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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO**

REPORTABLE

Appeal Case No: CA&R 26/21

In the matter between:

S[....] J[....]

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

STRETCH J.:

[1] On 18 October 2018 the appellant was convicted in the Zwelitsha regional court on five counts of rape committed on diverse occasions during the period 2013 to 2016. He was sentenced to life imprisonment on each of the first four counts, and to 15 years' imprisonment on the last count. The complainant is his natural daughter, who was 18 years old in 2013, and 23 when the appellant was convicted. The appeal is in respect of the convictions and the sentences imposed.

[2] The grounds of appeal against the convictions are that: (a) The court below erred in finding that the prosecution had proved, beyond a reasonable doubt, that the appellant had raped the complainant on diverse occasions; (b) The complainant, being a single witness, was not honest and reliable and contradicted herself; (c) The court erred in finding that the complainant's evidence was corroborated by her sister,

L[....]; (d) The court erred in not drawing an adverse inference from the complainant's and L[....]'s delay in reporting the rapes.

[3] The complainant testified that she and her siblings were living with the appellant during the period 2013 to 2016. Sometime during 2013, while her stepmother was working nightshift, she was awoken from her sleep. The appellant was busy undressing her. He raped her vaginally with his penis. She cried but he placed his hand over her mouth, threatening to assault her if she continued. She did not tell anyone as she was afraid of the appellant. He did this on more than five occasions during 2013.

[4] She testified that during the middle of 2014, after the appellant and her stepmother had separated, the appellant called her to his bedroom to watch television and again raped her vaginally with his penis. She said that at some stage her paternal aunt, Thembisa, enquired from the appellant whether he was having sexual intercourse with the complainant. He denied the allegation. He promised the complainant that if she corroborated his version, he would not rape her again. She complied. She forgave him and trusted his undertaking. Thereafter the appellant refrained from raping her for some time, until 2015, when he began to abuse her once more.

[5] She testified that during 2015 he raped her over weekends and did so more than ten times. Towards the end of the year he stopped and apologised, saying that he did not know what possessed him to do these things.

[6] During 2016 her half-sister L[....] came to visit. The appellant invited L[....] and the complainant to sleep with him in his room. He waited until they were asleep, whereafter he proceeded to rape the complainant vaginally with his penis. She said that he repeated this act more than five times during 2016.

[7] She went on to say that during July 2016 she and the appellant had quarrelled, but he did not sexually assault her during that month. After the quarrel she sent a message to Thembisa confirming that the appellant had been raping her. Thembisa promised to fetch her but failed to do so, so she reported the rapes to her

maternal aunt, Agnes Mbembe.¹ Agnes arranged for the police to interview the complainant, and for her to be medically examined.

[8] During cross-examination the complainant confirmed that she deposed to two affidavits in 2016. She said that she read the statements herself and that she was satisfied with their contents. When it was put to her that she had stated in her affidavits that the appellant also raped her on Saturday, 23 July 2016, she said that she was mistaken when she omitted this in her evidence in chief.

[9] The medico-legal examination report reflects that Dr Madikane examined the complainant at Grey Hospital in King Williams Town at 21h30 on 25 July 2016. The report reflects the following:

‘Allegedly sexually assaulted. No visible bruises. The assailant allegedly used a condom whilst sexually assaulting the victim ... History of sexual assault. Condom used during the incident. Victim has washed and changed clothing since the incident.’

It appears further from the report that the complainant was sexually active and that her hymen was perforated.

[10] The complainant's half-sister L[...] testified that when she visited the home where the complainant and the appellant were living, he indeed invited them to sleep in the bed with him. She said that she would pretend to be sleeping, but was able to see the appellant raping the complainant, and that she could hear the complainant asking him to stop. She also heard the appellant threatening to assault the complainant.

[11] Agnes, the complainant's maternal aunt, testified that on a Sunday in July 2016 she received a cell phone text message from the complainant which read as follows:

¹ The transcript reads 'Agnes Ntende' but it seems from the magistrate's long-hand notes and a reconstruction of this portion of the record, that the surname is Mbembe.

