

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	yes
Of interest to other Judges:	/NO
Circulate to Magistrates:	/NO

Appeal number: A333/2017

In the appeal between:

**L R
MOTSUHI MATHLOKO**

1st Appellant
2nd Appellant

and

THE STATE

Respondent

HEARD ON: 22 OCTOBER 2018

CORAM: REINDERS, J, MLHAMBI, J *et* OPPERMAN, J

JUDGMENT BY: OPPERMAN, J

DELIVERED ON: 14 DECEMBER 2018

I INTRODUCTION

[1] The appeal on convictions lies before the Full Bench after trial in the High Court: Free State Provincial Division. The predominant question is whether

the appellants had a fair trial.¹ The predicament that presents in this case is not new. In **S v Molimi** (CCT 10/07) [2008] ZACC 2; 2008 (3) SA 608 (CC); 2008 (2) SACR 76 (CC) 2008 (5) BCLR 451 (CC) (4 March 2008) a similar scenario presented:

“[1] This case raises issues of considerable importance regarding the admissibility of extra-curial statements of an accused against a co-accused in a criminal trial. More specifically, we are asked to consider the rules governing the admissibility of hearsay evidence under the provisions of the Law of Evidence Amendment Act (the Act)² in the context of the right to a fair trial and the need to prevent, among other things, procedural abuse.”

¹ The appellants were sentenced; in toto, to 20- and 15-years imprisonment respectively. The appellants were assisted by Legal Aid South Africa. The consequences of section 51(1) of the **Criminal Law Amendment Act 105 of 1997** were explained to them and they took proper cognisance thereof. The complainant testified with the assistance of an intermediary. The record shows that the procedure was proper.

² Section 3 of **Act Act 45 of 1988** (Hearsay-act) reads:

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—
 - (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
 - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the court, having regard to—
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,
 is of the opinion that such evidence should be admitted in the interests of justice.
- (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
- (3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of the account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.
- (4) For the purpose of this section—

‘hearsay evidence’ means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

‘party’ means the accused or a party against whom hearsay evidence is to be adduced, including the prosecution.

[2] The four charges involve the same complainant; a 14-year-old girl.³ The charges arraigned and convicted⁴ of were:

- 1.1 Rape⁵ in December 2015 in respect of the 1st appellant only.
- 1.2 Rape on 1 February 2016 in respect of the 1st appellant only.
- 1.3 Attempted rape⁶ in August 2016 in respect of the 1st appellant only.
- 1.4 Rape in August 2016 in respect of the 2nd appellant only.

[3] The succinct allegations⁷ against the accused are that the 1st appellant raped the complainant, his daughter. She confided in the 2nd appellant, a friend of the family and pastor in their church, in the hope that he will help her to manage the situation with her father. He also raped her. The whole incident came to the fore after a report was made to the maternal grandmother by one Thokozile.⁸ M testified about a conversation with the 2nd appellant wherein 2nd appellant declared to him that both the 1st appellant and he had sexual intercourse with the complainant. The conversation was prompted by the hearsay evidence of one Thamsanqa. The appellants pleaded not guilty and pleaded a bare denial on all the allegations.

II THE ISSUES

[4] The issues are that:

- 4.1 Hearsay evidence was provisionally admitted but the witnesses on whose testimony the veracity thereof was dependent were not called to testify. The two witnesses⁹ were made available to the defence and

³ Hereafter referred to as "P".

⁴ Record page 251, lines 13-5.

⁵ Contravention of the provisions of section 3 read with sections 1, 50, 55, 56(1), 58, 59, and 60 of Act 32 of 2007 and read with sections 256, 257 and 261 of the Criminal Procedure Act 51 of 1977, read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1977.

⁶ Contravention of the provisions of section 55 read with sections 1, 50, 56(1), 58, 59, and 60 of Act 32 of 2007 and read with sections 256, 257 and 261 of the Criminal Procedure Act 51 of 1977, read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1977.

