



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

NOT REPORTABLE

Case no: 22/2022

In the matter between:

THE STATE

and

PHILANI AIDEN BOTHA

Accused

JUDGMENT

Govindjee J

[1] Mr Botha was charged with rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 ('the Sexual Offences Act').¹ It was alleged, following an amendment to the charge sheet, that he penetrated the complainant, a seven-year-old girl, per vaginam without her consent during August or September 2020.

¹ Act 32 of 2007.

The State's case

[2] MK, the complainant's grandmother, testified that Mr Botha was a family relative. She had sent the complainant to his home for a mobile application to be installed on her device. He had attended to such work previously. Upon her return, the witness asked the complainant why there had been a delay. The response was that Mr Botha had been busy with the device. After returning the device, the complainant went to sleep. She appeared to be normal, and the witness had no reason to suspect that anything was amiss.

[3] On 6 October 2020, the witness' daughter ('D'), who is the complainant's mother, and the complainant had spoken to her. The complainant was in tears and D enquired about a discharge that was evident on the child's panties. It was brownish in colour and contained some blood. The complainant indicated that she wanted to speak to her grandmother alone. They went to a different room where the complainant asked her not to tell her mother what she was about to tell her. Her mother would wish to fight, and the child feared the accused. The complainant, emotional, crying and scared, proceeded to tell the witness the reason for this fear: Mr Botha had raped her on the day she had been sent to him with the cellular phone.

[4] The witness discussed the matter with D. They decided to contact Mr Botha's father. He arrived at their home and was told what had occurred. The child was undressed and the father was shocked when he saw that the opening of her vagina was red. He requested that the child be taken to the doctor for an examination the following day.

[5] Under cross-examination, the witness could not dispute that she had sent the complainant with the phone during August 2020. It had been early in the afternoon. The witness was unable to indicate how long the child took and denied that the child had only been away for a 15-to-20-minute period. This was because she remembered enquiring, upon the child's return, why she had taken so long. The complainant had replied that Mr Botha had been fixing the phone. The witness had not noticed anything amiss at the time, or during the days that followed. The witness maintained that the complainant had mentioned Mr Botha by name as her rapist on the evening that D had

noticed the discharge on the panty. She had a close relationship with the complainant, had been emotionally disturbed and not made further enquiries.

[6] The witness explained that the complainant had visited Mr Botha's home in the past. The children of that household were older, and the complainant usually played with younger children. It was put to the witness that the children of that household played several games, on numerous occasions, with the complainant at Mr Botha's homestead. This included drawing on the floor and playing with little rocks. She denied that she had agreed, a few days later, to pay Mr Botha R15 for fixing the phone.

[7] The complainant, now aged nine, testified through duly appointed and suitably qualified intermediaries. The complainant testified in a separate room containing appropriate closed-circuit television facilities. This followed an unopposed application to permit this method of testimony given the age of the complainant and the possibility of undue mental stress or suffering caused by testimony in open court.² That application was supported by the submission, by agreement, of a confidential psychological report following examination of the complainant's mental state and was based on the report's recommendations.

[8] The clinical psychologist who had interviewed the complainant had concluded that she would be able to provide an account of her experience despite her youthfulness and distress, and that she understood what it meant to tell the truth and the consequences of telling lies. The court spent some time establishing if that was indeed the case and, having satisfied itself, admonished the witness in terms of s 164 of the Criminal Procedure Act, 1977 ('the Act').

[9] She testified that she had been sent by her grandmother for Mr Botha to install Whats App for her. She knocked on two doors in the household premises without response. Mr Botha opened the third door and she informed him of the reason for her visit and handed him the phone. She stood outside. He called her to his room to fetch the phone. He covered her eyes with something like a towel and covered her mouth with his hand. He lowered her pants and panties and asked her to bend forward, before

² S 158(2)(a) and ss 170A(1) and (3) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

inserting his penis into her vagina. When she was about to exit the room, Mr Botha threatened to kill her if she mentioned what had occurred. She took the phone and ran home, scared. She gave the phone to her grandmother. At some point her grandmother had been called to the front room and told about the incident.

[10] The complainant could not remember the date of the incident. She had never entered Mr Botha's room before. She had not observed anybody else present at that household. She had stood outside while he installed the application on the phone. She explained, with the aid of dolls, and using slang words for private parts, that Mr Botha had inserted his penis into her vagina and that she had felt pain.