‘Mama come and rescue me. Father is sleeping with me forcefully, and tomorrow he is taking me by force to Grahamstown. Come urgently.’

[12] Agnes testified that she saved the message and showed it to the police. She also sent a message to the complainant encouraging her to accompany the appellant to Grahamstown, as she was arranging for someone there to attend to the complainant. It was only after the complainant had been medically examined that she told Agnes that the appellant had been raping her since 2013. She also told Agnes that L[...] had confirmed that she had seen the appellant raping the complainant.

[13] The appellant testified in his defence. He denied ever having raped the complainant. He denied that he had had the opportunity to do so during the period in question, particularly during 2015 and 2016, because his girlfriends were always around. He was of the view that the entire story had been concocted by Agnes and his estranged spouse, and that they had coached the complainant and L[...] to falsely implicate him.

[14] An analysis of the evidence, is captured in less than two pages of the trial court’s 15-page judgment. There is no reference to the applicable law. The essential portion of the judgment reads as follows:²

‘The big question is, did this happen or did it not happen? I have taken this summary so that I can put the picture as I find it before me, and the accused says “look, just cut the picture in front of you. These people have been coached by Agnes and Nomvuyisi³ to make these allegations against me.”

And there is no further basis as to what was promised to them and how they were coached by two people. And Agnes is not staying with them but either in Illitha or Ndevana, and Nomvuyisi has since left the house.

² I have taken the liberty of correcting obvious spelling and grammatical errors in the transcript of the judgment, particularly in that it is not presented under cover of a transcriber’s certificate.

³ The complainant’s maternal aunt and the appellant’s estranged spouse.

This runs back from 2013 to 2017, 2016, and is accounted for on each occasion it happens. And there are discrepancies here and there, but these discrepancies did not distort the picture before the Court. One such discrepancy for instance, is the evidence of the complainant who says in court she was not raped in July 2016 (on the 23 July 2016, that is on the day of the quarrel). But when she reports this to the police, she says later after the quarrel she was called from the room. She refused. Called by the accused of course, who ended up raping her that night. And when she reports to Agnes on the 27th she goes on and includes the incident of that weekend.

I can find no reason to agree with the defence that she is not telling the truth, but she is being put to this by other people. I am satisfied with her demeanour here in court. I am satisfied with her memory and how she remembered the incidents. I accept that she did not have a diary. She was not referring to any diary. She was not diarising these incidents, and that her memory as she shared it with us did not mislead the Court.

I confirm that she is to some extent, and for those instances where L[...] was there, corroborated by her. I find that her statement to the police, except for a few *material* (emphasis added) things that were pointed out by the defence, are consistent with her evidence given in this court. And her first report to Agnes is consistent with what she had given to this Court. Further, her communication, SMS communication to Agnes are also consistent with what she had given in court.

[I find] that the evidence given by Agnes as to how she interacted with people resulting in her rescue from Grahamstown, is material, realistic, and shows that this was indeed happening. I can find nothing fanciful or funny with that – as argued by the defence.

All said, [this] Court rejects the evidence of the accused insofar as he denies this. In the circumstances the Court finds that the State has proved its case against the accused.'

Motive to falsely implicate

[15] Immediately after having summarised the evidence, the trial court criticised the appellant for firstly, not having been able to produce a motive on the part of Agnes and Nomvuyisi for coaching the appellant and L[...] to falsely implicate him; secondly, for not having been able say what the nature of the promises were that were made to these children; and thirdly, for not having been in a position to describe how, when and where they were coached. In my view this type of criticism amounts to a serious misdirection and a compromise of the appellant's fair trial rights to be presumed innocent, to remain silent, and not to testify during the proceedings, as envisaged in s 35(3)(h) of the Constitution. This approach was particularly criticised in *Van der Watt v S*,⁴ where the appeal court rejected the fact that it had been held against the appellant that he had, when asked what possible motive the complainant may have had for falsely implicating him, proffered a reason that turned out to have been unfounded. If an accused is asked to speculate, and not to testify on a matter of fact, he cannot be blamed if it turns out that his speculation is found to have been wanting.⁵

