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

**REPORTABLE
CASE NO. CC 13/2019**

In the matter between:

THE STATE

and

LUTHANDO MAKAYI

Accused

JUDGMENT

***Criminal trial** – summary of substantial facts – incorrect information – whether affecting the accused's right to a fair trial – duties of prosecutors*

***Rape** – elements of - intention – whether intention can be in the form of dolus eventualis*

STRETCH J.:

[1] For reasons which will soon become apparent, it is necessary for me to reproduce the indictment in this matter. It reads as follows:

INDICTMENT

The Acting Director of Public Prosecutions for the Eastern Cape Local Division of the High Court of South Africa, Bhisho, who prosecutes for and in the name of the State, hereby informs this Honourable Court that:

LUTHANDO THANDO MAKAYI, a 43 year old male person, residing at [...]
NU2, Mdantsane

(hereinafter called “the accused”) is guilty of the crime of:

**RAPE IN CONTRAVENTION OF SECTION 3 READ WITH SECTION 1,
56(1), 57, 58, 59, 60 AND 68(2) OF THE CRIMINAL LAW (SEXUAL
OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007
 (“the Sexual Offences Act”)**

In that on or about the 31st of March 2018 and at or near Duma Nokwe B,
NU2, Mdantsane, in the district of Mdantsane, the accused did unlawfully
and intentionally commit an act of sexual penetration with the complainant,
O[....] T[....], a 6 year old female person, by inserting his penis into her
vagina and anus without the consent of the said complainant.

In the event of a conviction the said Acting Director of Public Prosecutions
requests sentence against the accused according to law, where the
provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997
relating to a discretionary minimum sentence of life imprisonment will apply,
in that the victim was raped whilst being a person under the age of 16 years
old.

A summary of the substantial facts of the case as well as a list of the names
and addresses of the State witnesses are attached hereto in terms of section
144(3) of the Criminal Procedure Act, 51 of 1977.

Signed on this 27th day of August 2019

I GOBERDAN

ACTING DIRECTOR OF PUBLIC PROSECUTIONS

BHISHO / PORT ELIZABETH / GRAHAMSTOWN

SUMMARY OF SUBSTANTIAL FACTS

1. On the 31st of March 2018 the complainant and her siblings were left alone at home by their mother when she left for work.
2. The accused entered the shack after that and raped the complainant by inserting his penis into her vagina, and anus.¹
3. After that he left the shack and the victim went to urinate.
4. She cried and her siblings woke up and she reported to them that she had been raped by the accused.
5. They in turn reported the matter to a neighbour who contacted their mother and the police.
6. The accused was arrested on the same day.

[2] The charge outlined above was put to the accused. He pleaded not guilty, explaining that he did not deny that he was at the complainant's home on that day. He found the children at home as their mother had gone to work. He denied having sex with or inserting his penis into the vagina or anus of the complainant. He left there and went to buy bread. He was informed of the allegation upon his return.

[3] The accused agreed that the admissions contained in his plea explanation could be recorded as formal admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 ("the CPA"), confirming that the only issue was whether he raped the complainant.

[4] The prosecution did not deliver an opening address. An application for the complainant and her two siblings to testify from a room adjoining the court room via CCTV with the assistance of an intermediary (Ms Tenge) was not opposed and duly granted.

[5] The complainant's oldest sibling, A[...] T[...] (who is 13 now but was ten when the accused was arrested), appeared to understand the difference between right and wrong as well as the difference between the truth and a lie. She did not,

¹ The words "and anus" were added by consent after I had raised with the prosecutor that the indictment refers to both the vagina and the anus.

however, understand the import of taking the oath, and was admonished to speak the truth.

[6] She said that she had known the accused for a short time before his arrest. He had built the shack in which they were living at the time, and used to visit them from time to time.

[7] On 31 March 2018 she woke up early. The complainant was crying saying it was painful to urinate. She and her other sibling, L[...], enquired from the child why she was crying. The complainant did not respond. They asked her again. She said that the accused had been there. He sat beside her and asked whether she was not feeling lonely or drowsy and she said no. The accused took her and put her on his lap. He shook her around.

[8] Upon hearing this, they went to the neighbour, Nonci, and told her. Nonci phoned their mother. She (the witness) spoke to their mother and told her that the complainant had said that it was painful to urinate because of the accused. Their mother warned them not to wash the complainant and said that she was on her way. They waited at Nonci's house until their mother arrived, as well as their paternal aunt. They took the complainant to the hospital.

[9] A[...] testified that she herself, did not see the accused that day, but that it was not usual for the complainant to say that it was painful to urinate. She said that the accused would sometimes visit them in the daytime when their mother was at work.

[10] A[...]’s younger sister, L[...], who was 11 when she testified, was also admonished to speak the truth. She immediately proceeded to explain what had transpired before she woke up that morning and was warned to refrain from doing so. She continued to describe how the complainant’s crying woke her that morning, and she saw the child sitting on the bucket used for urinating. The accused was present. He said that the child might be crying because her wound was painful. She confirmed that the complainant did have a big wound on one of her knees and other

smaller ones covering her legs.² She called the child to come and sleep with her and her sister who were sharing a bed.

[11] The accused, who had been sitting on their mother's bed (which their mother used to share with the complainant), put on his shoes and left. He said that he was going to buy bread. He was later brought back. They expected him to be there as their mother would normally give him money to buy bread for them. He sometimes slept on their mother's bed when their mother was present.

[12] After he had left, the complainant told them that the accused had arrived and had asked her if she was not lonely or drowsy, and that she had said she was not. He put her on his lap. He made movements. She said that she cried when he did this. Thereafter it was painful to urinate. The complainant was wearing a nighty.

