appellant had
10 done to her.

When they got home they found Sihle's father sleeping and did not wake him as he looked like he had been drinking. In the morning Sihle called their brothers and told them. The brothers
15 advised that they go to the police station to report the incident. They went to the police station as suggested. The complainant still wearing the clothes she wore the day before, (i.e. the day of the alleged rape). She explained to the police what happened and told them that Vuyokazi knew the appellant.

20

Sihle mentioned the name of the person that raped the complainant to the police. She, the complaint, and the police and others went together to arrest the appellant. She confirmed that the man being arrested was the man who raped
25 her. Siphesanda, her boyfriend also saw the man. The

complainant was then taken to the doctor and was examined the same day. She had scratches around the pubic area and there was bleeding around that area due to the scratches. After she was raped it was difficult for her to walk and she was
5 crying.

Nohepi, an adult woman at the tavern saw her crying, Vuyokazi also saw her crying but did not take note of her, she was just dancing. She did not know if Mazimandile saw her crying.
10 She did not ask for help from the men that got into the vehicle because the appellant was still around them. She decided to tell Sihle about the rape, because Sihle was a member of her family.

15 In cross examination she was confronted about the statements that she made to the police that she, inter alia, contradicted herself in a number of respects, including that she was walking with others, a guy slapped her and offered her a lift to Jimbo liquor store, which she accepted, that statement was different
20 from her testimony. She testified that certain aspects of the police statements that were put to her were incorrect.

The second witness was Mazimandile Buba. He testified that he knew both the complainant and the appellant. He saw the
25 complainant crying or looking like she was crying. He

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approached her and asked her what the problem was but she did not want to tell him. Tears were coming down her face. She was making sounds like she was sobbing. She sat alone at the intersection of the table. As he was walking towards her, 5 the appellant came and started assaulting her without saying anything. He hit her with a fist on her back. Mazimandile stopped the appellant after which the appellant left. The complainant's cousin came and took her away.

10 In cross examination it was put to Mazimandile that the appellant had one arm disabled and he testified that he probably used the other arm to assault the complainant. He confirmed that the appellant owned a white Mazda Sting and that he had no problems with him. There were security 15 personal at the shebeen but they did nothing to stop the assault. According to him, fights occurred every weekend in that shebeen in the presence of the security guards.

Sihle Ndebeni was the next witness to testify. She testified 20 that on 17 June 2012, she was with the complainant and three friends (Thobeka, Pamela and Yolanda) on their way to drink at London tavern around 12:00 midnight. The complainant is her [...].

25 They had not even started to drink when the police came and /DS

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told them to leave as they were going to close the place. The complainant's boyfriend Siphesanda called the complainant. They decided to go to Renies place, another shebeen, with their boyfriends. Whilst they were walking, a vehicle
5 approached and the man who was driving the vehicle said he wanted the complainant. Siphesanda replied by stating that the complainant was his girlfriend. Vuyokazi called the complainant and told her not to worry because she was also in the vehicle. Vuyokazi then grabbed the complainant into the
10 vehicle. The complainant got inside the vehicle and left.

Siphesanda told her who the gentleman in the vehicle was and he was worried that something could happen to the complainant. They went around looking for the complainant in
15 all the shebeens including Jimbo but could not find her.

Sihle and the remaining friends went home around 4h00am. Sihle was woken up by a person known as Nosani telling her that her sister was being hit by somebody at Jimbo. She and
20 others went to Jimbo and found the complainant crying. Mazimandile told them that the complainant was assaulted by the appellant. She asked the complainant if they could go to the bathroom. She noticed that the complainant could hardly walk and her pants were torn. Mazimandile gave the
25 complainant a jacket to put around her waist. The complainant

was holding her waist. She asked her why she held her waist and the complainant told her that the appellant had raped her. She told the complainant that they must go home and tell the older people. On their way home the complainant could hardly
5 walk. She and Yolanda had to help her. They went to sleep and she asked the complainant again about what she had told her so as to make sure that it was true. The complainant repeated what she had earlier told her about the rape. Their father was still not home and they decided to go and tell the
10 grandmother. On their way to their grandmother they met their father and told him that the complainant was raped. He went to tell the rest of the family about the incident.