[11] The incident came to the attention of the elders in her house when she had requested her mother to accompany her to the toilet and her mother observed something white with blood on her panty. She had not wanted to tell her mother what had caused this and had cried. Her mother had shown her grandmother the discharge. The complainant did not wish to discuss the matter with her mother and told her grandmother in the lounge what had occurred. She was concerned that her mother would fight with Mr Botha. Her grandmother told her that she would tell D. Mr Botha's family had subsequently been summoned so that they could be informed. Mr Botha's father advised that they would visit a doctor in Makhanda the following day. She, her mother, and Mr Botha's father did so. She was examined and given pills but nothing else had resulted. She was subsequently examined at a clinic in Riebeek East and then referred to Settlers Hospital for examination by a doctor. The complainant confirmed that she was depicted in a photograph, admitted into evidence, pointing at the spot in Mr Botha's bedroom where she had been standing, near his bed, at the time she was raped.

[12] The complainant denied that she had played the 'Crazy Eights' card game with K and A, two other young children, on the day in question. She also denied that Mr Botha had been sweeping the floor in the area outside his home when she had visited. She confirmed many of the statements she had made to the police in the presence of her mother relating to the incident. This included that Mr Botha had threatened to kill her with an axe. The statement also indicated that she had been afraid to tell her

grandmother what had occurred because of her fear, and that she did not know which date she had asked her mother to accompany her to the toilet.

[13] She confirmed under cross-examination that she had not returned home and reported the incident to her grandmother on the day it had occurred. After having reported the matter, she had cried in her bedroom and Mr Botha's parents had been summoned. She later testified as follows:

'After you came back from [Mr Botha's] home did your grandmother ask you why you took long?

Yes

What did you say?

I said [Mr Botha] made me wait outside then he called me, I got inside and he closed my eyes and mouth.

So you told her what happened on the same day when you came back from [his] home?

Yes

[But what about your] statement that "on arrival I gave my grandmother the cell phone and kept quiet"?

Yes

The statement doesn't say anything happened to you?

Yes

But in evidence you now say that your grandmother asked why you took long and you told her what happened?

Yes

These are different stories.

(No comment.)'

[14] The complainant conceded, when her testimony resumed following illness which necessitated a postponement midway during cross-examination, that she may have made a mistake about this portion of her testimony. She denied, however, that she had been mistaken in asserting that K and A had not been present and that the children had not played a card game together. It was not put to the complainant that Mr Botha's aunt had also been present and observed the scene.

[15] During re-examination, the complainant testified that she had seen Mr Botha sweeping with a broom near the doorway of his bedroom when she arrived on the day

of the incident. She repeated this when asked during further cross-examination permitted by the Court. With respect to the actual incident, however, she reiterated that Mr Botha had undressed her and penetrated her. She denied she was mistaken in that regard, adding 'He did undress me ... He did insert it'.

[16] Dr McConney testified that he was the clinical manager at Dora Ngizwa Hospital. He had previously examined many sexual assault victims and testified with reference to a J88 Report that he had duly completed on 16 October 2020, when the complainant was seven years old. The conclusion he had reached referred to sexual assault. In particular, he highlighted that the child's hymen was not intact, suggesting that penetration had occurred. A purulent discharge on the vaginal orifice was also depicted in the diagram forming part of the J88 form. He explained that this was because of the presence of yellow pus, which was indicative of an infection and was abnormal. That discharge was linked to the hymen not being intact and penetrated. Penetration could have occurred via a penis, a finger or another object. An infected penis could transmit an infection to a vagina through penetration. The examination, including the history provided to him, resulted in his conclusion that sexual penetration with a penis had probably occurred. The timeframe provided to him suggested that a rape had been perpetrated two weeks previously, and this timeframe was probable when considering what he had observed during the physical examination.

[17] A second J88 report had been completed by the witness in similar vein a few hours later. He explained that this was due to the child having been anxious and uncooperative during the initial examination. He had then sedated her in theatre to exam her in more detail. The remnants of the damaged hymen had been observed in more detail, resulting in Dr McConney noting on the second report that it was 'patchy'. The doctor's conclusion remained the same, namely that penetrative sexual intercourse had taken place.

[18] Under cross-examination, Dr McConney testified that a sexually transmitted disease or infection could keep manifesting for up to a month if left untreated during the first week. The hymen was usually a continuous membrane. It had been torn and damaged, as occurred when the vaginal orifice was penetrated. The tear was not continuous, resulting in the second report describing the hymen as 'patchy'. There was

no reason for the hymen to be damaged in that way without penetration. Penetration could occur in various ways other than through penile penetration, because of the insertion of a finger or object. The infection observed could have been caused through insertion of a dirty object, including a dirty finger containing traces of bacteria. The doctor's conclusion had been based on the history he had been provided and the purulent discharge. Given the time that had elapsed, he testified that there could be no forensic evidence linking Mr Botha to that penetration.

The defence case

[19] Mr Botha testified that the complainant was related to the father's side of his family and that she stayed close to his homestead. The complainant would usually play with his sister at that homestead. She would visit the homestead frequently, also to play with a cousin's sister, as the complainant was related to their family. The two girls were referred to as "A" and "K". They played lots of games, including cards and playing with dolls.

[20] Mr Botha had been sweeping the yard on the day of the incident. The complainant had arrived and explained that her grandmother had sent her to him so that he could repair her cell phone. Whats App had expired and needed to be downloaded. After he took the phone from the complainant, A and K came out and asked the complainant the reason for her visit. She stood with them near the outside tap. Mr Botha went to fetch his phone to attend to the Whats App issue. Having done so, he advised the complainant that she must inform her grandmother that the cost would be R15. She took the phone, exited the gate and went home.

[21] K and A had been present during the incident and the complainant had played with them. Mr Botha's aunt ('LB') had also been present, and the complainant had visited for ten minutes. She had not entered his flat but had been playing with the two other girls at the tap while he worked on the phone. He denied undressing her, penetrating her or threatening her. He met her grandmother the following day on his way to the shop. She informed him that the complainant had advised her that the work on the phone would cost R15. She promised to pay him when she had this money and he agreed with this arrangement.

[22] The incident had occurred during the first week of August 2020. Nothing transpired until 2 September 2020 when another aunt ('LM') had arrived at their homestead, crying and asking him how he could do such a thing. She had been at the home of the complainant and informed Mr Botha that he was being accused of rape. His father and LB advised him to remain at home while they went to the complainant's home to make enquiries. He came to hear from other people what had transpired thereafter. The complainant had been crying and could not respond when questioned. It was arranged that she should be taken to a private doctor, who concluded that nothing had happened to the child. The incident only reared its head again during October 2020, when he was arrested.

[23] Mr Botha confirmed that A and K were both older than the complainant. A was born in 2011 and K in 2007. He testified that the complainant would not frequent his homestead but would sometimes come to play there, approximately on two days per week. Before the incident, she had last visited during December 2019, with adults, when he had been involved in a ceremony. She had not visited for approximately seven months but the children would sometimes play in the street, along with other children in the location.

[24] Mr Botha recalled that he had worked until 13h30 and that the complainant had arrived at 14h00. A and K returned from school around 13h00. When asked why he was convinced that this was during the first week of August, he referred to LM's arrival on 2 September 2020, when he first heard about the allegation. He had informed her that he would never do such a thing. Thereafter his father and LB had visited the complainant's home to inspect the child, who was taken to the doctor by his father, the child's mother and grandmother, on 3 September 2020. It was not in dispute that she had been examined at Settler's Hospital during October 2020.

[25] Mr Botha testified that there was no bad blood between him and the complainant and there was no reason for her to fear him. He had not threatened her or raped her as she had described and did not know why he was being accused of this.

[26] He testified that the three children had been playing cards that day but was unsure as to how long this had continued. A and K had been inside the house when the complainant had arrived. He was sweeping at the time. By time he took the phone inside the other girls were outside and had asked her the reason for her visit. She had already told him why she was there and he heard her tell the children while on his way to his room. From his room he could hear them speaking and see them playing. They were not making any noise and were just playing cards. When asked how he could see the children, as his room did not have a window facing the area in which they were playing, Mr Botha explained that he had taken his phone from his room and downloaded Whats App while standing outside. The children were playing approximately 25 metres away and he called the complainant. She left the other children, approached him to receive the phone, was informed of the cost and left without finishing the game or speaking to the other children again. They continued to play.

[27] LB had been inside the house in the kitchen and would have heard him speaking to the complainant. She came out of the house and noticed the phone brought by the complainant. She went to the tap to pour water as there was no tap inside the house. After the Whats App had been downloaded she returned to the house, approximately at the time the complainant was called to collect the phone. The complainant would have been visible to her for almost the entire duration of her visit.

[28] K testified that she was 14 years of age and in grade 9. She would play with the complainant in the location and at her homestead. They were related but lived in separate houses. They would usually play the Crazy Eights card game. K recalled the complainant arriving with the phone at approximately 14h00. She and A were already playing Crazy Eights at the time, behind the vehicle. The complainant had arrived with a cell phone. Mr Botha was sweeping near the tap and she gave the device to him before joining them. He then went into the room with the phone while they played for approximately 15 minutes. Mr Botha then brought the phone to them and handed it to the complainant who left for home.