⁷ The State's case consisted of the evidence of the maternal grandmother, the complainant, the intermediary, the complainant's mother and the person (Hereafter referred to as "M") to whom 2nd appellant allegedly confessed. There was not any Medico-Legal evidence adduced. The appellants cases consisted of their own evidence.

⁸ Hearsay-witness.

⁹ Thamsanqa and Thokozile.

they also elected not to call them to testify. The court did not make any ruling on the admissibility of the evidence at any stage.

- 4.2 M testified, after information received from Thamsanqa, that the 2nd appellant informed him that he and the 1st appellant had intercourse with the complainant. The court did not deal with the admissibility of the evidence but took it into account as corroboration of the complainant's evidence.

Section 219 of the **Criminal Procedure Act 51 of 1977**¹⁰ that provides that: "No confession made by any person shall be admissible as evidence against another person." A confession made by one accused should be excluded when determining the guilt or otherwise of his or her co-accused. The confession must, moreover, be admissible in the first instance against the maker thereof.

- 4.3 There is a real issue whether the facts proved the offence of attempted rape on count 3.
- 4.4 The court *a quo* evaluated the veracity of the complainant's evidence, amongst others, on the support of the evidence of the hearsay-witnesses and the evidence of M. Concisely, the grounds of appeal forwarded by counsel for the appellants question the finding of the court that the complainant was a credible witness notwithstanding contradictions in her and the other State witnesses' evidence. The complainant previously made allegations of rape against another man but later withdrew it. The complainant, according to the appellants, never described "the act" that was committed. The claim is that the versions of the appellants should have been accepted as reasonably possibly true.

- [5] The State's case *vis-a-vis* that of the appellants on the facts itself forms the evidentiary basis on which the fairness of the trial must be adjudicated. The

¹⁰ CPA.

other three issues are matters of law; the hearsay evidence, the confession by the 2nd appellant and the permissibility thereof against the 1st appellant and himself and lastly; prove of attempted rape. The conspectus of evidence is vital. (**S v Trainor** 2003 (1) SACR 35 SCA) The golden rules applicable to appeals will be the compass.

III THE LAW: APPEALS

[6] The general principles according to which a court of appeal should consider the case are set out in **R v Dhlumayo** 1948 (2) SA 677 (A).

6.1 The court of appeal must bear in mind that the trial court saw the witnesses in person and could assess their demeanour. That was stated seventy years ago and it is still true; especially in cases where sexual offences are involved. If there was no misdirection of facts by the trial court, the point of departure is that its conclusion was correct.

6.2 The court of appeal will only reject the trial court's assessment of the evidence if it is convinced that the assessment is wrong. If the court is in doubt, the trial court's judgment must remain in place (**S v Robinson** 1968 (1) SA 666 (A) at 675H).

6.3 Courts of appeal have greater liberty to disturb findings of a court *a quo* when dealing with inferences and probabilities (**Minister of Safety and Security v Craig** 2011 (1) SACR 469 (SCA) at [58]).

6.4 The court of appeal does not zealously look for points upon which to contradict the trial court's conclusions and the fact that something has not been mentioned does not necessarily mean that it has been overlooked.

IV RULING ON POTENTIALLY INADMISSIBLE EVIDENCE AND EVIDENCE IN GENERAL

[7] Trial courts must rule on issues of admissibility and do so timeously. These courts must provide reasons for findings. They must diligently apply their

minds and cause procedural safeguards against unfair hearings and misfortune to the administration of justice. What might be a strong case on the word of the victims of crime might become a sad acquittal of criminals that burdens the balance of righteousness and justice in a democratic society.