Dr Gail Beverley Davids testified that on 17 June 2012, at
15 17h30 she examined the complainant. The gynaecological examination indicated that the complainant had sustained swelling of the urethral orifice, the fraenum of the clitoris was swollen, the para-urethral folds were swollen, there was friability of the posterior fourchette and swelling of the hymen
20 with fresh tears in the 7 o'clock position. The complainant also had small superficial tears in the vagina that did not actively bleed. The vaginal examination was painful. Superficial tears were noted and there was a bloody discharge. Further, there was bleeding in the cervix and sample of pregnancy were
25 negative. Her conclusions of the gynaecological examination

were that there was definite clinical evidence of dry penetration with fresh tears in the hymen and superficial tears in the vagina. The hymen was torn indicative of the fact that the complainant was not sexually active. The swelling and
5 bruising indicated that injuries could not have been older than a week and could have happened 24 hours before she examined the complainant. She found the complainant's mental health and emotional health to be withdrawn and she did not find any clinical evidence of drugs or alcohol.

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Constable Sibuyele Sihlobo, testified that he was the investigating officer in the matter. He received a phone call from Mbekweni Police Station that there was a rape case reported. She saw the complainant for the first time on the
15 Sunday, the day after the matter was reported to her. The complainant looked very traumatised and she was crying. She saw that the complainant's pants were torn but did not say where they were torn. She also noticed that the complainant was wet because when she left a chair she could see that she
20 left a wet spot or mark. When she spoke to the complainant, the complainant told her that she realised that she had just had her periods. She took down the warning statement of the appellant having explained his rights. The appellant's blood and pubic hair were taken as part of the investigation.

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Michelle Smit testified that she had been attached to the biology unit of the forensic science laboratory since 1 July 2009 and did the DNA examination of the exhibits sent to her pertaining to this case. She confirmed that no male DNA was
5 found on the swabs. She testified that lack of semen could be because of drainage, which could be caused by going to the bathroom or having periods. Such activities could wash the evidence such that when the doctor did the examination no semen was left inside her body. She could not say whether or
10 not sexual intercourse did occur as no male evidence was found. That was the evidence of the state witnesses.

The appellant testified and called Vuyokazi as his witness. He testified that on the day in question at about 11:00 at night he
15 was with Vuyokazi and the complainant. He drove to the garage with the complainant to put in petrol. From there they drove to Jimbo Liquors and they bought four beers and drank. After drinking the beers he told Vuyokazi and the complainant that they must go home, the complainant refused. He and
20 Vuyokazi left and the complainant remained behind at the shebeen. Before going to Jimbo he and Vuyokazi had been at London shebeen where police came and chased them out. From the London shebeen they went to his vehicle. The complainant said they must wait for her. Before they got there
25 she was called by her boyfriend. When she was done talking

to him, she got into the vehicle and they drove off.

When they arrived at Jimbo he told the complainant and Vuyokazi to get off the vehicle. The complainant did not get
5 off. He then drove with her to the garage to put in petrol. He got back from the garage and parked the vehicle next to the school by the pavement. The complainant got off and went inside Jimbo. He stayed behind, locked the vehicle after which he proceeded to go inside Jimbo. He was searched by the
10 security personnel at Jimbo and proceeded to go inside. He then saw the complainant, Vuyokazi and Noyepi sitting together. There were also two gentlemen and another lady from Silvertown. He joined them and they all drank alcohol. He was at the same time playing pool. When the alcohol was
15 finished, he said they must go home. The complainant said he was not going to go home with them because she was sitting with her aunt Noyepi. They then left her behind and went to sleep.