[13] During cross examination it was put to her that when she woke up the complainant was crying and the accused was sitting on her bed trying to console her. The witness replied that when she awoke, the accused was sitting on her mother's bed but the child was on the urinating bucket. She agreed that when she asked the child why she was crying, the accused had said that he had disturbed the child's wound, and that it could be that her wounds were painful. He then said that he was just going to buy bread, and that he would be back.

[14] It was further put to her that the accused had disturbed the child's wound when he was pulling her blanket in order to make the bed. She responded that she was unable to comment as she had been asleep. She could not remember whether the accused sometimes made her mother's bed. She said that they used to lock the exit door to the shack at night but then forgot to lock it in the morning after their mother had gone to work.

[15] The 34 year old mother of the siblings, A[....]² T[....] told this court that the accused had been known to her since 2017. He had built the shack in which they had been living at the time from material which she had purchased. After she and the girls had moved into the home which the accused had built for them, she asked her

² L[....] explained that these wounds on her little sister's legs were caused by dirty water.

cousin if the accused could move into their old shack which belonged to her cousin. Her cousin agreed.

[16] She said that on 31 March 2018 the complainant was awake when she left for work early in the morning (about 5.30) without locking the door behind her. It was on a weekend. There was no public transport close by. She awoke the accused who lived nearby and asked him to escort her on foot to Hiway taxi rank. He did. While they were waking together, his phone kept on ringing. She boarded a taxi at the rank just before 6.30am.

[17] She explained that she had laid charges against the accused because her neighbour had phoned at about 9am that day and had told her that something had happened. When she spoke to L[...] on the phone, L[...] told her that the complainant had been crying, and had said that the accused had done “dirty” things to her.³

[18] She responded to this information by phoning the street committee. Thereafter she phoned the accused who told her that he was at Hiway. She asked whether he had money and then asked him to buy some bread from the Rhino store and bring it to the children. She then went to the police who escorted her to her home. The accused was there. He had been assaulted by the community members. She did not interact with him at all. He however spoke to her and said that he did not do what he was being accused of. The police took the accused and said that both he and the complainant had to be taken to Cecilia Makawane Hospital (“CMH”). The complainant never told her what had transpired between her and the accused.⁴ All that happened was that she asked the child whether it was still painful to urinate.

[19] When they reached the hospital a male doctor said that he would take vaginal swabs. The complainant refused to part her legs. She had to have nil per mouth for six hours after which she was anaesthetised. After the examination a female doctor told her that something had been done to the child’s vagina and her anus. The

³ The evidence is not clear in this respect. According to A[...] it was she, and not L [...], who spoke to their mother on the phone and told their mother that the complainant had said “that it was painful to urinate because of the accused”. L[...] too, did not say that she herself spoke to the mother. The mother however was adamant that she spoke to L[...] on the phone, who told her that the child had been crying and had said that the “accused did dirty things to her”.

⁴ This, despite the fact that the child was in her company for at least eight hours before the child was medically examined.

doctor asked her what had happened. She responded by relaying what had been told to her. She spent the night at the hospital with the complainant who was discharged the following day.

[20] She agreed that she sometimes told the accused to collect money from her home and to buy bread for them from Rhino store near the Hiway taxi rank as it was cheaper there. When she did not have money she would in any event phone the accused and ask him to buy bread for them. She denied that the accused ever cleaned their home or made the beds.

[21] She admitted that the complainant had healing sores on her legs and below her left knee. She was unable to say what had caused them.

[22] During cross examination it was put to her that the accused had returned to her house after he had escorted her to the taxi rank as there was left over chicken which he wanted to eat. She admitted that there was left over chicken at her home. She admitted that the accused used to visit her house in her presence. She said that he also went there in her absence when she asked him to. She denied however that she had in the past asked the accused to check up on the girls from time to time. She denied that he helped with domestic chores, but when it was put to her that he swept her floor and made her bed on 31 March, she replied "I wasn't there".

[23] She said that he was like a brother to her and that she used to invite him for meals. She denied that he was her boyfriend. When it was put to her that she and the accused used to sleep together in her shack on weekends when the children were visiting their grandparents, she said that the accused would sleep there to look after the shack when she was doing nightshift and the children were away. But when she did nightshift when the children were there, they would either stay at home and Nonci the neighbour would look after them, or they would go and stay with Nonci.

[24] The complainant (O[....] T[....]) is nine years old and in grade four. On 3 March 2018 she was six, having been born on 12 October 2011. On 30 May 2018 forensic social worker Captain Thomas assessed her for competency as a witness, and concluded that she managed to identify the difference between the truth and lies and that she was able to distinguish between right and wrong. After having questioned her, I arrived at a similar conclusion but had to admonish her, as she did not

understand the import of taking the oath. She told me that her friends called her “Matete” and that I could do the same.

[25] The prosecutor had some difficulty in taking Matete back to the alleged crime scene. She admitted that she knew who the accused was, but said that she did not see him on the day he was arrested. The accused’s representative agreed that the prosecutor could refresh the child’s memory by taking her back to the day on which the accused was present and she was crying while sitting on the urinating bucket, as this was in any event, common cause. The prosecution set the scene accordingly.

[26] Thereafter the complainant was asked twice why she was crying on that day. She failed to respond and said (changing over from isiXhosa to English) that she did not understand the question.