- [8] In **S v Van Der Berg and Another** 2009 (1) SACR 661 (C) it was correctly stated that the failure to give reasons for findings in trial courts places the Court of Appeal at a distinct disadvantage. Conflict in evidence is not resolvable solely by reference to record. The consequence is that it is not possible to reject the evidence of appellants as not reasonably possibly true. Therefore, the issue in dispute has to be approached on the basis of the evidence tendered by the appellants.
- [9] A presiding officer is under a duty to prevent inadmissible evidence and may not listen passively as the record is turned into a “papery sump of evidence”.¹¹
- [10] The inadvertent consequence of allowing inadmissible evidence is the effect it has on the legitimacy of our criminal justice system. In **S v Basson** 2007 (3) SA 582 (CC) the Constitutional Court ruled that the impartiality of a judicial officer¹² is crucial to the administration of justice. So too is the perception of his or her impartiality. The test for independence of the presiding officer should include that perception. A judicial officer must not only conduct the trial open-mindedly, impartially and fairly, but such conduct must be “manifest to all those who are concerned in the trial and its outcome especially the accused”.¹³ Inadmissible evidence might be perceived to have contaminated the final ruling of the trier of fact.
- [11] An accused cannot be ambushed by the late or unheralded admission of hearsay evidence; or of any evidence for that matter. The trial court must be asked clearly and timeously to consider and rule on admissibility. This

¹¹ **S v Molimi** supra at [36].

¹² **Van Rooyen & others v The State & others (General Council of the Bar of South Africa Intervening)** [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at [32].

¹³ **S v Le Grange & others** [2008] ZASCA 102; 2009 (1) SACR 125 (SCA) at [16].

cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the evidence and, before the State closes its case, the trial Judge must rule on admissibility. This is so that the accused can appreciate the full evidentiary ambit he or she faces.

- [12] Whilst, *in casu*, the admissibility of the evidence is governed, in large measure, by the provisions of sections 219 and 217 of the CPA and the law on hearsay. The question of admissibility has significant constitutional implications. Section 35(5) of the **Constitution of the Republic of South Africa, 1996** provides that:

“Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.”

- [13] There are accordingly two separate but related inquiries that have to be made in determining the admissibility of evidence namely, whether the statutory requirements referred to above have been satisfied, and whether in all the circumstances the accused has had a fair trial. Constitutional admissibility is paramount.

V **THE HEARSAY EVIDENCE, CONFESSIONS AND SECTION 219 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977**

- [14] Two instances of hearsay evidence that were allowed provisionally occurred during the trial. The witnesses were never called to confirm the veracity thereof. The court did not deal with it in her judgement.

14.1 The first occasion¹⁴ was the evidence of Thokozile. Thokozile said that what he/she is going to tell the grandmother is serious. Thokozile asked why the grandmother does not take the complainant to come and stay with them. The grandmother informed that “P (Complainant) was found having sex with the child.” Thokozile got her information from Thamsanqa.

¹⁴ Record page 11 line 15 to page 12 line 19.

14.2 It was indeed an oversight by the presiding officer to not declare on the Thokozile-hearsay in her judgement explicitly. It is however clear from her judgement as a whole that she disregarded it and that it was immaterial to the final conclusion she came to.

14.3 The Thamsanqa-hearsay is not that simple. The record shows that Thamsanqa went to M for protection against the 1st appellant because he had sexual intercourse with his then 13-year-old daughter, the complainant. Thamsanqa told M that it was not the first time that the complainant had sexual intercourse. M testified that:

“At the meeting, I told the people that Thamsanqa said to me he did, it did not feel to him that it was the first time P had intercourse. Then accused 1 stood up and said he is satisfied. When we left, I went to accused 2’s home to ask number 2 why did accused number 1 said he is satisfied after he heard that it was said that Thamsanqa felt that it was not the first time that sexual intercourse was held with the child, he was satisfied with that.”

14.4 M used this report to confront the 2nd appellant and the fatal report of the 2nd appellant eventuated therefrom. It is the proverbial fruit from the poisonous tree. The verbatim evidence of M is the following:

“Accused number 2... then accused number 2 said to me: “You know, that person wanted to run away, because he was afraid that he will be asked who broke the virginity of the child.” I then asked him: “In other words you want to tell me that that child’s father had intercourse with her?” He said yes. He then asked me: “Will you be surprised if I tell you that I also had intercourse with the child?” When I was about to ask him more questions Thamsanqa arrived. We stopped talking.”