20 He denied that he drove with the complainant to a dead road and raped her. He refuted having any sexual intercourse with her and denied assaulting her. When asked about why the complainant would accuse him of raping and assaulting her, he testified that she was sent by her grandmother to lay a case of
25 rape against him, because the grandmother said she would get

him.

When asked about the motive of why other witnesses would testify against him, he testified that he did not get along with
5 Mazimandile in the township and they did not even talk to each other. As regards other witnesses, he did not have a problem as he did not even know them.

In cross examination he confirmed that he knew the
10 complainant, before the incident from seeing her around Langa Buja where he sold goods as a hawker. It was however the first time talking to her on the day of the alleged incident. He knew her by name for a while and also knew the grandmother. He also thought the complainant was around 16 years of age. He
15 was the only male amongst the girls he was sitting with. He normally drank with Vuyokazi regularly but not with the complainant. They normally put money together to buy alcohol and meet at the pub or shebeen. At the London shebeen, the complainant arrived that evening and asked Vuyokazi for a
20 glass of wine, Vuyokazi gave it to her and they all carried on drinking. It was normal for a stranger to walk into a group and ask for a glass of wine. He could not say how many glasses of wine she drank because they were all sitting there and drinking wine or beer.

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When asked why he would go to the garage when he had already arrived at Jimbo where they had intended to drink, he testified that he would not have been able to go further than Jimbo with the petrol he had. He was a businessman and would need to wake up early in the morning to go to the farms. He put in petrol when he did, so as to prevent having to do so before going to the farms in the morning. It took about three minutes to drive from Jimbo to the petrol station. He put in petrol for thirty rand and got back very quickly from the petrol station. There was blood in the vehicle but it was as a result of things that he was selling. He found it strange why the complainant would not tell the security at Jimbo that she was raped.

Vuyokazi testified that whilst they were sitting and drinking a girl child arrived and went straight to the appellant and asked for a glass of wine and the appellant gave it to her. It was the first time she saw her. While they were sitting the police arrived and closed the shebeen. As they were outside, the appellant said they must go to Jimbo. This girl, who was identified as the complainant called another man and asked where Vuyokazi and the appellant were going. She then asked them to wait for her. She got into the vehicle and drove with them. She denied that she pulled the complainant into the vehicle stating that the complainant got into the vehicle by

herself.

When they got to Jimbo the appellant told them to get out of the vehicle as he was going to the garage to put in petrol. The
5 appellant gave money to Vuyokazi to buy alcohol in the meantime. Vuyokazi got off the vehicle but the complainant said she was not getting off she was going with the appellant. Vuyokazi went inside Jimbo and the complainant and the appellant left for the garage. It was not long before they came
10 back. They took about five minutes and they were back. The garage is not far from Jimbo.

When they came back there was nothing wrong with the complainant. There was nothing wrong with her face or pants
15 and she was not crying. She did not see Mazimandile. She also did not see the appellant hitting the complainant. After the appellant finished playing pool he said they must leave and the two of them left.

20 In cross examination she testified that it was the first time seeing the complainant. She did not know if the appellant knew her. She denied giving the complainant wine. She did not know why the complainant said she would not get off the vehicle. She was confronted about the statement she gave to
25 the police that the appellant and the complainant were gone

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for a long time. She denied that she told that to the police and stated that she said they did not take long. According to her, the complainant never got up to go to the bathroom. She, Vuyokazi also never went to the bathroom. Furthermore, the
5 appellant never hit her. She admitted that she was drunk because they were drinking wine the whole time. The complainant only drank one glass of wine at the London shebeen.