[27] After the child had explained how the accused had entered the house, she indicated that she was tired and hungry and wanted to take a break. Immediately after the break she was asked whether the accused had said anything when he entered the bedroom. Her immediate response was that when he entered the room, he said she must not tell anything to anyone, because he was going to kill her. She did not know what it was that she was not supposed to disclose. She was asked whether the accused did anything to her. She confirmed that he did.

[28] Thereafter the prosecution applied for the witness to demonstrate what had happened to her with the use of anatomically correct dolls. She was given four fully dressed dolls: a male and a female adult, and a male and a female child. She selected the male adult and the female child. Thereafter, with some difficulty, she placed the fully clothed male doll on his back with the fully clothed female doll sitting on top of him, facing him, in a straddling position, with his hands on her waist.

[29] The prosecutor asked whether anything happened while they were in that position. The witness did not respond. She was asked whether she wanted to say anything. She remained mute.

[30] Thereafter the witness demonstrated that the nighty she had been wearing reached just below her private parts. She confirmed that she had been wearing panties as well, made from a soft texture. She said that the accused was wearing

long trousers. She was asked whether she felt anything. She said yes. When asked what she felt she initially did not respond and then said "I don't know". When asked where she felt "this thing", she replied "in my sisi", clarifying that this is the part of her body she uses for urinating. She was asked again how it felt. She remained silent. Then she said that she was thinking, and eventually (after at least ten seconds) said that it was painful, but that she did not know what had caused the pain. When again asked what was causing her pain, she again replied in English that she did not understand. The prosecutor eventually managed to extract from her that when she felt the pain, her "sisi" was on the accused's urinating part.

[31] At this stage I intervened and suggested that she be permitted to refer to the anatomically correct dolls to assist her to identify body parts. The response from the prosecutor was quite unexpected. I was addressed from the bar in the following words: "My lady the reason why I wanted to use dolls, I wanted her to demonstrate the position because, my lady, they were fully dressed, both of them. The child was dressed up, they were not naked." The proverbial horse having bolted by then, I admonished the prosecutor not to testify from the bar, and allowed the trial to continue.

[32] The child was again silent when asked why she had referred to the accused's urinating part. When persistently pressed to explain what it was that she felt on her "sisi", she again said "I do not know". The question was repeated. The witness still did not answer. She was then asked whether the accused had removed his trousers. Not knowing where the prosecutor was about to go, I disallowed the obviously leading and possibly incriminating question. When asked where her urinating part was in relation to that of the accused, she said in English: "I don't understand".

[33] Thereafter the complainant appeared to be demonstrating something with the dolls, but the intermediary's microphone was not working and the proceedings had to be aborted, and it was arranged for the trial to continue the following day, as the witness was tired.

[34] The next day the prosecutor repeated the last question from the day before, which the witness had indicated she did not understand. It was the first question of

the day. This time the child did not hesitate. Her prompt response was: “They were attached to each other”.

[35] She was again asked to use the dolls to demonstrate. By this time it was apparent that no evidence of the accused raping the child by inserting his penis into her vagina and into her anus would be forthcoming, and furthermore, that it was never the State’s intention to present evidence of this nature. Indeed, I was informed that it was always the State’s case that both the child and the accused remained fully clothed throughout the course of the experience which the child had been pressed to describe.⁵

[36] Matete was again asked to demonstrate, using the dolls, what had happened while she was sitting on top of the accused. The child remained motionless. So did the dolls. The question was repeated. She eventually said that the accused had made some movements. When she was asked whether she felt anything on her urinating part there was once again no answer forthcoming. The question was repeated. The silence continued. The child was then asked how her urinating part was after the movements. She eventually replied that it was painful. When asked whether the accused made the movements several times or for a short while, she said that he stopped after a short while, as she had said that she wanted to urinate. Later in her evidence, when asked whether the accused made soft or hard movements, she said that he made the movements “strongly”. When asked whether his urinating part was soft or hard, she said that it was hard.

[37] She added that it was before she had gone to urinate that the accused had warned her not to tell anyone otherwise he would kill her.⁶ She testified that she did not have an urge to urinate and that it was painful to try. It had not been painful on other occasions and she cried on this occasion. Her crying awoke L[...], who asked why she was crying but she did not respond. The accused did however. He said that it could be that her septic wounds were painful. She did not respond to this

⁵ At this stage the prosecution submitted that it would be contended at the end of the day, with the help of medical evidence that penetration did occur even though both parties were fully clothed, despite the fact that this was not mentioned in the summary of substantial facts or in an opening statement.

⁶ When she commenced with her evidence in chief, the complainant volunteered that this was the first thing that the accused had said when he had entered the shack.

suggestion. During her evidence, she confirmed that she did have a septic wound on her knee, but said it was not painful. The pain was already subsiding, she added.

[38] She continued to explain that the accused left thereafter, saying that he was going to buy something. She lay on the bed with her two sisters. By this stage she had stopped crying. She told them what had happened to her (for some reason the prosecutor did not pursue this line of questioning but instead questioned the child about the visibility and whether anyone else had entered the house after her mother had left and before the accused had arrived, to which she replied no). She said the accused did not make her bed that morning.

[39] During cross examination it was put to her that the accused had visited her home because he wanted some meat that was left over from dinner the previous night. Her response was that he was not telling the truth, and that they did not eat meat the night before.⁷ It was put to her that the accused warmed the meat and then asked if she was not hungry, and also went over to the bed where her siblings were sleeping to check whether they wanted food. She repeatedly said: “He is not telling the truth – he tells lies”. It was put to her that the accused had asked her to get up so he could make the bed. She denied this. It was put to her that the accused would say that when she was standing on the bed, preparing to move to her sisters’ bed, he pulled the blanket and she said “ouch”. He realised that he had disturbed a wound as he knew that she had wounds on her legs. He sat on the bed, pulled her towards his knee and comforted her, patting her on the back and apologising for hurting her. She denied that any of this had happened but agreed that her sister woke up while she was on the urinating bucket, that her sister asked why she was crying and that she had failed to respond. She also admitted that the accused had explained to her sister that he had removed the blanket from her, and that during the course of doing so, he had irritated and aggravated one of her sores. She agreed that she thereafter joined her sisters in their bed, but denied that the accused then proceeded to make her bed or that he swept the floor and tidied the shack. She also admitted that he told them that he was going to buy bread.

⁷ This is in contrast to the evidence of her mother who not only confirmed that they had left over meat from dinner the night before, but specified, as the accused did, that it was chicken.

[40] She denied that the accused used to check up on them when their mother was absent.⁸ She admitted that he regularly visited them when her mom was at home.

[41] In response to the court's questions, she said that she was taken to hospital and that she did not see the accused when he returned. She also said that she had never seen the male urinating part before.

[42] The last witness who testified on behalf of the prosecution was Ms Makinana, the forensic nurse who examined the child under general anaesthetic at CMH at 19.50 on 31 March 2018, and who had completed the medical examination report form (the "J88"). It turned out that she had just completed a forensic training course when she examined the complainant. She said that by the time she had arrived the general anaesthesia had already taken effect and she could not speak to the complainant. Present during the examination were theatre nurses, an anaesthetist, a gynaecologist and the child's mother. She spoke to the mother after the examination when she completed the J88. The information which she recorded under the section "relevant medical history" was obtained from the mother. It reads as follows: "Alleged sexual assault by a man known to her. According to the mother, the child disclosed to her friend about sexual assault. Date of incident 31.3.2018. Time plus minus 09h00."

[43] She said that the child had no physical injuries but that she had concluded on the form that the absence of injuries does not exclude physical assault. She did not observe any wounds on the child's legs despite having had sufficient opportunity to conduct a full and thorough examination, as the child was under anaesthetics.

[44] She observed bruising to the urethral orifice, the labia minora and the posterior fourchette. The latter had a small laceration. The hymenal tissue was scanty with bruising at the three 'o' clock position. The vagina was not bleeding and did not present with any tears or discharge. The cervix was not visualised and the perineum was not injured. She noted that her findings were consistent with fresh vaginal penetration.

⁸ This denial is in contrast with A[....]'s evidence.

[45] There were no anal abnormalities detected except for a fissure on the orifice at the six 'o' clock position. She noted this finding to have been consistent with penetration. During her evidence in chief she qualified what she had noted and said that the anal penetration was also fresh. She concluded that the injuries were caused by blunt force.

[46] She was asked whether these injuries could have been caused while the child, wearing panties, was straddled atop her assailant, wearing trousers. Her response reads as follows:

“ ... so the force that is applied caused these injuries ... I don't know about wearing a panty but the force applied is the one that cause the injury ...”

[47] When I asked her whether her answer would have been the same if the assailant was also wearing trousers, she appeared somewhat taken aback and repeated:

“My lady, I don't know about the trouser, but as an examiner, those injuries are caused by the force applied to the area.”

[48] She added that the posterior fourchette is very close to the anus, so if penetrating blunt force had caused the vaginal injuries, it could have caused the anal injury too. Only hard objects can cause these types of injuries she concluded.

[49] When I enquired from the witness why she was of the opinion that the injuries were fresh, her response was of no assistance. She simply repeated that the wounds were fresh, that the lacerations were fresh and that the bruises to the urethral orifice were all fresh. When I tried to clarify, the witness said that the injuries were sustained within 72 hours of her examination. She explained that a fissure is a cut or a laceration. She could not say how long the anal fissure was. She did not measure it. Poor personal hygiene could cause a peri-anal fissure, but not one in the anal orifice. When asked whether it could be caused during an attempt to expel hard faeces or by constipation, she said that hard faeces can cause a fissure “below the midline” but not above the anal orifice, as in this case. I asked her to clarify. Her response, which did not provide clarification at all in my view, was the following:

“... Because if you look at the drawing, if you look at where I’ve indicated the fissure. That is above the mid, it’s not very deep like in a case where she will be pushing hard faeces. This one is just above the midline.”

[50] She said that if the child had been injured in this fashion at about 9am (ten hours before her examination) she would have expected bleeding. She then added: “but sometimes you won’t see bleeding.”

[51] She agreed that the J88 reflected facts, as well as her findings and her opinions, but that, despite the gynaecologist having been present, and despite her lack of experience, no other health practitioner had been asked to sign off the J88 or to provide independent comment. She said that while the gynaecologist remained present throughout the entire examination, there was no specific reason why the child was not examined by the gynaecologist.

[52] I made my best endeavours to repeat to the witness what the child had described during her evidence. I then enquired whether the injuries she had observed could, for example, have been inflicted by trousers made from hard material, or a belt or a buckle perhaps, rubbing through the soft material of the child’s panties. Her response was that she could not say what had penetrated the child, except that it was blunt force.

[53] Before the State closed its case, the accused admitted that what the social worker (who had assessed the complainant for competency) had recorded in his report, correctly reflected what the child had said to him. On this point the social worker had recorded the following:

“In the case of the child concerned, she argued that Thando (close friend and neighbour) entered the house while her siblings were asleep. He then asked her if she was not bored and answered no. He then took off his shoes and got into bed. He apparently holds her tight while sleeping on the bed ...

he is reported to have hold her tied shaking his body until the child concerned wanted to pee. He then threatened to kill her if she told anyone.”⁹

[54] The 43 year old accused elected to testify in his defence. He repeated his version as put to the state witnesses. He explained that he had built the shack for the complainant and her family. When the children were away visiting their grandparents, he and their mother used to sleep together as boyfriend and girlfriend in the shack which he had built.

[55] He said that on the day in question he had anticipated that A[....]2 T[....] (the complainant’s mother) would ask him to do something at the shack as usual, so after he had escorted her to the Hiway taxi rank, he went to the shack and warmed up some of the chicken left over from dinner the previous night. He described (in line with the version which had been put to the State witnesses on his behalf), that when he pulled the blanket the complainant exclaimed (using the word “ouch”) and he observed that she was holding her knee. He checked her knee and realised that he had caused pain to her sore. He pulled her towards him and said “sorry, sorry sisi” (at this stage the witness demonstrated how he had patted the child on the back using one of the female anatomical dolls to represent the complainant). He explained that, when her sister enquired why she was crying, he had said that he was the one who had touched her sore and had caused her pain. When he saw that there was no bread in the cupboard, he decided to go to Hiway to buy some so that they could all eat the bread and meat together. Upon his return, and in the vicinity of the complainant’s shack where he had just been, two men accosted and assaulted him accusing him of having raped A[....]2’s younger child. He told them that he had just come from these children, but they just dragged him to the complainant’s shack where many people continued to assault him.

[56] A[....]2 (the complainant’s mother) arrived with the police. She never spoke to him. He spoke to her. He said: “I did not commit this offence and I will never commit it.”

⁹ The obviously confusing grammar and potentially prejudicial interchangeable use of words such as “tight” and “tied” is repeated verbatim from the report of Captain Thomas, the designated forensic social worker.

[57] He confirmed that previously he had visited the complainant's shack of his own volition to check on the shack and on the children as there were housebreakers and thugs in the area, and most of the time the door was not locked. The complainant's mother had also invited him to go there and help himself to leftover food as he did not have a stove. She had also previously asked him to take care of the children. Sometimes, when the children were at school, he went there and cleaned the shack in exchange for her kindness. He also sometimes did so when the children were present.

[58] His evidence was that on the day in question he was wearing underwear with "heavy-weight" trousers over them and a long sleeved top. He had a good relationship with the children and their mom. They had no reason to falsely implicate him, he said.

[59] During cross-examination he described the blanket as a soft one. He said that when he inspected the complainant's knee he saw that the blanket had dislodged the scab and there was a little bit of blood. He realised that this had caused her a lot of pain. When he patted her back trying to comfort her however, she resisted. She did not want to be touched. He had never touched her before, he added.

[60] He said that he did not dispute the evidence of the forensic nurse because she is an educated person. All he was disputing was "sexual activity". Upon questioning by the court he admitted that his phone kept on ringing when he was escorting A[....]2 to the taxi rank. It was a woman who wanted him to do a job for her. A[....]2 was curious about the phone calls but he had said "no, just wait" and she just laughed.

[61] After the evidence had been completed I gave the legal representatives an opportunity to prepare to address me, particularly on the question of intent. The prosecution pressed for a conviction on the main count, contending that the complainant's honest and reliable description of the manner in which the accused had placed her on top of him and the manner in which he had moved, was sufficient to prove that the accused had the requisite intent to rape, and the evidence was sufficient for a conviction of rape on the basis of *dolus eventualis*.

[62] The prosecutor conceded that the accused was a good witness, but contended that this was so only because he was sure that the youngest of the three siblings would not be in a position to describe what he had done, and because he had prepared his defence even before he set out for the complainant's shack. Indeed, so it was argued, as an inherently evil person, he had cunningly calculated and planned his every move in advance, even down to saying that he had injured the scab on her knee, in the event of her telling on him. It was contended that this was a ripe opportunity for him. He knew that the mother would be at work. He knew that the children were alone. He knew that the door was unlocked. It was further contended that his reason for having gone there in the first place was improbable and ought to be rejected as false. The reason he did not undress himself or the child was because his mischievous intent would then be too easily detected. His clandestine conduct was designed to confuse this young child. It was contended in the alternative that the accused should be convicted of attempted rape; alternatively, of sexual assault in contravention of section 5 of the Sexual Offences Act.

[63] The accused's representative on the other hand argued for an acquittal, even on the competent verdicts such as attempted rape and sexual assault. Constructive criticism, which I will deal with presently, was levelled at the paucity of the State's summary of substantial facts, and the failure of the prosecution to comply with its obligation to set out the facts it intends relying on with sufficient clarity to enable the accused to understand the case he is expected to meet. It was further contended that the prosecution had failed dismally to prove that the accused had the requisite intent to rape the complainant.

[64] Section 144(3)(a) of the Criminal Procedure Act 51 of 1977 ("the CPA") states that an indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the Director of Public Prosecutions ("the DPP"), are necessary to inform the accused of the allegations against him. The subsection makes it clear that the provision shall not be so construed that the State shall be bound by the contents of the summary. In *S v Mpetha & others (1)* 1981 (3) SA 803 (C) the issue as to what constitutes an adequate summary of substantial facts was discussed. It was held that at the very least the Attorney-General (now the DPP) is required by law to form an opinion as to the adequacy of the summary. Implicit in this

is the duty to bring a fair, objective and responsible judgment to bear upon what facts it is desirable for the accused to know in order to fully understand the allegations against him, in order to prepare for the case and to present his defence. The purpose of the summary is to fill out the terse picture invariably presented by the indictment. The greater the lack of adequate information in the summary, the greater the need for detailed particulars. Indeed, in terms of s 87 of the CPA the accused may at any stage before evidence is led, present the prosecution with a request in writing to furnish particulars or further particulars of any matter alleged in the charge. This goes without saying. I wish for the moment however, to dwell on the summary of substantial facts before me.

[65] The accused has been charged with unlawfully and intentionally committing an act of sexual penetration with the complainant in terms of section 3 of the Sexual Offences Act. The term sexual penetration includes any act which causes penetration to any extent whatsoever by –

- a. The genital organs of one person into or beyond the genital organs, anus or mouth of another person;
- b. Any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- c. The genital organs of an animal, into or beyond the mouth of another person.

[66] The summary of substantial facts, to my mind, is very clear. It does not call out for elucidation and I am not surprised that none was called for. It mentions the time and the place of the offence. It unequivocally states that the accused raped the complainant by inserting his penis (as opposed to another part of his body or an object) into the complainant's vagina and her anus. It is specific. It does not refer to the area penetrated as the genital organs or the mouth of the complainant. Indeed it cannot be more precise. It refers to the vagina, which is a closed muscular canal which extends from the outside of the female genital area right up to the neck of the uterus. Differently put, while the prosecution was quite entitled to use the much wider term of "genital organs" it elected to confine itself to a tube which is situated deeper

than most of the other genital organs, in that it is a tube designed, amongst other things, to accommodate childbirth.

[67] As I have said, the prosecution is not bound by the summary of substantial facts. However, where the evidence which the State intends to lead is so vastly different from that reflected in the summary of substantial facts, it is expected from the prosecution to either supplement the summary, and/or present an opening address. Most of the cases dealing with this aspect, traverse it on the level of prejudice to the accused. The accused is not however, the only party to these proceedings. The presiding officer forms an integral part of the composition of this court.

[68] The Prosecution Policy of the National Director of Public Prosecutions is the end result of a process of intense consultation amongst all prosecutors in this country. It has been tabled in parliament and is binding on the Prosecuting Authority. Over and above that, the National Prosecuting Authority Act 32 of 1998 requires that the United Nations Guidelines on the Role of Prosecutors should be observed.¹⁰ Any discretion exercised by an individual prosecutor must be exercised according to the law and within the spirit of the Constitution. The aim of the Prosecution Policy is to set out the way in which the Prosecuting Authority and individual prosecutors should exercise their discretion.

[69] According to this policy the prosecutor's primary function is to assist the court in arriving at a just verdict, and, in the event of a conviction, a fair sentence based on the evidence presented. The decision to prosecute, and upon which charges are formulated, must be taken with care because it may have profound consequences for victims, witnesses, accused and their families. A wrong decision may undermine the community's confidence in the criminal justice system. The Prosecution Policy specifically states that resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution.¹¹ In deciding whether or not to institute criminal proceedings against an accused, prosecutors should assess whether there is sufficient admissible evidence to provide

¹⁰ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

¹¹ Item 4 of the Prosecution Policy.

a reasonable prospect of a successful prosecution on the charges specified. Indeed, there must be a reasonable prospect of a conviction on the charges specified, otherwise, either lesser charges should be preferred, or the prosecution should not be commenced or continued. As stated in the Prosecution Policy, the assessment may be difficult, because it is never certain whether or not a prosecution will succeed. Thus, in borderline cases, prosecutors should probe deeper than the surface of written statements. Where prospects of success are difficult to assess, prosecutors should consult with prospective witnesses in order to evaluate their reliability. Factors to be considered, as specifically applicable to the case before me, are whether the evidence is strong enough to prove all the elements of the offence and what sort of impression the witnesses are likely to make.

[70] Prosecutors should decide upon, and draw up charges based on available evidence which will *inter alia* adequately reflect the nature, extent and seriousness of the criminal conduct and which can reasonably be expected to result in a conviction, provide the court with an appropriate basis for the sentence requested, and enable the case to be presented in a clear and simple way.¹² This means that prosecutors do not necessarily have to proceed with the most serious charges imaginable. Alternative charges may be justified by the amount of evidence and where such charges will significantly enhance the likelihood of a conviction. The bringing of unnecessary charges should be avoided because it may not only complicate and prolong trials, but also amount to an excessive and potentially unfair exercise of power.

[71] Item 7 of the Prosecution Policy is of particular relevance to the matter before me. It states that prosecutors should fairly present the facts of a case to *a court* (my emphasis). They should disclose information favourable to the defence (*even though it may be adverse to the prosecution case*).¹³

[72] It is with the foregoing in mind, that I return to the summary of substantial facts. To my mind it is misleading in its particularity. This is not a defect which could not have been cured by an appropriate opening address, an indulgence which has

¹² Item 6 of the Prosecution Policy.