14.5 The court relied extensively on the above evidence in her judgement without any ruling on the admissibility against the 1st appellant or the 2nd appellant. She stated the following about the evidence of M:

“His version in my opinion connects the dots that indeed accused 2 admitted to him what was going on. His version explains accused 1’s behaviour of readily accepting an apology from Thamsanqa when he knew very well that it was wrong from Thamsanqa to have sex with a minor. His version explains why accused 1 knew, that accused 1 knew that if more noise was raised surrounding P’s sexual activities, it will eventually come out that he is actually the first to have sexual

intercourse with his daughter. This also explains accused 1's behaviour and insistence that the mother should take the child to the clinic for contraception.

In my opinion when accused 2 made these admissions to M, he was of the view that all was done and dusted and their acts will be buried and forgotten. This Court therefor accepts M was an independent and truthful witness with no agenda against the two accused. The Court also accepts his version that accused 2 made admissions to him."

14.6 The 2nd appellant's report is more than a mere admission. Having committed an act of consensual sexual penetration with a child as contemplated in section 15 of the **Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007** is a competent verdict on rape.¹⁵ The premise will be that the statement of the 2nd appellant is a confession and to such an extent that it is fatal against the 1st and 2nd appellants. In context with the evidence of the complainant and the charges it is a confession. It is a confession of an accused against a

¹⁵ Criminal procedure Act 51 of 1977: Competent verdicts
Section 261 Rape, compelled rape, sexual assault, compelled sexual assault and compelled Sexual Assault.

- (1) If the evidence on a charge of rape or compelled rape, as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of—
 - (a) assault with intent to do grievous bodily harm;
 - (b) common assault;
 - (c) sexual assault as contemplated in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
 - (d) compelled sexual assault as contemplated in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
 - (e) compelled self-sexual assault as contemplated in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
 - (f) incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
 - (g) having committed an act of consensual sexual penetration with a child as contemplated in section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
 - (h) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, the accused may be found guilty of the offence so proved.
- (2) If the evidence on a charge of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, does not prove any such offence but the offence of—
 - (a) common assault or;
 - (b) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

co-accused. **Mudau v The State** (1148/2016) ZASCA 34 (29 March 2017)

“[10] It is trite that a confession must conform to the rigidly defined requirements specified in s 217. Failure to satisfy any of the requirements will render it impermissible to tender the statement as a confession. In *R v Becker* it was said that a confession can only mean an unequivocal acknowledgment of guilt, the equivalent of a plea of guilty before a court of law. It is therefore an extra-curial admission of all the elements of the offence charged. Similarly in *R v Hans Veren & others*, it was said that the accused must in effect have said ‘I am the man who committed the crime’. Thus, a statement will not be regarded as a confession where it is made with an exculpatory intent. The decisive factor is whether the accused has admitted all the essential elements of the offence.”

VI THE ADJUDICATION OF THE FACTUAL EVIDENCE BY THE COURT A QUO

[15] The complainant's case¹⁶

15.1 The issues that crystallised against the evidence of the complainant is her lies to her mother, her lies about previous sexual intercourse, the reporting of the rapes and the act of rape.

15.2 “Reporting of a rape is not an exact science.” The Acting Judge had the correct approach when she also noted that:

“One of the accepted principles in sexual offences cases is that the complainant is expected to make a report at the earliest convenience. This, however does not

¹⁶ **Cele v State** (AR191/13) [2016] ZAKZPHC 4; [2016] 2 All SA 75 (KZP) (12 January 2016):

“[1] How does an appeal court approach the evidence of a single witness, a child testifying at the age of eight years about an accused allegedly raping her three years earlier? With caution and common sense, the authorities say. Children are both ‘highly imaginative’ and open to ‘suggestions by others’. Caution in the context means applying common sense to assess whether the truth has been told and the evidence is trustworthy. Caution cannot displace common sense. Credibility must be assessed ‘in the light of all the evidence’. Caution is exercised not inflexibly but practically to avoid ‘injustice to the innocent’ and, I add, the injured. The trier of fact should be aware of the risks of a wrongful conviction arising from the evidence of a single witness in the prosecution of a sexual offence and, I add, a guilty person being erroneously let loose on society. The traditional assumption that the motive to falsely implicate an accused is prevalent in sexual offences must be balanced with the ever-increasing prevalence of rape, particularly of children, often by people they know. Corroboration as independent evidence that confirms the testimony of a witness provides a safeguard. To be relevant and material such corroboration must point to the guilt of the accused.