10 The grounds of appeal raised on behalf of the appellant are that:

1. The trial of the appellant was unfair and not in accordance with the proper administration of justice and the Magistrate erred by finding that it was, for the following reasons:

15 (a) that the appellant was inadequately represented because the cross examination of the state witnesses and the doctor was ineffective and simplistic and in so doing the appellant was prejudiced in his rights to challenge and adduce evidence;

20 (b) the approach of the legal representative to the warning statement was not done skilfully by the legal representative and the presiding officer;

(c) it can be gleaned from the record that the legal representative simply paraphrased the complainant's
25 statements to the police, argued with the complainant

instead of questioning her; made irrelevant conversation with the state expert witness.

2. The trial court erred by not intervening and applying the rules of evidence and proper administration of justice. The
5 presiding officer could have ensured that the rights of the complainant and the appellant were not trampled. The introduction of the warning statement of the appellant was left unchallenged or verified as to whether the appellant understood his rights. The evidence with regards to the
10 DNA and the J88 was introduced into evidence without an indication of section 220 admissions or legal representative and/or appellant was aware of the contents of the documents and admissions of chain of evidence;

3. The magistrate was not objective. The record shows
15 distracted comments and logistical considerations while evidence was led. There are instances where the presiding officer negatively influenced the confidence and demeanour of the appellant's testimony with abrasive interjections. In one instance, the appellant preferred to stand while he
20 testified and the presiding officer read or perceived this as a sign of arrogance.

4. The state did not prove the guilt of the appellant beyond reasonable doubt and that his version is reasonably possibly true for the following reasons:

25 (a) The complainant was a single witness with regards to

the rape incident and the cautionary rule should have been applied;

- 5 (b) The complainant was not consistent when she was confronted about the discrepancies in her statement to the police and there were material discrepancies such as her torn pants and why they were not secured as an exhibit; if the appellant had a knife; if she had sustained injuries; the conditions of the arm of the appellant; the description of the assault after clinical examination; she
- 10 conceded that she was under the influence of alcohol; she informed the doctor that her last sexual encounter was in 2011; she had her menstruation on the 15th of June and that there was no consensual partners during the seven days prior;
- 15 (c) She washed but did not change her clothing; there was no trace of semen in her inner parts; the magistrate erred in her findings regarding the medical evidence; the magistrate erred by finding that the appellant's version was riddled with improbabilities and was not reasonably
- 20 possibly true; observations by Vuyokazi supported the appellant's version; ages and experience of the complainant and the appellant as well as alcohol should have been taken into account.

25 The first question to determine is whether or not the appellant

got a fair trial?

Mr Paries who appeared for the appellant prefaced his argument in his heads of argument by quoting a well known
5 decision of the Supreme Court of Appeal of S v Tandwa 2008(1) SACR 613 (SCA) where Cameron JA (as the then was) stated the following at paragraphs 7 and 8:

“7. The Constitution guarantees every accused person the right to a fair trial (Bill of Rights s 35 (3)). This
10 includes the right ‘to choose, and to be represented by, a legal practitioner’. (s 35(3)(f)), as well as the right ‘to have a legal practitioner assigned to the accused person by the state at the state’s expense if substantial injustice would otherwise result’
15 s35(3)(g)). The right to a chosen or assigned legal representation is a right of substance not form: ‘The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper, effective and competent defence’.

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Incompetent lawyering can wreck a trial thus violating the accused fair trial right. The right to legal representation therefore means a right to competent representation - representation of a
25 quality and nature that ensures that the trial is

indeed fair. When an accused therefore complains about the quality of legal representation, the focus is no longer, as before the constitution, only on the nature of the mandate the accused conferred on his legal representative, or only on whether an irregularity occurred that vitiated the proceedings - the inquiry is into the quality of the representation afforded.

8. It need hardly be added that accused 1 enjoyed a constitutional right to testify in his own defence. The right of the accused person to 'adduce' evidence (Bill of Rights s 35 (3)(i)) clearly encompasses the right to adduce his own evidence. It follows clearly from the structure of s 35 that an accused person has the right to represent himself, without the interposition of counsel. If the unwanted or inept advice of counsel improperly or unfairly thwarted his exercise of that right, his right to a fair trial would have been infringed."