¹³ These policies, and many more have been codified in terms of a Code of Conduct for members of the National Prosecuting Authority under section 22(6) of the National Prosecuting Authority Act 32 of 1998.

been consistently withheld from the Bhisho and Mthatha criminal courts in this Division. Section 150 of the CPA provides that the prosecutor may, at any trial, before any evidence is adduced, *address the court for the purpose of explaining the charge and indicating, without comment, to the court what evidence he intends adducing in support of the charge.*

[73] Our courts have emphasised that the prosecutor does not represent only the interests of the State. The prosecutor also represents the community at large and the interests of justice generally and has a duty to the accused to ensure that an innocent person is not convicted. In *S v Ntozini* 2009 (1) SACR 42 (E) Pickering J warned against the making of unsustainable submissions. The overriding duty of the prosecutor is not to win convictions, but to ensure that criminal justice is done. A prosecutor is expected at all times to act in a manner which is responsible and fair to the accused and to be candid and open with the court.¹⁴

[74] In my view an opening outline, explaining from the outset that the high water mark of the State's case (if all went according to plan) would be that the accused made movements up against the complainant's body while the two of them remained fully clothed, would have served the purposes outlined above. Not disclosing this in the summary of substantial facts, or at least in an opening address, has not only deprived the court of an explanation that the evidence which the State intends adducing is at odds with that which is set out in the summary of substantial facts, but may very well have the effect of depriving the accused of his Constitutional right to a fair trial. Because of what I am about to say however, it is not necessary for me to make a definitive finding in this respect.

[75] One of the main objects which the introduction of the Sexual Offences Act has achieved, is to criminalise all forms of sexual abuse or exploitation. The crime of rape has been expanded and extended to include blunt penetrative force exerted by using objects other than the instrumentality of the male penis being inserted into the female vagina. Having regard to well-documented examples of where unlawful and intentional acts of sexual penetration have been committed using hands, fingers, dangerous weapons and other similar blunt instruments, oft times inflicting far more

¹⁴ See *S v Rozani; Rozani v Director of Public Prosecutions; Western Cape & others* 2009 (1) SACR 540 (C)

serious bodily and psychological harm than that which may potentially be inflicted by the external male organ primarily designed for urination and copulation, the introduction of the Sexual Offences legislation has been welcomed.

[76] Prosecutors are however, expected to be vigilant and to avoid artificial reasoning in their approach to matters which would under the previous regime, not have been elevated to anything more serious than what was termed “indecent assault”, the elements of which coincide with “sexual assault” as referred to in s 5 of the Sexual Offences Act.¹⁵ The definition of “sexual violation” as set forth in s 1 of the Act and as applied to the evidence before me, would include any act which causes direct or indirect contact between the genital organs or anus of one person, and any part of the body of another person, or any object, including any object resembling or representing the genital organs or anus of a person, but does not include the act of sexual penetration, which includes any act which causes penetration by the genital organs of one person into or beyond the genital organs or anus of another person.

[77] The somewhat novel and fascinating argument contended for by the prosecution has no support in the facts, and has no place even in the extended definition of rape as provided for in the Sexual Offences Act. There is nothing before me to suggest that the accused intended to, or attempted to commit an act of sexual penetration with the complainant, as provided for in the Act. As I understand it, the prosecution seeks to rely on intention to rape in the form of *dolus eventualis* – another even more novel and fascinating attempt to develop the law to cover a multitude of sins it was never intended to cover. Insofar as it may be necessary to provide reasons for rejecting such far-fetched and spurious conjecture, I will be brief. Application of *dolus eventualis* to the scenario which the prosecution has attempted to sketch will go something like this: The fully clothed accused, in making the movements vaguely described while he held the fully clothed complainant on his lap, acted with intention to rape in the form of *dolus eventualis* if the commission of the act of rape was not his main aim but:

- a. He subjectively foresaw the possibility that, in striving towards his main aim (presumably to assault the child by rubbing himself up against her while

¹⁵ Section 5 states that a person who unlawfully and intentionally sexually violates a complainant, without the complainant’s consent, is guilty of the offence of sexual assault.

they were fully dressed), the act of rape (on the State's case penetrating both her vagina and her anus with his penis) may be committed, and

b. He reconciles himself with this possibility.¹⁶

[78] Burchell and Milton's definition and the learned authors' comments on foresight are insightful. They put it thus:

'*Dolus eventualis* exists where the accused foresees the possibility that the prohibited consequence might occur, in substantially the same manner as that in which it actually does occur, or the prohibited circumstance might exist and he accepts this possibility into the bargain (ie is reckless as regards this possibility). The requirements of *dolus eventualis* in consequence crimes are, therefore: (a) foresight, (b) possibility, (c) correlation between foreseen and actual manner of consequence occurring, and (d) recklessness.

Intention in the form of *dolus eventualis* relates to circumstances or consequences which the actor does not plan or desire but which, in the light of human experience, can be expected to follow if the actor proceeds with the planned course of action. *Dolus eventualis* thus has as its focus those circumstances or consequences which are expected and which the actor has realised will come about.'¹⁷

[79] To suggest that, in the light of human experience, it can be expected that such actions as described by the complainant will result in the actor's penis penetrating the vagina and the anus of the victim, is absurd and deserves to be rejected outright.

[80] That then leaves me with the competent verdict of sexual assault. In order to determine whether the prosecution has proved beyond a reasonable doubt that the accused is guilty of a contravention of s 5 of the Sexual Offences Act, I will briefly traverse the cautionary rules which apply to the complainant.