[29] K testified during cross-examination that the complainant had not visited their home for a long time before that day. She and A would play with the complainant. LB,

her mother, was at home in the main house at the time. K had returned from school, eaten, done her homework for approximately five to ten minutes and then played the card game. K recalled that she had isiXhosa homework and had written a story. 'A' was at her homestead, which was nearby, at the time. 'A' had brought the cards for them to play the game. The area they had played in, behind the vehicle, was visible from the main house and Mr Botha's room, which was approximately thirty metres away from where they were playing. She had heard the complainant tell Mr Botha the reason for her visit upon arrival, as they were in that area already playing cards. She nevertheless later testified that she and A had asked her the reason for her visit when she joined their game. When asked why this was necessary if she had already heard the conversation between the complainant and Mr Botha, she replied:

'She was not someone who would usually visit our homestead.'

[30] K added that the children usually played with the complainant in the street, not at home. Mr Botha had taken the phone to his room but had not been gone for long before returning and giving it to the complainant while she was involved in the game. He mentioned to her that it would cost R15 to repair and the complainant then departed, running. Throughout this time LB was at the tap pouring water.

[31] K testified that she had heard about the rape allegation from her mother sometime after that day, when LM had visited and informed them about this. LM had been crying and K had spoken to Mr Botha about the allegation while the other family members went to the home of the complainant.

[32] LB testified that Mr Botha was her nephew. The complainant was the child of her uncle. She had left the kitchen to fetch water from the tap when the complainant arrived. Mr Botha was sweeping near the tap. The child requested him to download Whats App on her grandmother's phone. He let go of the broom and took the phone from the child, who ran to play near the vehicle with K and A. K and A had been playing there for a long time before the complainant's arrival. Mr Botha fixed the phone in his room. While he did so the witness took the water into the house. She then proceeded to clean the yard. Mr Botha emerged from his room after fixing the phone. He went to the tap and called the complainant, who was behind the vehicle, to him. She ran to

where he was and received the phone, before running out of the yard on her way home.

[33] LB indicated that K and A had returned from school, eaten and washed the dishes before going to play. She was unable to estimate how long it had taken for the work on the phone to be completed. She had been sweeping in the yard during that time. The complainant had not entered Mr Botha's room. She estimated that this had occurred during the first week of August, as it was approximately three weeks later that the child had been examined by a doctor.

[34] LM, a relative, had arrived one evening crying. After a long period, she indicated that she had been called to the complainant's homestead where she had been told that Mr Botha had raped the complainant. The two ladies, accompanied by Mr Botha's father, had proceeded without delay to that home and made inquiries. LM had spoken on behalf of her and her brother but none of the three had said much, as they were in shock and had not expected Mr Botha to have done such a thing. The complainant's grandmother showed them her panties. The child could not tell them who had raped her as she was crying. The child's grandmother then advised them not to question the child and arrangements were made for her to be taken to the doctor the following day. Following that, they had been informed that the child had not been raped.

[35] LB confirmed, during cross-examination, that K had washed the dishes before playing in the courtyard. She added that K loved to watch movies and had watched a movie that afternoon with A for approximately three hours. When the complainant had arrived, the other girls were playing cards behind the vehicle. Mr Botha had fixed the phone while inside the room, and not while standing outside. The witness had overheard the conversation between the complainant and Mr Botha. K was mistaken in thinking that he had walked to them to return the phone.

[36] LB testified that Mr Botha was not a problematic child. She knew him well and he was usually to be found at home. Their bedrooms were divided by a wall and she could hear everything that happened and the complainant had not entered any of the rooms on the day in question. There had been nothing wrong with the complainant when she left the homestead running home.

[37] AB, a SAPS constable, and the father of Mr Botha was the final witness called. The complainant was known to him, her father being his uncle. He had not been at home on the day of the alleged incident. He had been present when LM had arrived, crying, to report what she had heard. He had immediately proceeded with LM and LB to the home of the complainant. Her mother, D, was furious and they could not say much. D suggested that the witness take the child to the doctor and this was agreed. He had taken the complainant and D to a doctor in Makhanda on 3 September and a receipt confirming payment of R400 to the doctor was accepted into evidence. The witness had not been present at the time the child was examined by that doctor. A case had only been opened during October 2020.

[38] AB testified during cross-examination that he had had a short private talk with Mr Botha on 2 September 2020 after LM advised their family of the allegation and they had visited the complainant's home. When asked, his son denied having committed the offence without any further explanation and the matter was left there. He had not considered reporting the matter to the police immediately, but hoped or thought that the child's mother would do so. He had spoken more than LB or LM when they visited the complainant's home after hearing of the allegation. No explanation was given for why the child had been brought to a doctor in Makhanda the following day. At some point LB had said to him that she would have known if the complainant had entered Mr Botha's room as two rooms had to be passed for her to do so.

The legal position

[39] It is trite that the evidence of young children should be accepted with great caution. While no fixed rule in respect of corroboration is applicable, in *S v Manda*, the Appellate Division noted inherent dangers in relying upon the uncorroborated evidence of a young child.³ The imaginativeness and suggestibility of children have been held to be only two of several elements that require that their evidence be

³ *S v Manda* 1951 (3) SA 158 (A) at 162E-163F. See *S v Artman and Another* 1968 (3) SA 339 at 340H.

scrutinised with care to the point of suspicion.⁴ A trial court must fully appreciate the inherent dangers in accepting such evidence.

[40] While her allegations of sexual penetration are supported by the available medical evidence, the complainant in this matter is a single witness in respect of her identification of Mr Botha as her rapist. Section 208 of the Act provides that an accused may be convicted of an offence on the single evidence of any competent witness. There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness.⁵ The evidence must be weighed by considering its merits and demerits before deciding whether, despite shortcomings, defects or contradictions, the truth has been told. The cautionary rule that the evidence of a single witness must be clear and satisfactory in every material respect does not mean that any criticism of that witness' evidence, however slender, precludes a conviction.⁶ The exercise of caution cannot be allowed to displace the exercise of common sense.⁷ The court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true, and notwithstanding that the testimony was unsatisfactory in some respect.⁸

[41] An accused person may only be convicted if, after proper consideration of all the evidence presented, his guilt has been established beyond reasonable doubt. It follows that an accused person must be acquitted if it is reasonably possible that he might be innocent.⁹ Before rejecting an accused's version on the probabilities, the court must be able to find, as a matter of probability, that the accused's version is simply not reasonably possibly true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version.¹⁰

[42] Where there is a conflict of fact between the evidence of the state witnesses and that of the accused, the court is required to consider the merits and demerits of

⁴ Ibid. Also see *S v Dyira* 2010 (1) SACR 78 (E).

⁵ *S v Weber* 1971 (3) SA 754 (A) at 758.

⁶ *R v Bellingham* 1955 (2) SA 566 (A) at 569, quoting *R v Nhlapo* (AD 10 November 1952).

⁷ *S v Sauls and Others* [1981] 4 All SA 182 (A) at 187.

⁸ *R v Abdoorham* 1954 (3) SA 163 (N) at 165, as quoted in *S v Sauls* ibid.

⁹ *S v Van Aswegen* 2001 (2) SACR 97 (SCA), with reference to *S v Van der Meyden* 1999 (2) SA 79 (W).

¹⁰ *S v Shackell* 2001 (2) SACR (SCA) at 194*g-i*.

the state and defence witnesses, as well as the probabilities of the case, before concluding whether the guilt of an accused has been established beyond reasonable doubt.¹¹

[43] It is necessary to adopt a holistic approach to analysing the available evidence in this matter.¹² In *S v Chabalala*,¹³ the Supreme Court of Appeal explained this as follows:

‘The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper count of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.’

[44] The Court's conclusion must account for all the evidence, whether it is found to be false, unreliable or only possibly false or unreliable, and the appropriate process of reasoning depends on the nature of the evidence before the Court.¹⁴ While it is necessary to critically analyse each component in the body of evidence presented, it is also necessary to consider the picture as a whole.¹⁵ As the SCA held in *S v Trainor*:¹⁶

‘A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independent verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach ... is illogical and wrong’.

¹¹ *S v Guess* [1976] 4 All SA 534 (A) at 537-538; *S v Singh* 1975 (1) SA 227 (N) at 228.

¹² *Van Aswegen* op cit fn 9. For an application of *Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others* to resolving two conflicting versions between the State and the accused in criminal proceedings, see *Kuhlane v S* [2020] ZAECGHC 124 para 10 and following.

¹³ *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15. Also see *S v Dlamini* 2019 (1) SACR 467 (KZP) para 25.

¹⁴ *Van der Meyden* op cit fn 9 at 81I - 82E.

¹⁵ *S v Mbuli* 2003 (1) SACR 97 (SCA) para 57.

¹⁶ *S v Trainor* 2003 (1) SACR 35 (SCA) para 9.

[45] As the SCA confirmed in *Kotze v S*¹⁷ where a trial court is faced with two mutually destructive accounts, logic dictates that both cannot be true. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witness. Evidence that is reliable should be weighed against the evidence that is found to be false and, in the process, measured against the probabilities. In the final analysis the court must determine whether the State has mustered the required threshold proof beyond reasonable doubt.

[46] As to the evidence of a previous consistent statement, s 58 of the Sexual Offences Act provides that this is admissible in criminal proceedings involving the alleged commission of a sexual offence. Section 59 of that Act provides that the court may not draw any inference only from the length of any delay between the alleged commission of a sexual offence and the reporting thereof.

[47] To the extent that the defence relies on a specific form of alibi, based on Mr Botha having been in the presence of the other children and LB during the time of the alleged rape, the correct approach is to consider the alibi in the light of the totality of the evidence and the Court's impressions of the witnesses. If, on all the evidence, there is a reasonable possibility that the alibi evidence is true, it means that there is the same possibility that the crime has not been committed.¹⁸ Neither evidence implicating the accused, nor exculpatory evidence, must be looked at in isolation.

Analysis

[48] It may be accepted that the complainant's mother discovered a brownish discharge, containing blood, on her daughter's panties. MK, the child's grandmother, was approached. The complainant subsequently reported to her that she had been raped by Mr Botha on the day that MK had sent her to him to attend to an issue with her phone, that this was painful and she had cried and that Mr Botha had put a hand over her mouth. After Mr Botha's family had been summoned, it was agreed that his

¹⁷ *Kotze v S* [2017] ZASCA 27 para 17.

¹⁸ *R v Biya* 1952 (4) SA 514 (A).

father would take the complainant and her mother to a doctor in Makhanda the following day. Documentary evidence of the receipt of payment from that visit, as confirmed by AB, confirms that this was on 3 September 2020. Given that it is common cause that this doctor's visit occurred the day after the report, it must be accepted that the complainant reported the alleged rape on 2 September 2020. MK was therefore mistaken in her testimony that this had only occurred on 6 October 2020. It is unclear as to precisely when the complainant was sent to Mr Botha with the phone. It may be accepted that this occurred sometime during August 2020.

[49] Despite being mistaken in relation to the date, MK made a favourable impression as a witness. She readily conceded, during cross-examination, that she might have erred in that respect, and that she could not remember that aspect for certain. She also avoided embellishing her testimony to favour the complainant's version, indicating that she could not confirm the precise period that the complainant had been at Mr Botha's home. That uncertainty is unsurprising given that the event would have been unremarkable in her memory at the time. She listened to the questions carefully and provided thoughtful responses. It was clear that she could recall asking the complainant, upon her return, why she had not returned quickly. Other than disagreeing that this could have been a fifteen-to-twenty-minute period, she could not provide further detail.

[50] The crux of the matter is to determine what occurred during the time that the complainant was at the home of Mr Botha, even accepting that this may have been only for a relatively short period of time. On her version, she was called by Mr Botha to fetch the phone after she had given it to him and waited outside. When she went to him, he raped her, covered her eyes and mouth and threatened to kill her if she discussed what had occurred. Mr Botha denies this, and K and LB, who claim to have been present throughout the duration of the complainant's visit, support his version of events. On that version, the complainant never entered his room that day and was not raped by him.

[51] The complainant was a confident witness for a child of her age. She spoke in short sentences. She answered the questions put to her clearly and created the impression of a witness speaking truthfully. She displayed reasonable powers of

observation, recollection and narration considering her age. She was able to explain, for example, the reason why she had not wanted to tell her mother what had occurred, and why she had preferred telling her grandmother. She recalled various details of her experience, including how she had knocked on different doors, her interaction with Mr Botha at the time she gave him the phone, where she had stood and what had subsequently occurred, including that she had been asked to bend forward, and that her eyes and mouth had been closed by Mr Botha during that time.

[52] There are two internal inconsistencies in her evidence. The first relates to her confusion as to when she had reported the matter to her grandmother. The complainant appeared to conflate the day of the incident with the day she reported the matter to her grandmother. Given MK's testimony, it must be accepted that these events occurred on separate days. At times the complainant was able to appreciate that, denying during cross-examination that she had returned home after the incident and reported the matter to MK. Prior to that denial, however, and as the earlier quotation from the evidence led reflects, she appeared uncertain on the point. When her testimony resumed briefly, some weeks after it had been interrupted during cross-examination, she conceded that she may have erred in this respect, demonstrating consciousness of the duty to speak the truth.

[53] The second issue stems from her remark, during brief re-examination and further cross-examination, that she had seen Mr Botha sweeping with a broom near the doorway to his bedroom when she arrived, which is similar to that aspect of his version of events. This is a contradiction of her evidence in chief, where she testified that she had knocked on various doors before she had seen Mr Botha, who had opened one of the doors. She had also denied seeing Mr Botha sweeping near the tap on one of the pictures she had been shown during her initial cross-examination, or that she had met him there.

[54] The complainant remained convinced, however, that she was not mistaken as to Mr Botha's conduct in undressing her and raping her, which she repeated in her own words, and in her firm assertion that K and A had not been present at the time.

On these material aspects she appeared to testify honestly.¹⁹ As already indicated, no adverse inference may be drawn from the length of the delay in reporting the incident.

[55] The medical report and related testimony of Dr McConney corroborates the complainant's claim that she was raped.²⁰ Examination on 16 October 2020 confirmed that her hymen was not intact. It had been torn and damaged and this had likely been caused by sexual penetration, even if the visible infection may have been caused by insertion of a different dirty object, such as a finger containing bacteria following a traumatic event which damaged the inside of the vagina.

[56] Mr Botha offered the following basic denial of the allegations. He had taken the phone from the child and gone to his bedroom to fetch his phone and transfer Whats App to the phone she had brought, while she played with the other two girls. He was unable to estimate how long it had taken for him to download the application. He seemed to recall clearly that A and K had been inside the house at the time the complainant arrived, and would not have heard her request to him related to the phone. He heard them ask her about the reason for her visit while he went inside and could then hear them speaking and see them playing cards quietly. When asked how this was possible given that his room did not have a window facing that area, he explained that he had taken the phone out of his room and downloaded the Whats App while outside. He had no difficulty in describing the movements of his aunt throughout this time. She had been in the kitchen, exited, noticed that the complainant had brought him the phone, proceeded to the tap to pour water and, after the application had been downloaded and he had called the complainant, had proceeded back into the house, so that the complainant would have been visible to her for most of the time.

[57] Mr Botha did not make a favourable impression as a witness. He initially tried to convey the impression that the complainant was a regular visitor to his home, frequently arriving to play a variety of games with his sister and cousin's sister. This was also the version that had been put on his behalf. He indicated during cross-

¹⁹ See *Vilakazi v The State* [2015] ZASCA 103 para 18, with reference to *Woji v Sanlam Insurance Co Ltd* 1981 (1) SA 1020 (A).

²⁰ See *Rugnanan v S* [2020] ZASCA 166 para 24.

examination that this occurred approximately twice per week, before confirming that the last occasion she had visited was during December 2019, when she had visited in the company of adults, some seven months before the alleged incident. He then suggested that the children would play together in the street, rather than in the courtyard of the homestead.

[58] His plea explanation, the version put to the complainant on his behalf and the testimony of the other witnesses for the defence suggested that he had attended to his work on the phone inside his room, while the complainant had been waiting or playing outside, as reflected in the following extract:

‘His evidence is that you met on the side of the tap and he took the phone and went inside to fix it while you waited around this area.

No.’

[He] will say that while you standing around here, A and K came and asked you what you were doing and you said you brought a phone from your grandmother.

No.

[59] In response to questioning from the Court, the version changed. He had heard them speaking and seen them playing not from inside his room but because he had merely fetched his phone from his room and downloaded Whats App while standing outside.

[60] He testified with some conviction as to the movements and activities of A, K and LB, despite being focussed on the complaint, fetching his phone and downloading the application. Yet he was unable to answer a question, or even provide an estimate, as to how long the children had played cards together while he was busy with the phone, seemingly standing approximately 25 metres away from them.

[61] The impression created was of a witness attempting to tailor the evidence to suit his own narrative, affecting the credibility of the testimony and the weight to be attached to it. As will become evident, the version offered finds little reliable support in the evidence of K and LB. On K’s evidence the card game was already on the go when the complainant arrived. The phone was given to Mr Botha who went inside while the children played outside for approximately 15 minutes, before he returned and handed

it to the complainant. While known to the other children, it must be accepted that the complainant was not a regular visitor to the homestead so that the children would have paid some attention to her arrival. There was no answer to why it had been necessary to ask the complainant the reason for her visit, given that she had allegedly already explained this to Mr Botha within earshot of K.

[62] In addition to that issue, a fanciful recollection of her prior movements on the day in question, including eating, doing homework and writing an isiXhosa story, was added. Given the length of time that has elapsed, and the likely period between the complainant's visit and the reporting of the incident, there was no reason for such detail to be remembered. Indeed, the witness was unable to offer any explanation for her ability to provide these descriptions. These matters combine to create the sense of a fabricated version of events, told by an unreliable witness who, it must be accepted, was not present at the time of the incident.

[63] The sense of fabrication is even more acute in respect of the testimony of LB. She is related to both the complainant and accused and, had she been present, was well-placed to provide clarity as to the events of that day. On her version, and that of Mr Botha and K, she witnessed the entire duration of the complainant's time at the homestead and could confirm that Mr Botha had been falsely implicated. Yet her conduct when the incident was reported to the family on 2 September 2020, both at her home and later at the home of the complainant, does not align with that of a senior family member who was witness to the complainant's visit. Given that it must be accepted that the complainant only rarely visited Mr Botha's homestead, and that there was a special reason for the visit, LB ought to have recalled the kind of details she offered during her testimony. Confoundingly, however, she suggested that her shock at the time prevented her from disclosing those same details a few weeks after the visit when LM tearfully informed her family of the rape allegations. Even when face-to-face with MK, an elder in the complainant's house, she remained silent. This is diametrically opposed to what would have been expected by a person in her position, casting serious doubt on her presence at the time of the complainant's visit, and affecting the reliability of her testimony, particularly the ability to have observed the events and the integrity of the recollection.

[64] That aside, her testimony offered a mixture of Mr Botha's original version and K's evidence. Her version contained an improbable recollection of details of K and A's activities on the day. That version changed blatantly during cross-examination, to include their watching of a movie for a three-hour period. LB's demeanour, when pressed, was not that of a witness speaking honestly. She presented as a person reluctant to believe that Mr Botha could have committed such an act, because of her previous experience of him as a good person. She appeared unconvinced by her own version of events, adding, unnecessarily given her version, that the thin walls between her bedroom and that of Mr Botha's made it possible for her to hear everything that occurred in his room. On occasion she was unable to respond to questions and appeared shaken when it was put to her that she was fabricating her evidence. As already indicated, it was not even put to the complainant that LB had been present throughout. In all these circumstances, her testimony, stands to be rejected.²¹

[65] The complainant is a young child who was a single witness to the alleged rape. Her evidence must be treated with the necessary caution. On my assessment, she presented as a credible witness who testified clearly and truthfully on the material aspects of what had transpired, and what had been reported to her grandmother. The evidence of the details of her report, which accords with her testimony, proves consistency. There is nothing to suggest that she had any reason to falsely implicate Mr Botha, who was known to her and a relative.

[66] The two contradictions highlighted are of the kind that are to be expected in the evidence of a young child testifying many months after the events in question occurred. As the Court held in *S v Sauls and Others*,²² it would have been remarkable if there were not flaws in such a witness. The first contradiction related merely to the time of the report to MK, rather than the content of the report, the description of what occurred or the identity of the perpetrator. The second contradiction related to the complainant seeing Mr Botha sweeping outside his bedroom door. Even though this only emerged, somewhat out of the blue, during re-examination, and following a question unrelated to the events on the day, this a more serious shortcoming in the

²¹ See *S v Oosthuizen* 1982 (3) SA 571 (T). On the effect of this rejection of testimony, see *Rex v Weinbert* 1939 AD 71 80; *S v M* 2006 (1) SACR 135 (SCA) para 281.

²² *S v Sauls and Others* 1981 (3) SA 172 (A) at 180H.

evidence and must be considered as such. The complainant seemingly became confused, adding that she had seen him outside when he had been called by a grandmother. When counsel attempted to ascertain whether her confusion now extended to material aspects of her testimony, however, she remained firm and clear. This, coupled with the context in which the contradiction arose, combined with the usual appreciation of the realities of child witnesses testifying about traumatic events that occurred some time ago, must soften the deficiency. The SCA has confirmed that such contradictions do not automatically warrant the conclusion that the complainant was an unreliable witness.²³ Applying the necessary caution, it remains apparent that the complainant's evidence remained satisfactory and spoken truthfully in all material respects.

[67] Despite this assessment, it remains necessary to consider the probabilities of the case in conjunction with the assessment of the merits and demerits of the State and defence witnesses in determining the outcome of criminal proceedings.²⁴ It is the complainant's version of events, aside from her belated suggestion that she had seen Mr Botha sweeping, that convinces, as supported by the doctor's report of her injuries. The probabilities also favour that she was threatened and afraid, so that there was some delay in her reporting the incident.²⁵ Mr Botha's evidence contained external contradictions with what was put on his behalf, and lacked candour, negatively affecting the assessment of the credibility of his evidence. It goes without saying that he held a natural bias to testify in a manner that would serve his interests, as did the main witnesses who supported him.

[68] Considering the totality of the evidence, and my impression of those witnesses and evaluation of their evidence, there is no reasonable possibility that the testimony of K and LB was true. On my assessment, Mr Botha's guilt has been established beyond reasonable doubt and his version, specifically his denial that he perpetrated the rape, is, in the circumstances, not reasonably possibly true, when considering the merits and demerits of the evidence presented on both sides, and the probabilities of the matter.

²³ *Vilakazi v The State* [2015] ZASCA 103 para 18.

²⁴ *S v Singh* 1975 (1) SA 227 (N) at 228, cited with approval in *S v Guess* 1976 (4) SA 715 (A).

²⁵ See *Vilakazi v The State* op cit fn 23 para 19.

Order

1. The accused, Mr Philani Aiden Botha, is found guilty of the crime of rape as charged.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 13-17 June; 16-17 August; 17-18 October 2022;

Delivered: 21 October 2022

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