[2] Consistency is another safeguard, bar the rule against self-corroboration. Reporting the offence is not corroboration but goes to consistency of the complainant's version. Demeanour is not decisive of a witness's credibility but could reinforce an objective assessment on the possibilities. Against the backdrop of these trite rules of evidence I turn to analyse the evidence in this case.”

mean that failure to report timeously means a person was not raped. We have to look at the circumstances surrounding the failure.¹⁷

In this instance it is common cause that the complainant has had sexual intercourse with Thamsanqa and possibly her boyfriend.

- 15.3 According to the trial court the reporting of the incident with Thamsanqa had catastrophic consequences for the complainant. At the age of 13 the complainant had intercourse with a 24-year-old man. She reported it as rape. The complainant explained why she reported the intercourse to be without consent. She testified that she first refused but Thamsanqa was angry and she gave up and consented. In the youthful laypersons mind, she did not know that subjected to threats it does not amount to consent. She clearly knew that it was wrong and will draw the annoyance of her parents and other adults. During the family meeting around the issue Thamsanqa's defence was that it was consensual intercourse. The manner in which the matter was dealt with, according to the trial court, shows that Thamsanqa was given the benefit of the doubt; even by her own father. They were admonished.
- 15.4 The court *a quo* held that it is therefor, not surprising that after the first and second incident with the 1st appellant she was afraid to tell and thought that her father will assault her. According to her he did threaten her with violence after the incidents occurred.
- 15.5 Right after the third incident with her father she went to the 2nd appellant, told him what is happening and requested him for assistance. She did not want her father to be arrested, she only wanted him to stop.
- 15.6 At this instance she was informed by the pastor and friend, the 2nd appellant, that helped her in the Thamsanqa-incident and whom she

¹⁷ Record page 233, lines 13-17.

trusted, that she must not tell her mother because it will “break the families.”

- 15.7 The complainant told the court that her paternal grandmother did not want to believe her and called her a liar.
- 15.8 She loved her father and her testimony reflects it. The judgement of the court *a quo*: “I tried my level best to find out why would P choose the two people she respected most and implicate them. Bearing in mind that one is the father she loved so much and whom she had no problems with. I could not find an answer to this, even though I tried my best. She was right when she said that she thought they will not believe her. It was her word against two figures of authority in the community.”
- 15.9 She did not go straight to the authorities, according to the court *a quo*, because during the incident with Thamsanqa there was a family meeting, everybody apologised and that was the end. She decided to follow this route. The complainant does not want anything bad to happen to the two accused. All she asked for was for the pastor to speak to her father to stop.
- 15.10 The court summated that rape is not child`s play and there are no hard and fast rules as to how people should behave or what they should do after going through the experience. Not everybody tells the first person they come across. People behave differently and cannot be expected at all times to tell the first person they come across.
- 15.11 The credibility of the complainant was investigated and pondered by the presiding officer. She warned herself that the complainant is a single and child witness. The reality, she pointed out, is that it will never be surprising that a victim of a sexual offence will be a single witness considering the act itself. As she stated: “There is no man

that will have sexual intercourse with a minor in the open, especially if the minor is a daughter of a follower in the church.”