In regard to the issue of incompetent lawyering it is apposite to also refer to the decision of S v Halgryn 2002 (2) SACR 211 at para 14 which was mentioned by Cameron JA in S v Tandwa where the court held that:

"The constitutional right to counsel must be real and not

illusory and an accused has, in principle, the right to a proper, effective and competent defence. Compare S v Majola 1982 (1) SA 125 and 133D – E. Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend upon the degree of *ex post facto* dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight. Compare S v Louw 1990 (3) SA 116 (A) at 125D – E. The Court must place itself in the shoes of the defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect. See (*cf R v Matonsi* 1958 (2) SA 540 A at 456 C as explained by S v Louw supra). The failure to take certain basic steps such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited. As the US Supreme Court noted in Strickland v Washington 466 US 668 1984 at 686:

“Judicial scrutiny of counsel’s performance must be highly differential. It is all too tempting for a defendant to second guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defence after it has been unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.”

Not everyone is a Clarence Darrell or FE Smith and not every trial has to degenerate into an OJ Simpson trial.”

10

‘Whether or not the appeal Court would intervene to grant appropriate relief at the instance of the accused dependent upon whether or not the irregularity had resulted in a failure of justice. That in turn depended upon whether or not the irregularity prejudiced the accused or possibly whether the appeal court’s intervention was required in the interests of public policy’. In this regard see the unreported judgment of Larry v S (A573/2013) [2014] ZAWCHC 98 (13 June 2014) at para 9’.

20

It is also convenient to consider what the courts have described as the role of the judicial officer as the objectivity of the magistrate in this case has been called into question on behalf of the appellant.

25

It is trite that the role and duty of the judicial officer in a trial is to ensure that justice is done and he or she should guard against entering into the arena.

- 5 The Court in S v Nnasolu 2010 (1) SACR 561(KZP) at paras 38 and 39 held the following:

“[38] He or she is entitled and often obliged in the interests of justice to put such additional questions to witnesses, including the accused, as seem to him or her
10 desirable in order to elicit or elucidate the truth more fully in respect of the relevant aspects of the case. The presiding officer should not enter the area. He or she is entitled and often obliged in the interests of justice to put such additional questions to witnesses, including the
15 accused, as seem to him or her desirable in order to elicit or elucidate the truth more fully in respect of the relevant aspects of the case. The Presiding officer should not only ensure that justice is done, he or she should also ensure that justice is seen to be done. The
20 trial should therefore be conducted in such a way that the open-mindedness, impartiality and fairness of the judicial officer are manifest to all those who are concerned in the trial and its outcome, especially the accused. The presiding officer should refrain from indulging in
25 questioning witnesses or the accused in such a way or to

such an extent that it may preclude him or her from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him or her. The presiding officer should refrain from questioning a witness or the accused in such a way that it may intimidate or disconcert him or her or unduly influence the quality or nature of the replies and thus affect his or her demeanour or impair his or her credibility.

[39] In my view the present case falls far short of those cases where the role of the judicial officer has led to an unfairness in the trial. The Magistrate might have overstepped the line in putting to the first appellant that he was “talking nonsense” and “playing games”. But the questions in which those statements were made, and the responses that they elicited, had no particular influence on the trial and its outcome. This case is one which falls far short of those cases where the court has interfered on appeal because in the trial court the judicial officer “entered the arena.” (own emphasis)

From my reading of the record, it appears that the state witnesses were cross examined at length and the appellant’s version was put to them for comment. The whole purpose of proper cross examination is to elicit from the opposing witness facts which are beneficial to the case of the cross examiner’s

client and put such client's opposing and contradictory version to the witness. The record is replete with instructions which were put to the witness and in particular the complainant.

5 Upon reflection Mr Paries was constrained to concede that indeed the questions were put to the complainant in such a manner and that the appellant's version was put to her and in that regard it could not have been said that there was substantial injustice. The questioning was done whilst the
10 complainant's statements to the police was read line by line. The fact that the approach that was followed by the legal representative during the trial is belatedly found to be unsatisfactory by the appellant cannot amount to an irregularity pointing to the failure of justice. If the
15 ineffectiveness of the cross examination or lack of skill by the cross examiner were found to establish a ground strong enough to vitiate proceedings then the possibility would be that many proceedings in this country would arguably stand to be set aside and the quality of cross examination may be found
20 wanting in many cases. What is important is to look at the conduct of the proceedings and conduct of the cross examination as and whether it was so gross such that lack of interference by the judicial officer in those circumstances led to a failure of justice.

It may be so that the cross examiner in this case lacked some experience, he however cross examined witnesses on crucial aspects of the case and put the version of the appellant. He read out portions of their statements to the witnesses for them
5 to comment. The fact that another counsel would have done differently is unfortunately not the test.

The appellant's version and his denials were repeated many times by the legal representative. The complainant was further
10 asked about the knife and pants and the police officers that did not take it as an exhibit. She was further accused of lying about her age and the fact that she did not ask for help from the security guards or people at the shebeen. The appellant and/or his current counsel may not like the strategy that was
15 adopted by the legal representative at the trial and his manner of questioning may also appear to be shallow but relevant questions were asked and the magistrate allowed him to do that. The complainant's cross examination went on for two days. Whilst the style of the cross examination may not be
20 like I repeat by the appellant as not being probing, it cannot be said that it was so irregular so as to vitiate the proceedings.

It is unclear what Mr Paries meant when he suggested that the statements were paraphrased. He clarified that during oral
25 argument by saying that paraphrasing was possibly not a

proper choice of words. Statements appear to have been quoted verbatim, not only in respect of the appellant but in respect of other witnesses too. Mazimandle's statement was read out as well. The magistrate mentioned during the
5 argument of the application for leave to appeal as this matter was also raised there that she did not ask the defence to hand in statements because she was criticised for not having done so because she was told no they would not hand it up. She stated that she did not want to insist as there could have been
10 things that were prejudicial to the appellant in those statements and the defence chose not to hand them in for those reasons. She made her decision based on the evidence before court. That on its own in my view cannot amount to an irregularity and it is curious that Mr Green who represented the
15 appellant at the application for leave to appeal and raised this point confirmed when asked by the Magistrate that their argument was not about the proper defence.

The issue around admissions and the J88 also does not make
20 sense as the evidence was led in full on the J88 and the DNA findings which would have been to the appellant's advantage. The Magistrate could not have been expected to intervene when she had no knowledge as to what the version of the appellant was and how he was to handle his case and most
25 importantly the appellant was legally represented.

As to the warning statement, the warning statement the investigating officer testified that he explained the appellant's constitutional rights to the appellant. The warning statement
5 was handed in as an exhibit. The admissibility of the statement was not an issue as the statement neither constituted a confession nor an admission. Whilst perturbed by the fact that questions were initially asked by the appellant's legal representative to the appellant through
10 reading of the warning statement, he was not prejudiced. If anything, words were put to his mouth. The prosecutor would have been entitled to object in that situation. The complaint about a warning statement has no merit.

15 Once again, upon reflection Mr Paries confirmed that this is not an issue at all. At the stage where the legal representative of the appellant during the trial attempted to put a written statement to Vuyokazi which was not before Court, the magistrate rightly intervened.

20

As to the magistrate's lack of objectivity, only two examples were given. Although the magistrate may have shown some impatience and irritability upon closer analysis, those interventions were not of any material degree. The
25 abrasiveness did not curtail the leading of evidence in any

way. There is no indication from the record that comments about the appellant's perceived show of arrogance affected the proceedings and the appellant's confidence or his manner of answering questions or relaying his evidence after those words were uttered in any way. It further appears from page 338 of the record that the appellant said something in Xhosa (that was not interpreted and the magistrate was Xhosa speaking), when he was asked about offering a lift to the complainant by the prosecutor whatever he said or did seems to have prompted, the magistrate's comments about his arrogance and attitude. It is hard to tell what exactly happened as some of it may have had to do with the appellant's demeanour in court. The magistrate went as far as saying: "I have never, never treated you or any witness with disrespect, I don't expect you to be disrespectful of this court either. Do you understand that. --- Yes." It is hard to tell without the benefit of the translation of what happened or what the appellant did or said prior to the magistrate's comments. At the end of the day, the comments and the interventions by the magistrate whilst appearing to be heavy handed or undesirable did not in my view singly or cumulatively amount to a misconduct rendering the trial unfair. As was found in S v Nnasolu supra at para 39, the magistrate may have overstepped the line by stating that the appellant showed arrogance, but such statements did not influence the outcome of the trial. Furthermore, other

statements that have been referred to by Mr Paries had no relevance whatsoever to the running of the trial. From the reading of the record after those comments the appellant answered questions in the same way as before. I am satisfied
5 that the appellant was afforded a fair trial.

Turning to the other remaining grounds of appeal it cannot be disputed that the appellant and the complainant were in each other's company on the evening of the alleged incident. The
10 appellant's evidence corroborates that of the complainant that she got into the vehicle having been told that they were going to Jimbo. Leaving aside for a moment her evidence that she was persuaded to do so by Vuyokazi, under the pretence that she'd be taken home, it is common cause that she, the
15 appellant and Vuyokazi drove to Jimbo. When they reached Jimbo, Vuyokazi got out of the vehicle, leaving the appellant and the complainant alone. It is also common cause that the appellant drove away with the complainant stating that he was going to the garage. What is in dispute is what happened
20 during the period the two were alone. The assessment as to what took place between the time the appellant and the complainant reportedly 'left' for the garage and came back is quite crucial.

25 It is so that the complainant was a single witness in the actual

rape. It is established that the trial courts should apply the cautionary rule to the testimony of a single witnesses and children. Application of the cautionary rule however does not mean dispensing with common sense. As was observed by
5 Diemont JA in S v Sauls and Others 1981 (3) SA 172 (A) at 180E – G, the Court must be satisfied that the truth has been told despite the fact that there are shortcomings or defects in the testimony of a single witness.

10 The complainant gave a detailed account of the events of the night in question from the time she went towards the London shebeen with her friends and what followed thereafter. She gave a descriptive and chronological version of how she got to be in the appellant's vehicle after which Vuyokazi got off. The
15 appellant drove her to a dirt road filled with trees, asked her for sex, joined her at the backseat, pinned her down with one arm, whilst using the other arm to undress her, penetrated her vagina with his penis, made sexual movements and funny noises and then stopped. The complainant's evidence was
20 clear, coherent and consistent. She was cross examined at length but stuck to her version.

The appellant on the other hand offered a very sketchy detail as to what happened during the time he left with the
25 complainant. All he could say was that he drove to the garage

to put in petrol and drove back to Jimbo. When asked during cross examination for more detail about what took place as they were together with the complainant in the vehicle, all he said was that the complainant was chatting about knowing him.

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His version about how long it took to get to the garage and back is also questionable. It was highly improbable that it only took a few minutes, possibly six, to drive to and from the garage, if one had regard to the fact that they had to wait for petrol to be put into the vehicle before going back to Jimbo. Vuyokazi's version that the appellant and the complainant were gone for only five minutes was clearly designed to protect her friend. It also made no sense that the appellant would suddenly need to put in petrol in his vehicle, having reached the destination where they were set to drink.

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It is also strange that the complainant with whom he only began to have a conversation with that night, would insist on remaining in the vehicle with a stranger for no apparent reason.