[16] During his evidence in chief, the appellant recorded that the complainant's mother died when the complainant was three months old. An arrangement had been made that the complainant would stay with Agnes until she was three years old. When she turned three or four, the appellant (who had by then remarried), tried to honour the arrangement, but Agnes refused to forfeit primary care of the complainant. The police intervened, and he finally managed to take the complainant into his care. He testified that since this incident, there had been bad blood between him and Agnes. He added the following:

'These allegations that are made against [me] are allegations that are not for the first time. By putting my name into disrepute from the maternal aunt, or Agnes, they emanate from the fact that I was requesting for my child to bring

⁴ [2010] 3 All SA 483 (SCA)

⁵ At [16]

up the child myself, as I was doing that to my elder child. So I also wanted to maintain her.'

[17] During cross-examination, the appellant testified that these false allegations surfaced again after he and the complainant had quarrelled in 2016, when he had reprimanded her for having had multiple boyfriends and for not having taken her epileptic medication properly. When he was asked why the complainant and L[....] would have falsely implicate him he replied:

'I am still of the mind that they got influenced from Agnes [Ntende] and my wife ... it is manipulation coming from Agnes and my wife. I am still saying so ... I am coming far with the two families. It is not the first time these things happened as I had indicated yesterday ... I am adamant what I say ... They will gain because they are humiliating and bringing my name into disrepute and they have destroyed my ... (inaudible).'

[18] The appellant was invited to think of a reason why the complainant would have implicated him falsely. He did so. In having done so, he could not have been faulted for not having been able to say how witnesses who were hostile to him had been coached and what they had been promised in return for their false testimony. There is no onus or evidentiary burden on an accused person to prove his innocence, or to explain in detail why he suspects that he is being implicated falsely.

The evidence of L[....] J[....]

[19] As I have said, L[....] is the complainant's younger half-sister. She testified to having been an eye-witness to at least one of the incidences of rape. She was 15 years old when she testified. After she had informed the trial court of her age and that she was in grade nine, the transcript of the proceedings reads as follows:

'Court: I want to encourage and warn you to stick to speaking the truth today. Do you understand?

Miss J[....]: Yes.

Court: Whatever you say, it must be something you have personal knowledge of, not something [that] anybody else told you.

Miss J[....]: Yes.

Court: Alright, the witness is admonished to speak the truth.'

[20] The relevant sections of the Criminal Procedure Act 51 of 1977 read as follows:

'162 Witness to be examined under oath

(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath ...

164 When unsworn or unaffirmed evidence admissible

(1) Any person, who is found not to understand the nature and import of the oath or affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth. ...'

[21] In *S v V*⁶ it was held that the court must inquire and satisfy itself whether a child understands the oath and understands what it means to speak the truth.⁷ If a child does not understand what it means to speak the truth, then it would be pointless to admonish the child under s 164. A witness who does not understand the difference between the truth and falsehood is not competent to testify, and any evidence which that witness may have been permitted to give is inadmissible against an accused person. It is that simple.

⁶ 1998 (2) SACR 651 (C)

⁷ See too *S v Nedzamba* 2013 (2) SACR 333 (SCA)

[22] It is of vital importance for a trial court to hold an inquiry in this regard and to clearly identify what it is investigating – whether it is the ability to distinguish between the truth and lies (which goes to whether the witness is competent to testify), or whether it is to establish the witnesses’ ability (in this case a child) to understand the nature and the import of the oath or affirmation (which goes to whether the witness should, instead of taking the oath, be admonished to speak the truth in terms of s 164(1)). Simply stated, a witness, irrespective of age, must be sworn if the court is of the opinion that the witness understands the nature and the religious sanction of the oath. It is only when a witness does not understand what it means to take an oath, but it is clear that the witness understands the difference between right and wrong, and the difference between speaking the truth and telling lies, that the witness falling into the latter category should be admonished instead of the oath being administered to him/her.⁸