- 15.12 The court found that she had ample opportunity to observe the complainant. She did not strike the court as an imaginative child open to suggestions by others. She remained calm and focused, did not mingle her words and withstood lengthy cross examination. She was precise and did not exaggerate.
- 15.13 The “sameness” of her evidence was criticized by the defence. She testified that the appellant would put her on the bed, open her thighs and undress her. The presiding officer found that she did however point to differences. In one instance she was at home looking after her siblings and he send them to the shop, during the other incident the grandmother appeared, during all three incidences the mother was away. She remembered where the mother was each time; once in Botshabelo, then in Soeklaagte and during the last incident at her parental place.
- 15.14 The above counters the allegation that the grandmother suggested to her to report the rape. There is just too much detail.
- 15.15 The trial court was cautious and she pondered the contradictions. Her conclusions hereon cannot be faulted. The contradictions were explicable and immaterial. The contradictions point to an absence of collusion between the witnesses. It was in regard to the reporting and the confusion was inconsequential if the totality of evidence was regarded.
- 15.16 As to the act of sexual penetration it was never disputed or questioned during the trial. All and everybody present knew what was being spoken of. Medical evidence would have been moot because the incident was reported long after the intercourse and the

complainant's body would reflect familiarity with sexual intercourse. The complainant testified: "He placed his penis in my vagina."¹⁸

- 15.17 The rape of the complainant on the version of the complainant as supported by peripheral evidence caused a defensible case against the two appellants.

The Appellants' Cases

[16] The 1st Appellant

- 16.1 He had a good relationship with his daughter, the complainant, until the day he was arrested. He, from the beginning denied that he ever raped her.
- 16.2 On a Sunday evening in September 2015 they were at the 2nd appellant's place. At some time during the evening he realised that the complainant was not there. After a while and after the mother went looking for her; the complainant returned and called the 2nd appellant aside. Both returned and informed him that Thamsanqa had raped her.
- 16.3 The parents of Thamsanqa was called and a family meeting was held the next day. It concluded with the complainant admitting that their sexual intercourse was consensual and that she lied about the rape. Thamsanqa is a 24-year-old man. The complainant was 13 years old at that time. Everybody decided not to report the matter to the police and the complainant as well as Thamsanqa was admonished.
- 16.4 On a Friday in September 2016 there was a meeting at the 1st appellant home where the maternal grandmother of the complainant disclosed that the complainant reported sexual abuse by the 1st appellant to her.

¹⁸ Record page 60 line 15 to page 61 line 5.

- 16.5 The maternal grandmother informed that the complainant told the school and her friend Thokozile. Thokozile then informed the maternal grandmother. The complainant reported here that the 2nd appellant also raped her. 2nd Appellant was called and he denied the report to him by the 1st appellant as well as having raped the complainant.
- 16.6 1st Appellant accused the maternal grandmother of suggesting evidence to the complainant. She instigated the whole case against the two appellants. The reason for the animosity is because she owes him money. This was never put to the maternal grandmother during her testimony. The first instance mention was made of it was during the testimony of the 1st appellant.
- 16.7 Hereafter the 1st appellant was confronted with the fact that he did not mention the above in his warning statement. He only implied that the complainant is implicating him because:
- “I deny all the allegations made against me. I elect to declare that the problem started when I asked my wife to reprimand our daughter not to roam around during the night. And I declare that I talked with my wife that, please to make sure that our daughter...”
- He could not explain why he did not mention the money-issue with the maternal grandmother in the warning statement and blamed the complainant for the false allegations.
- 16.8 M implicated the 1st appellant and they were only known to each other from playing soccer together. The 1st appellant did not give an indication as to why M would implicate him falsely except to say that they sometimes argued about “male things”.
- 16.9 As to why the 2nd appellant would be implicated, the explanation was that 2nd appellant should have been a witness against 1st appellant and when he refused his family in law implicated the 2nd appellant also.

16.10 The 1st appellant could not explain why he allowed Thamsanqa to “get away” after having had sexual intercourse with his 13-year-old daughter.

[17] The 2nd Appellant

The 2nd appellant confirmed the incident with Thamsanqa. He could not explain why M visited him and then afterwards implicated him in the rape, why the complainant accused him of rape. All these people got along well with him. His evidence was in general, a bare denial.