¹⁶ See C.R. Snyman: *Criminal Law* 5ed 2008 page 184

¹⁷ Jonathan Burchell and John Milton: *Principles of Criminal Law*: 3ed 2005 page 467

[81] Not only is the complainant a child. She is also a single witness. Her evidence must accordingly be evaluated with caution. Section 208 of the CPA provides that an accused may be convicted on the single evidence of any competent witness. It is however a well established judicial principle that the evidence of a single witness should be approached with caution. The correct approach to the application of this so called cautionary rule was set out by Diemont JA in *S v Sauls and Others*.¹⁸ The process of reasoning which is appropriate to the application of the cautionary rule in any particular case will depend on the nature of the evidence which the court has before it. There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial judge is bound to weigh the evidence, consider its merits and demerits, and, having done so, will decide whether, despite shortcomings or defects or contradictions in the testimony, the truth has nevertheless been told. A final evaluation can rarely be made without considering whether such evidence is consistent with the probabilities.¹⁹ Where the evidence of the single witness is corroborated in any way which tends to suggest that the story was not concocted, the caution enjoyed may be overcome and acceptance facilitated. A court will usually find it profitable to compare the nature and quality of the complainant's evidence with that of the accused.²⁰

[82] In the matter before me the child complainant falls into the classical category of a single witness. Evidence from her siblings that she told them that the accused put her on his lap and shook her around or that he made movements, does not serve as corroboration for her version. At best it shows that she has, to some extent, been consistent. In my view the medical evidence also does not corroborate the complainant's version. On the contrary, it tends to suggest that it is unlikely that the injuries which were observed when the complainant was examined were caused by the event which the child had described.

[83] It is in any event trite that the evidence of young children should be treated with the utmost caution owing to the dangers inherent in such evidence.²¹ Children are, by their very nature, imaginative. They are prone to suggestibility. These are but two of the elements against which the trier of fact should guard. The primary concern

¹⁸ 1981 (3) SA 172 (A) at 180E-G

¹⁹ See *S v Texeira* 1980 (3) SA 755 (A) 761

²⁰ See *Maake v DPP* [2011] 1 All SA 460 (SCA) at [6-8]

²¹ See *R v Manda* 1951 (3) SA 158 (A) at 162.

of this court as the trier of fact is to ascertain whether the evidence of a young witness is trustworthy. The concept of trustworthiness was examined by the court in *Woji v Santam Insurance Co Ltd*²². The court found that it comprises the following four components:

- a. The capacity for observation;
- b. The power of recollection, which depends on whether the child has sufficient years of discretion to remember what occurs around her;
- c. Narrative ability, which raises the question whether the child has the capacity to understand the questions put, and to frame and express intelligent answers;
- d. Sincerity, or a consciousness of the duty to speak the truth.

[84] It is clear from what I have already mentioned, that even without invoking cautionary rules, the complainant's evidence has failed to pass muster as being satisfactory in a number of respects. The prosecution had grave difficulty in extracting information from her. She either failed to respond altogether to relatively simple questions, or she said that she did not understand them. Indeed, she sometimes seemed quite bewildered, and more than once indicated that she did not know what she was supposed to say or that she did not know the answer to the question. This happened on at least 16 occasions. I noted that when she was asked how her urinating part felt, she first declined to answer the question, and then said that she was thinking. She remained in this state of contemplation for at least ten seconds before replying that it was painful. When she was asked where the accused's urinating part was in relation to hers, she first said that she did not understand the question. Yet, when the question was repeated the following day, she replied without hesitation that their urinating parts were attached to each other, which, on her own version (that no clothing was removed), could simply not have happened.

[85] Other extraordinary features of the evidence which may well have some bearing on the strength of the State's case is the fact that the complainant's mother

²² 1981 (1) SA 1020 (A) at 1028B-D

laid a charge of rape against the accused based on a single telephonic conversation with L[...] who told her that the complainant had said that the accused did “dirty” things to her. From this, and without ever enquiring from the complainant herself as to what had transpired, she extrapolated the information which she gave to the medical nurse, to the effect that the child had been sexually assaulted. I also found it uncomfortably out of place that her most vivid recollection of what transpired that day, was the fact that someone (who turned out to be another woman) persistently pestered the accused telephonically while he was meant to escort her to the taxi rank.

[86] The difference between the evidence for the prosecution and that of the accused was like night and day. The accused impressed me as a humble, unsophisticated and naïve witness who readily conceded what he had to. He gave his evidence in a clear, straightforward manner, often illustrating with physical demonstrations as if he was testifying from genuine recollection. I did not find his version of the events to be contrived or in any way fabricated or disingenuous. In my view, the prosecutor’s suggestion that he was a good witness only because he was repeating a version which he had contrived and rehearsed even before he committed the offence, is nothing more than conjecture. It is in any event unlikely that the accused would have gone straight back to the shack after having sexually violated the complainant, particularly not upon the request of the complainant’s mother, as suggested by her.

[87] It is in any event not necessary for this court to find that the complainant is a liar in order to find in the accused’s favour. Nor do I need to believe the accused. The onus is on the State to prove his guilt beyond a reasonable doubt. At the close of the State’s case this onus had not been discharged. Had the accused closed his case without testifying, I would have been constrained to invoke the provisions of s174 of the CPA and to have discharged him. Instead he elected to present his version of what had transpired on the day in question under oath. This was the same version which was disclosed in his plea explanation. This was the version that remained consistent throughout the trial, frequently fortified by the evidence of the State witnesses. A version which, in the light of the obvious hurdles which the State had failed to overcome, cannot, at the end of the day be rejected as false.

[88] In the premises it is this court's verdict that the prosecution has failed to prove its case beyond a reasonable doubt. The accused is entitled to the benefit of the doubt. He is found not guilty, and he is discharged.

I.T. STRETCH
JUDGE OF THE HIGH COURT

<i>Dates of hearing:</i>	<i>8 – 12 March 2021</i>
<i>Judgment delivered:</i>	<i>25 March 2021</i>
<i>Counsel for the State:</i>	<i>Ms Jodwana-Blayi</i>
<i>Instructed by:</i>	<i>The Director of Public Prosecutions, Bhisho</i>
<i>Counsel for the accused:</i>	<i>Ms Mtini</i>
<i>Instructed by:</i>	<i>Legal Aid Board, King William's Town</i>