[23] In *S v Matshivha*,⁹ Zondi AJA examined the type of questions which the trial court had put to the child witnesses and concluded that it was not clear, from these questions, whether the purpose was to establish competence or ability to understand the oath. Zondi AJA accordingly found that the trial court had failed to comply with its duties under ss 162 and 164. In the premises, and since the thrust of the Constitutional Court’s judgment in *Director of Public Prosecutions, Transvaal v Minister of Justice & Constitutional Development & others*,¹⁰ was that reliability was the crucial question, the court was constrained to conclude that no reliance could be placed on the evidence of the children who testified. Zondi AJA explained the step-by-step procedure as follows:

‘Section 164(1) is resorted to when a court is dealing with the admission of evidence of a witness who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation. Such a witness must, instead of being sworn in or affirmed, be admonished by the judicial officer to speak the truth. It is clear from the reading of s 164(1) that for it to be triggered there *must* (emphasis

⁸ See *Principles of Evidence*: P. Schwikkard and S. Van der Merwe 4th ed, Juta 2015

⁹ 2014 (1) SACR 29 (SCA)

¹⁰ 2009 (2) SACR 130 (CC)

added) be a finding that the witness does not understand the nature and import of the oath. The finding *must* (emphasis added) be preceded by some form of enquiry by the judicial officer, to establish whether the witness understands the nature and import of the oath. If the judicial officer should find after such an enquiry that the witness does not possess the required capacity to understand the nature and import of the oath, he or she should establish whether the witness can distinguish between truth and lies, and if the enquiry yields a positive outcome, admonish the witness to speak the truth.’¹¹

[24] The wording of s 164(1) is peremptory.¹² As I have said, the Constitutional Court made it plain in *DPP, Transvaal* (above), that:

‘The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a *precondition* (my emphasis) for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth. The evidence of a child who does not know what it means to tell the truth is not reliable. It would undermine the accused’s right to a fair trial were such evidence to be admitted. To my mind, it does not amount to a violation of s 28(2) to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not know what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.’¹³

[25] I venture to add that by the same token, particularly when one is dealing with an older child such as L[...], thorough questioning should also be aimed at determining whether the oath should be administered. If the court is persuaded that the oath should be administered, it must do so, and not merely admonish the child

¹¹ *Matshivha* (above) para [11]

¹² See *S v Ndaba* (unreported KZP case no AR528/2017, 18 May 2018)

¹³ At para [12]

witness. These views were endorsed in *S v SM*¹⁴ where Dambuzza JA (at [19]) said the following:

‘An inquiry into whether a potential witness can distinguish between truth and falsity goes to whether the witness is competent in the first place. On the other hand, a question directed to a witness on whether he or she understands the nature and import of the oath and affirmation goes to whether the witness should be caused to take the oath or affirmation, or should be admonished to speak the truth in terms of s 164(1).’

[26] In *Haarhoff & another v Director of Public Prosecutions, Eastern Cape*,¹⁵ the court pointed out that competence was a question to be determined by the trial court at the outset, and that the inquiries under ss 162 and 164 should be engaged only once the witness is found competent to testify. Courts tend to either lack an appreciation of the two-pronged inquiry into competence on the one hand, and the ability to take the oath/affirmation on the other, or they are inclined to conflate the inquiries in a way that makes it difficult to evaluate whether both have been addressed adequately.

[27] In the matter before us, the trial court embarked on neither of these inquiries. It did not inquire whether L[...] understood the difference between truth and falsehood. Nor did it inquire whether she understood what it meant to take the oath before admonishing her. In principle I have no particular reservations about what the magistrate said to her as captured in paragraph [19] of this judgment. I say so because, as was stated by Malusi J in *S v Mali*,¹⁶ ‘admonish’ by virtue of the dictionary definition of the word, means to ‘reprimand firmly; urgently urge or warn’. It seems that this was done in the matter before us. The fatal issue is that it was not preceded by the two-pronged inquiry which I have referred to. Simply put, this court does not know whether L[...], on the one hand, was able to take the oath in terms of the peremptory provision contained in section 162(1), or whether, on the other hand,

¹⁴ 2018 (2) SACR 573 (SCA)

¹⁵ 2019 (1) SACR 371 (SCA) at [17]

¹⁶ 2017 (2) SACR 378 (ECG) at [16]

she did not understand the difference between the truth and lies, which, if it were the case, would have rendered any warning to speak the truth, a nullity.

[28] This does not mean that this type of essential inquiry needs to be conducted in an overly technical manner. As explained by the authors Banoobhai & Whitear-Nel 2013 *Obiter* 359 at 364, the trial court should explore what it is to tell a lie. It should explore whether the witness understands what it means to deliberately deceive another by ‘providing inaccurate, incomplete or otherwise misleading information.’ The authors point to international literature which suggests the use of simple identification questions that reduce the use of language in assessing the understanding of the concept of truthfulness, as having been found to be most effective. By way of example, a simple scenario may be put to the witness, who is then asked to identify who is lying and who is telling the truth. The authors further point out that the fact that no standard test is used in South African courts leads to inconsistencies and exacerbates the danger that haphazard questions with no tested reliability and validity are used. I am inclined to agree with this criticism. It is imperative for the court to establish at the outset, whether all prospective witnesses (irrespective of age, maturity or mental wellbeing) present with a proper understanding of the *consequences* of testifying truthfully or not. If this does not happen, the witness has not been properly admonished.

[29] The fact that L[...] testified that she was 15 years old, which would have placed her in the category of an older child, is not in itself a test of her level of intelligence and knowledge. The fact that no inquiry was held at all, is, to my mind, a fatal misdirection which renders L[...]’s evidence inadmissible.¹⁷

The complainant as a single witness

¹⁷ See *S v Tshimbudzi* 2013 (1) SACR 528 (SCA), a case described by Bosielo JA as a ‘regrettable comedy of errors’, where no inquiry at all was held by the trial court to satisfy itself that the child witness understood and appreciated the distinction between the truth and a lie. The failure of the magistrate to embark on this inquiry was not addressed when the appeal was argued before us. During the course of preparing this judgment, we afforded counsel the opportunity to do so by way of written argument. Both counsel for the appellant and the respondent submitted (in the light of the relevant legislation and the authorities), that Lisa’s evidence is inadmissible.

[30] Section 208 of the Criminal Procedure Act provides that an accused may be convicted of any offence on the single evidence of any competent witness. As Schreiner JA held in *R v Nhlapo*,¹⁸ this does not mean that an appeal must succeed if any criticism, however slender, of the evidence is well-founded.¹⁹ At the end of the day the court must satisfy itself that the evidence is truthful and accurate. To put it differently, the court must be satisfied that the evidence as a whole is sufficiently honest and reliable to pass muster as proof beyond a reasonable doubt.

[31] Acceptance of L[...]'s evidence as inadmissible, renders the complainant a single witness on whether she was raped at all, and if so, by whom. As the magistrate said in his judgment:

‘The big question is, did this happen or did it not happen?’

[32] In exploring this issue, the magistrate found as a fact that the complainant had accounted for each and every time she was raped between 2013 and 2016. This is not correct. The accounting produced by the complainant was sparse, erratic, inconsistent and contradictory. This the trial court appeared to have recognised when it referred to the ‘discrepancies’ in her own narration of events, particularly in that she had specifically mentioned in both her police statements (but denied this in court), that the appellant had last raped her on Saturday, 23 July 2016, almost immediately after a heated argument and immediately before she reported the argument and this particular rape, first to her paternal aunt (Thembisa), and later to her maternal aunt (Agnes), which resulted in the appellant’s arrest. It was only when she was confronted in the court *a quo* with the detail as to the time and the place of this final rape, that she elected to include it in her narration of events.

[33] The trial court found that discrepancies such as this one ‘did not distort the picture before the court’. In my view, if it did not, it should have. It was after all, on the complainant’s version, at least half of the straw that broke the proverbial camel’s back – the other half being that the appellant was about to take her to Grahamstown against her will.

¹⁸ 1953 (1) PH H11 (A)

¹⁹ At 17

[34] Indeed, the trial court, having concluded that her statements to the police were consistent with the evidence in court (which they were not by any stretch of the imagination), nevertheless added in its judgment that the defence had pointed out 'a few material' inconsistencies between that reflected in her statements and what she had said in court. To my mind, once inconsistencies in the evidence of a single witness are described as 'material', they should be adequately addressed. This did not happen at all in the trial court. The failure to address material inconsistencies contained within the body of the evidence of a witness (particularly a single one), to my mind is a material misdirection. Had this exercise been performed properly with respect to the complainant's evidence, the trial court, in my view, would have been constrained to find that her evidence was not honest and reliable. This is not the end of the matter.

The delayed first report

[35] On the complainant's version, she did not report this repeated sexual abuse by her father, for a period of some three years, for two primary reasons. Firstly, because she was afraid of him, and secondly, because he had undertaken, from time to time, to stop, and she had believed him. Yet, according to Agnes, either on Sunday, 24 July, or on Tuesday, 26 July 2016, the complainant sent a message to her from the complainant's own cellular phone, complaining, quite out of the blue, that the appellant was forcing her to accompany him to Grahamstown, and that coincidentally, he had also raped her on the Friday and the Saturday, ie on 22 and 23 July. According to Agnes, when she showed the message to the police, they seemed surprised that the complainant had not mentioned this to her step-mother (Nomvuyisi) who happened to have been working at the same police station, and with whom the complainant had had a good relationship.

[36] Agnes testified that the complainant had remained with her after she had been medically examined, and it was only a couple of nights later that she mentioned for the first time that the appellant had started raping her as far back as 2013, and that L[...] had been aware of this. Agnes added that the complainant also showed her injuries (not mentioned by the complainant at all in her evidence) which she had

apparently sustained when the appellant had assaulted her with a sjambok that same weekend in July 2016.

[37] According to the complainant there had been a quarrel about a broken window and about money between her and the appellant on Saturday, 23 July, whereafter the appellant had confiscated her cellular phone and had raped her that same day. As a result, she had sent a cell phone message to Thembisa on the appellant's phone, wherein she had reported that the appellant had been 'sleeping' with her. According to the complainant's evidence Thembisa had responded, saying that she would fetch the complainant. When she did not, the complainant had sent the same message to Agnes, who ultimately arrived with the police. The complainant was adamant in her evidence that the appellant had not raped her during July 2016. She also did not mention that he had assaulted her with a sjambok, as testified to by Agnes. During cross-examination she alleged that the appellant had raped her once on Saturday, 23 July 2016, but not on Sunday 24 July 2016, and also not on the Friday and the Saturday, which was what had been reflected in the complainant's cell phone message to Agnes.

[38] Before 1998, our law took the view that the cautionary rule which applied to accomplices, should be applied in much the same way to the evidence of a complainant in a sexual matter.²⁰ It was accepted however that such witnesses, unlike accomplices, were not criminals, and as such, different considerations ought to be applied to their evidence. In an attempt to distinguish the rape complainant from an accomplice, without throwing caution to the wind, the courts divided the inherent risks in the testimony of the former into three basic categories:

- (a) The presence of various motives that may induce a complainant to substitute the real culprit with the accused.²¹ According to Milne AJ in *R v M*,²² charges of immorality were 'easy for woman to formulate but difficult for man to refute' and '[a]s a mode of obtaining vengeance for any affront to a

²⁰ *R v W* 1949 (3) SA 772 (A) 780

²¹ See *S v Snyman* 1968 (2) SA 582 (A) 585C

²² 1947 (4) SA 489 (N) 493 and 494

woman's pride and dignity, the bringing of a charge of this kind is probably without equal.'

(b) The danger that a frightened woman, especially if inclined to hysteria, might imagine that certain things had happened to her, which had not happened at all.²³

(c) The deceptive facility such a witness, who had actually participated in the sexual act with a person other than the accused (not unlike the accomplice) had for convincing testimony, by merely substituting the actual participant with the accused.²⁴

[39] Courts were accordingly encouraged to seek some safeguard, such as corroboration, which would reduce the risk of a wrong conviction. This position however, changed with the dawn of the constitutional era. The majority view was that this cautionary rule had no basis for its existence other than to discriminate against women, who were in the majority as far as complaints in respect of sexual assaults were concerned. After some deliberation, the rule was eventually abolished by the SCA in *S v Jackson*.²⁵ It was held that the rule, which had already been abolished in comparable modern systems such as Namibia, Canada, Australia and New Zealand, was based on an irrational and out-dated perception which unjustly stereotyped complainants in sexual cases (mainly women) as particularly unreliable, with the result that, although evidence in a particular case might call for a cautionary approach, there was no warrant for the application of a blanket-type cautionary rule.²⁶ The matter has now, in any event, been taken further by the legislature. Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act), provides that notwithstanding any other law, a court may not treat the evidence of a complainant in sexual offence matters with caution on account of the nature of the offence. It is clear that courts should continue exercising their discretion, but that the treatment of evidence with caution

²³ *R v Rautenbach* 1949 (1) SA 135 (A) 143

²⁴ *Snyman* above 585D

²⁵ 1998 (1) SACR 470 (A)

²⁶ At 476f. See also P.J. Schwikkard in Smythe & Pithey (eds) *Sexual Offences Commentary: Act 32 of 2007* (2011) at 23-8

when the only reason to do so is because it involves a sexual offence, will no longer be tolerated. So too, the failure by the complainant to raise the proverbial hue and cry at the first reasonable opportunity. Of relevance to the matter before us, are two further sections of the Sexual Offences Act which require particular scrutiny as having codified departures from the pre-constitutional era. They are ss 58 and 59, which read as follows:

‘58 Evidence of previous consistent statements

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* (italics added) from the absence of such previous consistent statement.

59 Evidence of delay in reporting

In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw an inference *only* (italics added) from the length of any delay between the alleged commission of such offence and the reporting thereof.’

[40] The failure of a complainant to raise an alarm at the first reasonable opportunity continued, between 1998 and 2007, to be a factor that could militate against the acceptance of the evidence.²⁷ But a delay was not necessarily fatal to the prosecution’s case. In *S v Cornick & another*,²⁸ the SCA upheld convictions where the complainant had laid charges 19 years after the event. Not only had the delay been fully explained, but the complainant was also found to have been a credible witness. The welcomed position presently, is that the failure of a complainant to report a rape as soon as possible cannot be the benchmark for determining whether or not the complainant has been raped. Studies have shown, and common sense dictates, that people differ in their responses to traumatic events, and are inclined to display individualised emotional responses to these, particularly when the experience is an embarrassing and shameful one which

²⁷ See *S v GS* 2010 (2) SACR 467 (SCA) at [23]

²⁸ 2007 (2) SACR 115 (SCA)

involves an assault on the bodily integrity of the victim. A report of this nature would ordinarily involve descriptions of private and intimate parts of the body. Some people are encouraged to be quite at ease doing this. For others, it is simply taboo. Also, as described by the SCA in *Monageng v S*:²⁹

‘Some of the immediate effects are frozen fright or cognitive dissociation, shock, numbness and disbelief. It is therefore not unusual for a victim to present a façade of normality.’

In particular, children often – especially if they are abused by family members – wait long ...

‘... for fear of retribution, feelings of complicity, embarrassment, guilt, shame, and other social and familial consequences of disclosure.’

[41] It seems on the face of it, that ss 58 and 59 place significant limits on the inferential processes that may legitimately be conducted by the courts. Differently put, courts are no longer at liberty to draw adverse inferences from either *only* the failure of the complainant to make a consistent statement, or *only* the length of the delay between the alleged commission of the offence and the making of such a statement, commonly referred to as ‘the first report’. The deliberate inclusion of the word ‘only’ in both these sections, to my mind, presupposes that if there are any other grounds for the drawing of an adverse inference or adverse inferences, failure to report, or the making of inconsistent reports, or a delay in reporting, may, in a given set of circumstances, be considered as a further ground or grounds to justify the drawing of adverse inferences. In other words, an additional trigger (established by an inferential process best left to the trial court) may well be required to establish a basis for exploring issues such as lack of previous consistent statements or an inordinate delay in making them - whether it is a feature of the complainant’s testimony, or the circumstances in which the act took place or was ultimately disclosed, or the nature of the relationship between the complainant and the

²⁹ [2009] 1 All SA 237 (SCA) at [23]

accused, or discrepancies within the evidence of the complainant, or differences between the complainant's version and that of other witnesses.³⁰

[42] As I have already pointed out, there are a number of these triggers in the matter before us. That being the case, it was incumbent on the trial court, at the very least to explore and evaluate the reasons why the complainant allegedly reported the rapes when she did, why there were inconsistencies in her own version about what she reported, why the first person she allegedly made this delayed report to (being her paternal aunt), was not called as a witness, and why her maternal aunt's version of what was said to her does not gel with any of the versions proffered by the complainant. The fact that the court *a quo* in these particular circumstances, found that the complainant was nevertheless a 'consistent witness', is not particularly helpful. Consistency, does not necessarily stem from honesty and reliability. In any event, the finding that she was consistent, is simply not borne out by the evidence. On the contrary, as I have been at pains to demonstrate, there are a host of inconsistencies and improbabilities in the complainant's account only, which ought to have led the trial court to have misgivings concerning her credibility and her reliability. In addition, the court ought to have taken into account the inordinate delay in reporting these allegedly repeated rapes, followed by only reporting one or two recent rapes, and then only in the peculiar context of her unwillingness to accompany the appellant to Grahamstown.³¹ As stated by Jones J in *S v Dyira*:³²

'Is it proper or possible, with any measure of certainty, simply to explain away some 17 weeks of adamant refusal to give an account of what happened because of fear of reprisal, only to have that fear disappear for no apparent reason?'

The appellant's version

[43] The magistrate made no mention of the appellant's version of what had transpired directly before the complainant decided to report him. According to the

³⁰ See Schwikkard above at 23-9

³¹ See for example, the similar facts in *S v GS* 2010 (2) SACR 467 (SCA)

³² 2010 (1) SACR 78 (ECG)

appellant, there had indeed been an argument between him and the complainant, but not exactly along the lines suggested by the complainant. The appellant's explanation for the quarrel (which seems to have had a ring of truth about it), was that at the time he enquired about the broken window (on the Saturday morning), he also noticed that all the complainant's bags had been packed. Quite coincidentally, while they were quarrelling about this, Agnes phoned and said: 'S[...], I request you to give me the child'. Thereafter he noticed that the complainant was behaving strangely. She had not been taking her epilepsy medication properly and had been refusing to accompany him to Grahamstown for proper medical treatment. According to the appellant's explanation, the complainant had also taken umbrage at the appellant having reprimanded her 'for having many boyfriends'.

[44] In response to questions from the court, the appellant said that in lieu of the call from Agnes, and having seen the packed bags, he suspected that the complainant had been planning to go to Agnes. He also found her explanation – that the packed bags only contained dirty laundry – implausible.

[45] To my mind, the court's failure to have given any consideration at all to the appellant's version, and whether it was reasonably, possibly true in the circumstances, amounts to a further misdirection. In all these circumstances, I am satisfied that the trial court erred in concluding that the prosecution had proved its case beyond a reasonable doubt. The appellant is accordingly entitled to an acquittal on all the charges preferred against him.

ORDER:

- (a) The appeal against the convictions and the sentences imposed is upheld.
- (b) The convictions and the sentences imposed are set aside.
- (c) The appellant is found not guilty and he is discharged.
- (d) The Bhisho registrar is directed to facilitate the appellant's immediate release from prison.

I.T. STRETCH

JUDGE OF THE HIGH COURT

I agree:

L. RUSI

JUDGE OF THE HIGH COURT

For the appellant: H.J. Erasmus

Instructed by: Legal Aid South Africa

For the respondent: C. Giyose

Instructed by: The Director of Public Prosecutions

Date heard: 14 September 2022

Date of further heads: 16 November 2022

Date of judgment: 06 December 2022