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The appellant admitted that there was blood in his vehicle (albeit attributing it to things that he sold). The existence of the blood co-incides with the complainant's version that she was bleeding around her pubic area due to scratches caused

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by the stabbing. It was highly probable that the blood on the seats of his vehicle came from her.

What is observed from the complainant by the state witnesses
5 at Jimbo after she returned with the appellant is also telling. It
strengthens the credibility of her evidence. She was seen
crying by Mazimandle. Her emotional state of crying was also
confirmed by Sihle. That they found the complainant crying,
that she could not even speak, Sihle also corroborates the
10 complainant's statement that she could not walk properly, that
her pants were torn and that the complainant went to the toilet
with her and reported to her that she was raped by the
appellant. The investigating officer also mentioned that the
complainant was traumatised and had torn pants.

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The doctor's evidence confirmed that the complainant had a
number of injuries in her genital area. The injuries in the
vagina were suggestive of penetration that had taken place
within a period of 24 hours of examining the complainant.
20 Various gynaecological injuries, swelling, tears, and bruises
the extent of which need not be repeated, were noted. The
doctor made various marks around the vaginal area. The
doctor concluded that there was dry penetration with a fresh
tear in the hymen. These are consistent with the
25 complainant's version that she was raped. The question is

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who rape her?

The only person that the complainant was alone with during a particular period of the night was the appellant. At all other
5 times, before getting into the appellant's vehicle and when she returned with him she was in the company of her relatives, friends and other people drinking.

The fact that no DNA was found from the swabs taken from
10 inside her body did not mean that she was not raped. Lack of male semen could be attributed to a number of reasons, one of which was explained as drainage by Ms Smith. It is furthermore trite that lack of semen does not discount sexual penetration.

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The issue of torn pants not being secured as an exhibit cannot be laid at the feet of the complainant that is the work of the investigating officer. I agree with the magistrate that the complainant's torn pants, which appear to have been noticed
20 by the investigating officer, should have been booked as evidence. That however, does not take away the strength of the state's case. Other evidence sufficiently corroborated the complainant's version of events. Whether or not she drank alcohol is of no purpose in this case, as she clearly was not
25 inebricated as to the extent that she did not know what was

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going on. To the contrary she gave a clear account of events.

As to the charge of assault the complainant is supported by Mazimandile who witnessed the appellant hitting the
5 complainant at Jimbo. He further reported this to the complainant's relatives. Sihle confirmed the report of assault, to her by Mazimandile at Jimbo after being woken up from sleep by a person who reported that the complainant was being assaulted at Jimbo. According to her, the complainant
10 looked like she had been hit. It has, in my view, been proved beyond reasonable doubt that the complainant was assaulted. The appellant's denial that he assaulted the complainant falls to be rejected. The complainant also alleged that the appellant assaulted her before raping her. The appellant has
15 however not been charged for two counts of assault.

The discrepancies pointed out by Mr Paries were not material. A holistic approach should be followed in weighing up all the evidence, taking into account the strengths and weaknesses,
20 probabilities and improbabilities of both sides, and having done so a decision must be made as to whether the balance weighs so heavily in favour of the state so as to exclude any reasonable doubt about the accused is guilt. See S v Chabalala 2003 (1) SACR 134 (SCA) para 15. Having
25 considered all the elements cumulatively, I am satisfied that

the appellant was correctly convicted for both rape and assault. There was no misdirection by the Magistrate warranting interference by this Court.

5 As regards sentence, as I have already mentioned, leave was not granted in this regard. Both the appellant and the respondent were therefore mistaken by suggesting otherwise. Be that as it may, to the extent that it is necessary my view is that, the sentence imposed by the magistrate was just and
10 appropriate and there is no reason to interfere with it.

In the result I would make the following order.

THE APPEAL IS DISMISSED AND THE CONVICTION AND
15 SENTENCE CONFIRMED

BOQWANA, J

20 I agree and it is so ordered.

KOSE, AJ

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