[18] Finding of the trial court

18.1 The trial court found the versions of the appellants unsteady. She warned herself that a court cannot expect from an accused to know the motive of false implication. She found that although both the accused denied rape, they did not deny specific allegations but attacked the sexual history and conduct of the complainant. They “came with completely new versions” that was never put to any of the witnesses. Specifically, the above reasons why they are being falsely implicated. She could not accept the versions of the appellants as it was. There was, of course also the contradictions between their evidence in regard to a meeting that took place between them after the accusations.

18.2 The appellants were convicted on the strength of the above.

VII DID THE EVIDENCE CONFIRM ATTEMPTED RAPE ON THE THIRD COUNT?

[19] As stated, an issue that needs consideration is whether the conviction of attempted rape was correct. The court, again, did not rule on the matter and the Court of Appeal is left at the mercy of the record.

[20] The evidence is that the father locked the door, undressed himself and the complainant, and at that stage the other children returned. That is the sum

total of the evidence on the conviction on attempted rape. It does not comply with the law on attempt in criminal matters.

[21] Snyman¹⁹ stated:

“A person is guilty of attempting to commit a crime if, intending to commit that crime, she unlawfully engages in conduct that is not merely preparatory but has reached at least the commencement of the execution of the intended crime. A person is guilty of attempting to commit a crime even though:(a) the commission of the crime is impossible, if it would have been possible in the factual circumstances which she believes exist or will exist at the relevant time;(b) she voluntarily withdraws from its commission after her conduct has reached the commencement of the execution of the intended crime.”

VIII CONCLUSION

[21] The court *a quo* relied heavily on the evidence of the complainant to convict. The conspectus of the evidence, however does not point to a fair and properly considered conviction. The appellants did not receive a fair trial.

[22] To reiterate; the court did not rule on the admissibility of any of the evidence. Not the confession by the 2nd appellant that implicated him unequivocally in the crime, nor the section 219-confession against the 1st appellant, nor the hearsay evidence of Thamsanqua and Thokozile. The case is riddled with questionable evidence. The misdirection by the court to allow the questionable evidence as corroboration of the complainant’s evidence is severe indeed.

[23] It is always for the prosecution to prove the guilt of the accused person, and that the proof must be beyond reasonable doubt. The standard is not part of a charter for criminals and neither is it a mere technicality. The standard of proof is universally required in civilised systems of criminal justice, and a core component of the fundamental fair trial right that every person enjoys under section 35(3) of the Constitution.²⁰

¹⁹ **Criminal Law**, Author: CR Snyman BA LLD (UOFS), Professor of Criminal and Procedural Law, University of South Africa, Advocate of the High Court of South Africa
Last Updated: 2014 - Sixth Edition at B Attempt, pages 277 to 285.

²⁰ **S v T 2005 (2) SACR 318 (E)** at 37.

- [24] The evidence of the confession and hearsay remains inadmissible against the appellants. The question remains whether their convictions ought to be upheld on the remaining admissible evidence. The answer is in the negative. The evidence does not, as a whole, convince of justifying the appellants' conviction.
- [25] There is a strong suspicion against the appellants on the face of the complainant's evidence alone. Crimes of this nature are horrendous and understandably, evoke exceptionally strong emotions from many quarters in society. Be that as it may, the appellants cannot, in these circumstances, be convicted merely because the Court finds the complainant's version devoid of malice. Convictions based on suspicion or speculation are "the hallmark of a tyrannical system of law" and "South Africans have a bitter experience of such a system and where it leads to."²¹ That system cannot and ought not, in our constitutional democracy, be stood for.
- [26] The statutory and constitutional requirements referred to above have not been satisfied, and the appellants' trial was not fair.
- [27] **ORDER**

In the result, the following order is made:

The appeal by both the appellants is upheld and the convictions against the 1st and 2nd appellants are set aside.

M. OPPERMAN, J

I concur.

²¹ **S v Molimi** supra at [53].

C. REINDERS, J

In concur.

J. J. MHLAMBI, J

On behalf of the appellants:

Adv. P. W. Nel
Instructed by:
Legal Aid
BLOEMFONTEIN

On behalf of the respondent:

Adv J BothaAdv. Nameka
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN