

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Case No. : A94/2014

In matter between:

M[...] J[...] P[...]

Appellant

and

THE STATE

Respondent

CORAM: LEKALE, J *et* MOTLOUNG, AJ

HEARD ON: 1 SEPTEMBER 2014

DELIVERED ON: 29 JANUARY 2015

JUDGMENT BY: MOTLOUNG, AJ

Introduction

[1] This is an appeal against both conviction and sentence imposed by the Welkom regional court on the 27 February 2014. The appellant was convicted of rape of his young daughter aged approximately 13 years on the 30 March 2013, and sentenced to life imprisonment. The court also ordered that the appellant's name be included in the register of sexual offenders, and he was automatically declared unfit to possess a firearm. The appeal comes to this court in terms of the accused's automatic right of appeal as provided for in section 10, read with section 43 of the Judial Matters Amendment Act 42 of 2013.

[2] The respondent (hereafter referred to as "the state") alleged in the charge sheet that the accused had raped his daughter more than once without her consent between the years 2011 (when she was still 11 years old) and the 30 March 2013. The accused pleaded not guilty to the charge.

[3] The state, on the one hand, led the evidence of the complainant herself and her mother, and also handed in the complainant's birth certificate as proof of her age, and the medical report (J88) regarding the findings of the doctor who examined the complainant (exhibit "A"). On the other hand, the accused, who was legally represented throughout the trial, testified in his defence and closed his case without calling any witness.

Evidence led by the state and the defence

[4] In brief, the state's case was that the mother of the complainant left with a friend at around 17h00 in order to go and borrow some money from the said friend, leaving the complainant alone with her father (the appellant) in the house (the home of the complainant). Thereafter, the accused instructed the complainant to look through the window in order to check whether the complainant's mother was on her way back or not. The complainant complied and as she was busy looking through the window, the accused went to the bedroom and returned with a pillow that he used to cover the complainant's face, and then carried her to her bedroom, where he threw her onto the bed, undressed her and raped her by sexually penetrating her with his penis.

[5] The appellant denied the allegations and stated that he found the complainant alone at home, asked her if she was not hungry, she said she was not but only needed chips. He gave her R1.50 to go buy the chips and also asked the complainant to look for her mother at her friend's place. As the complainant was about to leave the premises of the common home, next to the gate, the complainant indicated to him that her mother was coming. After the complainant's mother arrived, they (appellant and complainant's mother) argued after he raised her neglect of household duties like cooking for the family, and the complainant's mother would not let the matter pass without staking her case. He spoke to her in a loud

voice, and as he did so, the complainant returned from buying the chips, and was distressed by the ongoing argument or fight. The complainant even asked him not to assault her mother and he indicated that he was not going to do so and even apologized to her (complainant) for what was going on. He subsequently got arrested on the 31 March 2013 on the trumped up charges of rape, and he was informed by his wife (the complainant's mother) on one of her prison visits that she actually coached the complainant to falsely implicate him of rape.

[6] The trial court found that the state had succeeded in proving its case beyond reasonable doubt and found that the appellant's defence was not reasonably possibly true, and dismissed it as false. It then convicted him and sentenced him as stated above.

[7] The appellant is represented in this appeal by Mr Makhene whilst Mr Sampisi appears for the state. The appellant submitted in his grounds of appeal that the trial court erred in finding that the complainant had no reason or motive to falsely implicate him, and that the contradictions between the state witnesses were not material. When the appellant's heads of argument were subsequently filed, it was submitted that, as far as the conviction was concerned, the state had failed to prove its case beyond reasonable doubt, and that as regards the sentence, the trial court over-emphasized the seriousness of the offence and conversely under-emphasized the personal circumstances of the accused. As regards the sentence, it was submitted that the court erred in finding that the accused's chances of rehabilitation were limited.

[8] The state opposed the appeal on the grounds that, as far as the conviction is concerned, the state succeeded in proving its case beyond reasonable doubt, the trial court correctly analysed the evidence in that, although the complainant was a single and child witness, the trial court correctly applied the cautionary rules in approaching her evidence, her testimony was corroborated by the medical report (exhibit “A”), there were no contradictions in the evidence of the complainant, and the court was correct in finding that the accused’s defence could not be reasonably possibly true. Furthermore, this court should not lightly interfere with the findings of the trial court in respect of the credibility of the state witnesses. As regards the sentence, the state submitted that the trial court correctly found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment.

Concession made by Mr Makhene during argument

[9] When the appeal was argued before us, Mr Makhene made the concession that, from his study of the heads of appeal – compiled by himself – he was of the view that no grounds existed for the appellant to successfully challenge the conviction, and indicated that he was persisting with the appeal against sentence only.

[10] When Mr Makhene was asked by the court whether he had instructions to abandon the appeal against conviction, he indicated that the issue was never discussed with the appellant, and that it

was something that he was raising for the first time during argument in court.

[11] Mr Sampisi, in his argument, supported the concession made by Mr Makhene and submitted that it was correctly made in his view.

[12] In my view, counsel must always make sure that they act on instructions from their clients, and it is clear, from the answers of Mr Makhene, that he had no mandate from the appellant to limit the appeal to sentence only. In my view, the abandonment was, therefore, incorrectly made, as it had the effect of drastically and adversely changing the appellant's case on appeal, and did so without the appellant's knowledge and approval. As I see it, the situation was that the appellant, who was in prison serving his sentence, was under the impression that his counsel was going to argue against his conviction on appeal – whereas unbeknown to him his counsel was executing a different mandate. In my view, this would be grossly unfair against the appellant and could amount to a serious miscarriage of justice.

[13] This being so, the abandonment was wrongly made and could be safely ignored, and it was left up to this court to consider the matter as if the appeal against conviction was never abandoned – as it did. The same applies to the concession made which, in our view was incorrectly made regard being had to the totality of evidence before the trial court as appears below.

Issues to be decided

[14] This court has to determine, as a court of appeal, whether the accused was correctly convicted and / or sentenced.

Approach by a court of appeal

[15] It is trite law that a court of appeal will not interfere with or temper with the trial court's judgment or decision regarding either conviction or sentence unless it finds that the trial court misdirected itself as regards its findings of facts or the law. See **R v Dhlumayo & Another** 1948 (2) SA 677 (A). The principle was also restated in **S v Mlumbi** 1991 (1) SACR 235 (SCA) at 247g, as follows:

“Dit is gevestigde reg dat indien daar geen wanvoorligting op die feite is nie, die vermoede bestaan dat die verhoorhof se evaluering van die getuienis korrek is, en dat ‘n Hof van appel alleenlik daarmee sal inmeng indien dit oortuig is dat daardie evaluasie verkeerd is”.

[16] When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. As Nugent J (as he then was) in **S v Van der Meyden** 1999 (1) SACR 447 (W) stated at 450:

“What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.”

[17] The facts found to be proven and the reasons for the judgment of the trial court must appear in the judgment of the trial court. If there was relevant and material evidence led during the trial, but such evidence is not dealt with in any way in the judgment, it is safe for a court of appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten about at the time of delivering the judgment.

[18] Stated differently, this court must consider whether the magistrate considered all the relevant evidence, weighed it correctly and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the conviction and sentence (if necessary). This exercise necessarily entails a close scrutiny of the evidence of each witness within the context of the totality of evidence, and what the trial court's findings were in relation to such evidence.

[19] If the court of appeal finds that there was a misdirection by the trial court, it must then consider whether the misdirection, viewed either on its own or cumulatively together with any other misdirections, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal.

[20] It is also trite that if the trial court misdirected itself either on the facts or the law, a court of appeal will be at large to interfere and deal with the matter as it deems fit, including substituting its own order or decision for that of the trial court, which may include

an order for the setting aside of a conviction or the altering of the sentence.

[21] Where there is an appeal against both conviction and sentence, and the court of appeal sets the conviction aside, ordinarily that would be the end of the matter, as there would be no need to examine whether the sentence imposed would have been appropriate.

[22] In order to apply the above-mentioned legal principles to the facts of this case, this court must determine, as regards the conviction in the first place, what the evidence of the state witnesses was, as understood within the totality of the evidence led, including evidence led on the part of the defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the said facts in coming to its decisions / findings or judgment.

Applying the above-mentioned legal principles to the facts of this case

[23] I deal below with some of the findings of the trial court in order to show that it, in my view, misdirected itself in several respects.

23.1. The trial court found that when the complainant's mother asked why the complainant was crying, the appellant answered

and made up the story that the complainant was crying because he had asked her to go to the shop and she refused. In making this finding the trial court lost sight of the fact that this was not the only evidence led on this aspect. The complainant's mother gave contradictory evidence on the same aspect by testifying that the appellant answered that she was crying because she refused to be sent to go and look for her (the mother). This shows that the trial court did not take this contradiction into account in assessing the complainant's or the state's case, but accepted only one version for purposes of its judgment without stating its reasons for doing so. The trial court also lost sight of the evidence given by the complainant's mother when asked during cross-examination as to why would the appellant hit the wall with fists in anger, in respect of which she answered that *"I thought maybe he was angry because he send the child to go and look for me"* (quoted without amendment). This answer was quite strange or bizarre in my view, as it, in no small measure, significantly indirectly confirmed that the appellant said he had sent the complainant to go and look for her, and lent more credence to the appellant's version that the fight or argument was over her absence or neglect of duties. Therefore, the trial court did not take all material evidence led into account as regards the answer that the appellant allegedly gave when asked why the complainant was crying – which amounts to a misdirection in terms of the *van der Meyden* decision referred to above.

23.2. The trial court found that the complainant testified that she reported the rape to her mother on the next day. This is incorrect as it was not the complainant, but her mother, who stated that the complainant reported the rape to her on the next day. Furthermore,

the trial court lost sight of the fact that the complainant gave contradictory evidence on the same aspect, by stating that she reported the rape to her mother on the same day. The trial court also lost sight of the fact that, significantly, related to the same aspect was the contradictory evidence of the complainant and her mother. Whereas the complainant testified that it was only herself and her mother present when she reported the incident, her mother contradicted her and stated that they were three – herself, the complainant and a lady by the name of S[...] – and that the complainant did not want to report the incident to her until after S[...] arrived. Again, this shows that the trial court did not take this material evidence and contradictions into account in assessing the complainant's or the state's case – which amounts to a misdirection in my view.

23.3. Furthermore, as the trial court lost sight of the evidence that the complainant would not tell until S[...] arrived, it consequently failed to consider what role, if any, S[...] played in getting the complainant to tell. The evidence that the complainant would not tell until S[...] arrived suggests that S[...] played a role in getting the complainant to tell. This being so, the court had to examine this aspect in order to exclude the possibility of undue influence or pressure having been made to bear on the complainant to make her report the alleged rape, which it did not do, and this constitutes another misdirection in my view.

23.4. The trial court found that the complainant's mother testified about how the incident adversely affected the complainant in respect of her performance at school and her behaviour, which

resulted in her overall behaviour deteriorating and her becoming troublesome, and would go out at night and return home late. This finding is incorrect as it fails to take account of all the material evidence led on the same aspect – which is both contradictory to the magistrate’s finding and also irregular in terms of how the magistrate dealt with the aspect after asking the complainant’s mother about the complainant’s behaviour after the alleged rape.

23.5. Contrary to the trial court’s finding, when the prosecutor expressly posed the following question to the complainant’s mother, *“Would you say the personality of the complainant has changed since the incidents have become known”*, she answered that *“She is still the same”*.

23.6. Furthermore, after she had testified in her answer to the magistrate that the complainant’s behaviour had changed after the rape incident (of the 30 March 2014), and the magistrate asked the state and the defence if they had any questions arising from the mother’s testimony, the prosecutor – clearly realizing that the matter needed to be clarified – asked her *“Was her behaviour different before the incident?”*, the magistrate intervened and stated, inappropriately in my view (as he changed the question that the prosecutor put to the complainant and stated what question should have been put to the witness) that *“You should say after the incident, sorry the court didn’t hear your question”*. The prosecutor persisted by stating that *“I just wanted to know Your Worship was her behaviour before the incident different from the way it’s now because now she seems to be coming in later it’s not clear that”*, and the magistrate, again, intervened before the prosecutor

could even finish his question, and stated that *“No she said only after this incident”*. Obviously still not satisfied but constrained to pursue the point further, the prosecutor then left the point by stating that *“Is it only the change after, as it pleases the court then the state has nothing Your Worship”*.

23.7. The passages quoted above show that the magistrate, having asked the state and the defence whether they had any questions arising from his question regarding the behaviour of the complainant, actually did not allow the state to ask questions regarding the said aspect, and in fact went even further in providing the answer to the question posed by the prosecutor – instead of affording the complainant’s mother the opportunity to answer the question. This exchange gave the impression, correctly or incorrectly, that the magistrate did everything possible to avoid the witness giving an answer different to that already given to him, as it would have weakened the state’s case, and by implication, strengthened the appellant’s case.

23.8. The trial court found that the complainant was able to recollect the last incident (of 30 March 2014) and narrated it with sufficient detail, and also gave intelligent answers. In my view, it is not correct that the complainant narrated the incident of 30 March with sufficient detail or gave intelligent answers. I am of the view that the complainant gave incoherent answers when she was repeatedly asked (in her evidence-in-chief) a simple question of repeating to the court what report she made to her mother. She repeatedly could not provide an answer to the question and ended up answering the question by a simple “yes” to a leading question

after the court stood the matter down when she was battling with answering the question. I think that it is worth quoting the relevant part of the record to demonstrate this point:

“Okay tell us how did that come about that you told your mother? ...My mother asked me what’s going on and I told her, and she asked me did your father send you to the shop; I said no he did not.

Yes and what did you tell her? ...I said to her my father send me to peep through the window and asked me to peep through the window to look if you are not coming.

What else did you say?

Interpreter: At first she mentioned something about the police Your Worship and I asked her again I did not hear but now she is telling that the police arrived and they asked where is my father and he was coming.

Okay we’ll still get to that, we are still at the place in your testimony when you reported to your mother about the incident where your father had asked you to check the window to see if mother is not coming ... I told her that he asked me to peep through the window to look if my mother was not coming, whilst I was peeping he then came with the pillow and he covered my face with the pillow.

Did you tell her what else happened? ... He covered my face with a pillow.

And then? You can just explain to us if you can remember what you told your mother, whether you told her about the incident between you and your father or not, if you cannot remember if you told her you can explain to us.

Court: The court just wants to place on record that the child appears very disturbed so much so that Mrs Malgas has to also place her arm around her, the court just feels it's essential to place it on record but she may answer.

Prosecutor: Your Worship I don't know it seems as if she's maybe upset I wonder ...

Court: What did she say now?

Interpreter: No Your Worship she's starting to talk but very softly I cannot hear she's like mumbling.

Court: Yes it seems if she's, is she disturbed Mrs Malgas?

Mrs Malgas: It appears like that.

Court: Let's just give her some time madam Prosecutor. She doesn't have to discuss this case with anyone but just have a few minutes to herself and then we continue with it. ... Yes Your Worship.

Prosecutor: Your Worship, I understand from the (inaudible) officer that she cried a lot this morning so I would assume we might just be patient with her today.

Court: That's no problem

COURT ADJOURNS.

COURT RESUMES.

Court:Continue madam Prosecutor.

Prosecutor: As it pleases the court Your Worship. All we want to know M is whether you at a later stage told your mother about the sexual intercourse that your father had tried or had with you that's all we want to know whether you had told her about that. ... Yes I did" (quoted without amendment).

23.9. In my view, the above excerpt shows that everyone involved in the court proceedings – the prosecutor, the interpreter, the intermediary and the magistrate – battled to get the complainant to answer a very simple, clear and straight-forward question – where she was being asked to proceed and tell the court what else did she tell her mother, taking off from where she told the court that the appellant asked her to peep through the window and then covered her face with a pillow. She could not give any coherent answer thereto but started to mention something about the police arriving the following day and where the appellant was whilst he was coming.

23.11. Furthermore, when the complainant finally answered, she merely confirmed a leading question from the prosecutor – whereby the prosecutor expressly asked her if she told her mother about the sexual intercourse. What was required was the details of what she told her mother – and not the mere confirmation of a conclusion (sexual intercourse) without stating the factual details on which the conclusion was based – which she never did. The prosecutor had obviously given up on getting the required detail from the complainant, and concluded by asking her a leading question which entailed only the conclusion. The said leading question cannot, in my view, be seen as a question that was intended to remind the complainant (as a child witness requiring special treatment) of her testimony already on record (as she had not given the required detail at any stage of her testimony up to that point) or to guide her with the intention that she should not testify on irrelevant, prejudicial or improper facts. Although it has been said that a court has a discretion to allow a leading question

in cases where a witness might be requiring special handling – like in the case of a child witness – it has also been emphasized that a court must take care to be sure that the examiner is not coaching the witness through leading questions. In my view, her purported answer to the question was worthless, and she had effectively failed to answer the question.

23.12. However, the trial court approached this aspect differently in its judgment, and even provided an excuse for the complainant's failure to answer the question. In my view, this was a misdirection on the part of the court, as the court, instead of disallowing the leading questions or criticizing the complainant for her failure to answer the questions or provide incoherent answers, it, instead, provided a favourable excuse for the said failure. This obviously had a bearing on the court's assessment of the evidence led, and the trial court did not properly assess the complainant's evidence in my view.

23.13. The trial court found that *"it is worth noting that, however, that it at times appeared that the complainant did have difficulty in understanding certain questions – more especially those relating to the incidents that occurred prior to the year 2011. The initial impression gained by the court was that she did not understand the questions put to her, but upon careful scrutiny of her evidence, and as time passed, it was obvious to the court that she was very disturbed by the incidents that happened, and that after testifying about the last incident of the 30 March 2014, she simply did not want to testify any further about anything else. She gave the court the impression that she was emotionally disturbed*

and she was crying, so much that the court had to adjourn several times in order to enable her to settle down emotionally. It was obvious to the court, and to be expected of a child to be in such emotional distress, especially if she had to testify against her own father". In my view, there was nothing difficult or not clear about the questions that were posed to the complainant regarding the alleged previous incidents of sexual abuse. She even answered those questions very clearly – saying she could not remember what happened. Furthermore, the court never adjourned at any stage, unlike what the magistrate stated in his judgment, to the effect that the court had to adjourn several times in order to allow her an opportunity to settle emotionally, in relation to answering any questions regarding the alleged previous incidents. Whilst it is true that the court adjourned at some stages, those adjournments were not related to questions relating to the alleged previous incidents. I quote the interaction between her, the interpreter and the magistrate to demonstrate this point:

" ... was that the only incident between you and your father or was there other similar incidents? ... There was other incidents that took place before.

Can you still remember what year those incidents started or can you just tell us if you cannot remember the year how old you were when the incidents started? ... I was 11 years old.

M can you please explain to us how did it come about or how did the incidents start between you and your father when you were 11? ... I cannot recall.

Okat that's fine, can you just tell us what happened between you and your father when these incidents had in fact occurred? ... I cannot recall.

Court: She says she can't recall, I think just leave it unless you wanted to have a break again because I see she's again getting feeling very

Prosecutor: Your Worship I'll just try a bit more.

Court: No but she can't recall.

Prosecutor: The state just wants to maybe clarify your worship, Your Worship whether, I think the witness Your Worship, Your Worship can the state just try something else maybe?

Court: Yes.

Prosecutor: Can you just explain to us the other incidents that you are referring to where did these incidents that you are referring to where did these incidents take place? ...We were at home.

Was your mother present then? ... She was not present.

... I don't want you to explain all the incidents that you are referring to now in detail or anything I just want to have you to, so that we understand, just explain to us what happened to you in the other incidents just shortly. ... I cannot recall.

Okat that's fine" (quoted without amendment).

23.14. The trial court found that the "complainant's evidence was clear and satisfactory in all material respects. She also made a good impression on the court, and appears to be honest, and although it was difficult for her to testify against her father, the court got the impression that she was simply telling the truth although it was painful for her to do so". In my view, this assessment of the complainant's evidence is incorrect as the trial

court lost sight of the fact that she could not remember any detail of the alleged previous incidents – for which the appellant was standing charged - despite reporting them to the doctor. In my view, this can hardly be described as being satisfactory in all material respects.

23.15. Furthermore, the prosecutor asked the complainant many leading questions regarding crucial aspects of her testimony, and this negatively impacted upon the weight to be accorded to the complainant's evidence on those aspects, but the trial court failed to take cognisance of this fact, which amounts to a misdirection in my view. It is worth quoting some of the questions and answers thereto in order to demonstrate this point:

*“Was your mother in fact coming did you hear her? ... Yes.
What did you do then did you dress? ... Yes I put on my clothes because he told me that I must on your clothes very quickly because your mother is coming.
Okay you dressed and did your mother arrived there? ... Yes my mother arrived and she asked me what's going on.
What was your emotional condition at the time that your mother asked you what's going on? ... I was crying.
Did you tell her what was going on? ... My father was the one who responded ... “.*

23.16. The above excerpt shows that the prosecutor phrased her questions in a manner that suggested answers to the complainant and also put sequence to events – instead of allowing the complainant herself to do so.

23.17. Even when the prosecutor needed to elicit evidence regarding whether there was any conversation between the complainant and the appellant, instead of asking the complainant whether there was any conversation between them or not, and at what stage such conversation was (if the answer was to be in the affirmative), the prosecutor asked the following leading and/or loaded questions: *“At the time when the incident was almost finished and your mother your mother is coming now and you were told to dress was there any conversation between your father and you whether you are able to tell her or not to tell, was there anything like that?”*, to which the complainant answered that *“He said I must not tell my mother not anyone and then he gave me R1.50”*, to which the prosecutor asked *“What was the money for did he say? ...So that I must not tell my mother”*.

23.18. The above-mentioned questions are very suggestive of the desired answers. instead of allowing the complainant an opportunity to tell her story in a simple, unhindered and unchannelled manner, the prosecutor not only asked the question whether the mother was in fact coming, but then went further to suggest an answer, in my view, whether she also heard her coming. This was unnecessary and not prudent. The power of suggestion in the question was simply overwhelming, and coupled with the well-known pliability of child witnesses, it was incorrect to ask the question in this suggestive manner (suggesting that she said the mother was coming because she heard her coming) whilst she was still giving her evidence-in-chief. Furthermore, immediately thereafter, the prosecutor asked another leading

question by asking the complainant “*What did you do then did you dress?*” Instead of asking the complainant what did she do when she heard her mother coming, and leaving the question there, the prosecutor went further to suggest an answer to the complainant by asking if she did then dress.

23.19. The questions regarding the conversation between the complainant and the appellant are loaded as they necessarily imply or assume two important aspects or things that the complainant had not mentioned up to this stage of her testimony (whilst still in her evidence-in-chief). Firstly, they suggest the timing of the conversation – that it occurred at the time when the rape was almost finished, and when the complainant’s mother was coming, and after the complainant had been instructed to dress. Secondly, they imply that there was indeed a conversation between the appellant and the complainant. The complainant had not testified about any conversation that took place between her and the appellant. Therefore, the question was suggestive of both aspects – the occurrence of the conversation and its timing.

23.20. A leading question is the kind of question that, in its phrasing, suggests its own answer or desired answer and or contains the information the examiner is looking to have confirmed or elicited. In many instances a simple “yes” or “no” would be sufficient to answer the question. This shows that the details of the witness’ testimony does not come from the witness but from the examiner. By suggesting the answer to the complainant or putting to her questions containing the information she desired the complainant to confirm – like the complainant finally did when

asked if she told her mother about the sexual intercourse that the appellant had with or attempted to have with her – by giving a simple “yes” as an answer - the prosecutor reduced the witness' impact, as she thereby effectively put words into her mouth. A leading question is objectionable because of the danger of collusion between the examiner-in-chief and the witness and the impropriety of suggesting facts which are not already part of the evidence led. As the prosecutor asked the complainant leading questions on material facts during her evidence-in-chief, this adversely affected the weight, if any, to be accorded her answers.

23.21. As stated above, this kind of questioning, on such crucial aspects, is not to be encouraged in the light of the pliability of children. An uncritical acceptance of the complainant's answers on the above-mentioned questions, as the trial court did in my view, would go against and displace the exercise of caution when assessing the evidence of a single child witness, which is a misdirection.

23.22. Furthermore, the trial court inferred that the complainant was in distress during her testimony because she had to testify against her own father, although it was painful to do so. In my view, the court failed to consider the possibility that the complainant was distressed by the fact that she knew that she had been coached by her mother to falsely implicate the appellant and was battling with telling a lie when she knew it to be such. The court did not consider its own observation in respect of the complainant's mother that she looked very afraid whilst giving her testimony. In my view, the court failed to take this aspect into

account in considering the probabilities. In my view, the mother could well have been afraid from the knowledge that she was falsely implicating the appellant – particularly if viewed against the appellant's defence or version.

23.23. As far as the trial court's comments regarding the honesty of the complainant and her pain because of having to testify against her own father (the appellant), the Supreme Court of Appeal was worried by a similar approach which was adopted by the trial court (in convicting the appellant of rape) in the decision of **Mangoma v S (155/13) [2013] ZASCA 205 (02 December 2013)**. Salduker JA stated the following at paragraph [13] in expressing her worry at the comments or remarks made by the trial court in assessing the evidence of an appellant as contrasted with that of the state witnesses closely related to him:

*“[13] It is troubling that the trial judge made the following statement during the appellant's testimony: ‘Let me tell you **the court finds it very hard to believe the story you are telling it, very hard, that your own blood children could tell against you** and the one who is not your blood child is the one you say is more reliable, it is more stranger than fiction, particularly the boy who is named after you’ (my emphasis).*

23.24. The remarks or comments of the magistrate in this case regarding the impression he got in respect of the complainant's honesty and the pain of having to testify against her own father are in the same league. They were, in my view, a misdirection on the part of the court.

23.25. The trial court found that the appellant's defence that the complainant was told by her mother to falsely implicate him was put to the complainant who remained unaffected and she vehemently denied it. In my view, this finding is incorrect as the trial court did not consider the conduct of the complainant, of looking scared and traumatised. The court decided to stand the matter down in order to afford the complainant an opportunity to recoup her emotions after the appellant's defence (that she had been told to lie by her mother) was put to her. She was clearly affected in her testimony, and as stated above, the trial court incorrectly summarily inferred that her conduct was the result of having to testify against her own father.

23.26. In my view, the particular circumstances of this case, where there was no corroboration of the complainant's evidence (for an example, by way of medical evidence which is not neutral), called for a cautionary approach. Although the magistrate referred to the cautionary rule, I am of the view that he did not apply sufficient caution in approaching the evidence of the complainant – particularly in the light of the leading and loaded questions that related to his findings on material facts and the contradictions between the testimony of the complainant and her mother referred to above. Therefore, in my view, the trial court misdirected itself on this aspect too.

23.27. The facts in the SCA decision of *Mangoma* mentioned above were briefly as follows: The accused was convicted of rape of his 13-year old daughter and sentenced to life imprisonment in the Limpopo High Court. He appealed to the SCA against both

conviction and sentence, amongst others, on the grounds that evidence of the state witnesses was riddled with contradictions and inconsistencies, and also challenged the admissibility and reliability of the medical report relied upon by the trial court. The SCA also dealt with the assessment of the evidence of child witnesses in rape cases in the matter. Salduker JA, writing the unanimous decision of the court, stated the following at paragraphs [14] and [15]:

*[14] In any event, it appears to us that the appellant is entitled to an order that his conviction and sentence is set aside because the state failed to discharge the onus resting on it. **The evidence of the child witnesses was not carefully scrutinised.** The contradictions and inconsistencies were not properly considered, **nor the possibility that they might have been put up to it by their mother. In this fundamental regard the trial court erred.***

[15] In the result the appeal against both the conviction and sentence is upheld and the conviction and sentence are set aside” (my emphasis).

23.28. The SCA did not even deem it necessary to consider the merits or demerits of the accused’s defence of an alibi before setting his conviction aside, in the light of its finding regarding how the child witnesses’ evidence was dealt with by the trial court – which it found to have been deficient and constituted a fundamental misdirection. In my view, as the trial court did not carefully scrutinise the complainant’s evidence by considering it against the background of the contradictions between her and her mother, and between her evidence and her report to the doctor, it materially misdirected itself in its assessment of her evidence.

23.29. The trial court found that according to the complainant's mother, she found the complainant crying in the house, and that the emotional state of the complainant actually corroborates the complainant's evidence that something bad happened to her, and that same is admissible as evidence to prove that sexual intercourse occurred – as found in *S v Hammond* 2004 (2) SACR 303 (SCA). In my view, the trial court erred on a material point in viewing the testimony of the complainant crying as corroboration of the complainant's version.

23.30. Whilst it is quite possible for a court to find that the emotional state of a victim or the complainant, immediately after the incident or at the first available opportunity of making her report regarding the incident, may provide corroboration of her evidence, and that the complainant's emotional state at the time of testifying in court provides corroboration of her evidence – a court may only view such emotional state to be constituting corroboration if such state is consistent with or similar to the complainant's previous emotional state in relation to the incident, and inconsistent with the appellant's version of events.

23.31. In my view, even if the trial court accepted the evidence that the complainant was crying, this cannot constitute corroboration of the complainant's version because such evidence (of crying) is not inconsistent with the appellant's defence that she cried because of the distress she suffered from watching and listening to the argument between the appellant and her mother, and her apparent anxiety that the appellant was going to assault her mother.

23.32. The trial court also found that *“the medical report (exhibit “A”) recorded history of the incident and is consistent with the complainant’s testimony. Of particular importance regarding the medical report is the fact that it recorded that the complainant was emotionally hurt, crying, sobbing and anxious, and these serve as corroboration of her evidence that something bad happened to her”*. In my view, the trial court seriously misdirected itself on a very material fact and a point of law. It misdirected itself in finding that, despite there being no evidence of previous sexual abuse of the complainant by the appellant, the medical report provided corroboration of the complainant’s evidence. In doing so, the court lost sight of the fact that there was, for all intents and purposes, no evidence before it of previous sexual abuse by the appellant. Therefore, the court incorrectly saw the medical report as corroborating non-existent evidence – which is a misdirection on a point of law and fact.

23.33. The trial court found that gynaecological examination indicated slightly swollen and bruising on the clitoris as well as redness and erosion, and such findings support the allegations of penile vaginal penetration. Therefore, the trial court regarded the medical report as providing proof , firstly of penile penetration despite the fact that there was no evidence regarding how long was the alleged sexual intercourse or how many times did the appellant go up and down (if ever). It is hard to imagine, in the absence of other evidence, how a penis that was inserted “just a little bit” (as the complainant testified) could have caused the swelling and bruising on the clitoris, as well as redness and

erosion. Secondly, the court accepted the medical evidence as corroboration of penile penetration by the accused and nobody else, whereas such medical evidence was neutral in the sense that it did not point to the appellant as the specific perpetrator of the alleged rape. Thirdly, the court accepted the evidence as corroboration of non-existent evidence, as there was no evidence of previous incidents of sexual abuse by the appellant (as the court itself finally found in acquitting the appellant of such incidents). In my view, the trial court incorrectly regarded signs of previous sexual abuse, for which there was no credible evidence from the complainant, as corroboration for the alleged rape incident of the 30 March 2013. In fact, the medical report expressly stated that *“Clinical findings no visible fresh injuries regarding the general examination noted [and] [there was] indication of previous tears due to penile vaginal penetration ... [and] the hymen as irregular”* – meaning that no injuries were observed resulting from the alleged incident of the 30 March 2013, and the only signs that were there were those of previous sexual activity.

23.34. The trial court found that the evidence of the doctor who examined the complainant the next day showed the injuries that he observed – being the redness, erosion and swelling and penile vaginal penetration – which was not disputed, and thus it could be accepted that sexual intercourse did take place. The trial court misdirected itself in admitting this evidence as support or corroboration of the fact that sexual intercourse took place on the 30 March 2013. Even the medical report made it clear that there were no visible fresh injuries, but signs of previous sexual intercourse as stated above.

23.35. The trial court also found that the forensic nurse's report that her findings were that there was penile vaginal penetration, coupled with the fact that there were signs of previous vaginal penetration as shown by the clefts and scars that were there, were consistent with a history of sexual abuse of the complainant. The trial court did not consider the gap that existed in the state's case as regards the evidence of the nurse. The state failed to call the nurse as a witness, and no written report was presented to the court from the said nurse, and no explanation was furnished to the court for not calling the said nurse to testify. The only suggestion of the nurse's observations came from the prosecutor during the cross-examination of the appellant. Therefore, the trial court misdirected itself in accepting non-existent evidence into the record and further utilizing it in order to bolster its assessment of the evidence led in favour of the state's case.

23.36. The trial court found that in determining whether it was the accused who raped the complainant, the court had to examine the accused's version, and within this context found that it was highly unlikely that the complainant would have cried because she wanted chips and the appellant gave her the money to go buy them, as she wanted those chips. The court also found that the appellant's testimony about the complainant's sexual activities or what he suspected were her sexual activities, had no factual basis and was based on trivial reasons. The court also found that the appellant's testimony about his wife influencing the complainant to

falsely implicate him, “*could not hold as his wife visited him in prison and they appeared to still have a relationship*”. In my view, the trial court misdirected itself in a number of respects in making the above-mentioned findings. In my view, the trial court misdirected itself in several respects.

23.37. Firstly, it misdirected itself by finding that the appellant’s version was that the complainant cried because she wanted chips. The appellant’s version was that he gave her money to go and buy chips as she said she needed them. He never said she cried because she needed the chips or money to buy them.

23.38. Secondly, it misdirected itself as it was not entitled to draw any adverse inference against the appellant because it found his suspicions to be baseless or implausible. – see **S v Lesito 1996 (2) SACR 682 (O)**, wherein the accused said that the dagga found in his house had been planted there by the police. He explicitly said that he did not see the police planting the dagga, but that he inferred the planting of the dagga from other facts. In this regard the court stated (at 687h-i): “*Sou hy pertinent beweer het dat hy so iets sou gesien het en sou die hof kon bevind dat daardie bewering vals was, dan sou die afleiding dat die res van sy getuienis ook vals was, waarskynlik geregverdig gewees het. Waar slegs bewys word dat 'n afleiding wat 'n persoon maak verkeerd is, is daar nie dieselfde ruimte om al sy getuienis as vals te verwerp nie*”.

23.39. Thirdly, it misdirected itself in finding that the complainant's mother's prison visits to the appellant were an antithesis of her capacity to influence the complainant to implicate him falsely. In my view, the fact that the mother kept on paying the appellant visits in prison is not necessarily inconsistent with the capacity to influence the complainant to falsely implicate the appellant - especially if one bears in mind the appellant's version and the mother's testimony (including her admission by nodding and that the appellant would also ask her how is the complainant doing outside). I am particularly troubled by the fact that the mother initially confirmed the submission by nodding her head without uttering a word when the submission was pertinently put to her under cross-examination.

23.40. The trial court found that when it was put to the appellant's wife during cross-examination that she influenced the complainant to falsely implicate him, she denied it, and it is improbable that she would not have corrected the situation by admitting that she influenced the complainant if one considered that she still visited him in prison. The court also stated that it did not get an impression that she coached the complainant to tell a lie. In my view, the trial court misdirected itself by finding that the complainant's mother denied influencing the complainant to falsely implicate the appellant. What the record shows is that when it was put to her during cross-examination that she influenced the complainant to falsely implicate the appellant, she nodded her head without saying anything. In other words, she answered by conduct. Nodding ordinarily means one is agreeing. Therefore, she initially agreed with the statement that she told the appellant whilst

visiting him in prison that she influenced the complainant to falsely implicate him.

23.41. As stated above, it was stated in the *van der Meyden* decision mentioned above, that a judgment must account for all material evidence. When the complainant's mother initially admitted the statement (although she later denied it), this was very material and significant. However, the judgment of the magistrate fails to make any reference to this significant development – it creates the impression that there was never such a moment, and that the only evidence that was led before the court was that of the mother denying the statement. The record actually shows how the magistrate himself interjected after the complainant's mother nodded her head – obviously surprised at the admission made on such a decisive question. I have also found nothing in the record to sustain the magistrate's suggestion that the complainant's mother did not appear to understand the questions put to her. In my view, the record shows that the questions put to her were clear and she understood them and answered them clearly by conduct. Furthermore, the mother's answers to the magistrate's questions are, in my view, very significant and very revealing. I quote the interaction between her, Mrs Terblanche, the interpreter and the magistrate to demonstrate this point.

“You still goes and visit the accused in prison is that correct, at time to time? ... Yes.

Now according to accused in one of these visits you informed him that you told the complainant to say that he raped her because you were angry at him you had a fight with him that evening.

Interpreter: She's nodding her head not saying anything Your Worship.

Court: Did you tell your child to say that she was raped by the accused person because of a fight that you and accused had? ... We did not fight.

But did you tell her to say anything of that sort? ... I did not talk to the child.

Mrs Terblanche: According to the accused the argument between you and him was when you returned home and it was about you leaving the home for a long time or a long period. ... I'm always at home with him.

Why was he hitting ...

Court: It doesn't appear that the witness is understanding the questions and that is why the court is intervening, the question has to be repeated because it's not in general, is that a generalised question, the accused is talking about that particular day when this incident took place that he was angry because she left that day for a long period? ... Is it on Saturday?

Mrs Terblanche: Yes when you went to your friend to get the money. ... He did not tell me that he's angry.

If you didn't have a fight or an argument why was he hitting the wall with fists? ... I thought maybe he was angry because he send the child to go and look for me.

Your Worship I have no further questions".

23.42. Even if it was to be found that the complainant's mother later denied the statement, this would still not cure the misdirection as the latter answer contradicted the initial one, and the judgment makes no reference to such contradiction or

inconsistency or the pains that the magistrate and Mrs Terblanche had to endure in an attempt to get her to answer to the statement or accusation that she influenced the complainant to falsely implicate the appellant.

23.43. Furthermore, the subsequent denial of the complainant's mother must be placed in a proper perspective – it came out of turn as it came out of the ordinary process. It came after she had been cross-examined by the defence attorney and after her re-examination by the prosecutor, and after the court had excused her by saying “*Yes thank you maám you may stand down*”. I thus fail to understand how that belated evidence could supersede her earlier answers to Mrs Terblanche, the prosecutor and the magistrate.

23.44. In my view, her earlier answers must have been accorded due weight, or at the very least, they must have been regarded as contradictory to her latter answers. Failure to deal with this aspect, which was no small matter in her testimony, and which detained the court for some relatively reasonable period whilst trying to get a clearer answer from her, was a fundamental misdirection in my view and is very crucial as it bears significant relevance to the appellant's defence. If the mother's evidence of agreeing that she influenced the complainant to falsely implicate the appellant was accepted by the trial court, it would have spelt the collapse of the state's case. No wonder the court spent some time to get clarity on the aspect, without any success.

23.45. The trial court found that in evaluating the accused's version, the court is of the view that he was simply changing his version all the time, and his evidence was flawed with contradictions and improbabilities, that he also gave far-fetched answers most of the time, his answers did not make sense, and he was not an impressive witness, and the court was satisfied, based on its assessment of the totality of the evidence led, that his version was not reasonably possibly true, and that the state succeeded in proving its case beyond reasonable doubt. In my view, the trial court's submission that the appellant was simply changing his version all the time is with respect, untenable, as it finds no support from the record of the proceedings. I have not been able to find any material changes of the appellant's version in the record.

23.46. To the contrary, I am of the view that he did not contradict himself and was consistent in his version – namely that he came home to find the complainant alone, and after he had asked the complainant to go look for her mother at her friend's place they had an argument over why she neglected her household duties (like cooking for him and the child), and that the complainant cried as he was arguing with her mother in a loud voice, thinking that he was about to assault her mother, and that he suspected that the complainant might have been to some mischief by having sexual intercourse with her opposite sex peers.

23.47. In my view, it is no wonder that the magistrate could not even quote one such alleged contradiction or inconsistency. As regards improbabilities, I find nothing improbable with the

appellant's version. It is a well-known concept or phenomenon for children to get distressed and at times cry when exposed to arguments between their parents, and it is not uncommon for one parent to apologize to the child for causing it the stress – like the appellant testified that he did ask for forgiveness from the complainant for shouting at her mother. Furthermore, the appellant's anger and hitting the wall with a fist, which remained unchallenged and uncontradicted, is not inconsistent with him being angry at the complainant's mother for neglecting her house duties.

23.48. The trial court, correctly in my view, found that there was lack of evidence as regards the previous history of sexual abuse even though the complainant mentioned it. Where, in my view, the trial court went wrong, was in qualifying this correct observation by stating what, in its view, were her reasons for her inability to testify further regarding that history. The trial court, instead of unequivocally accepting the complainant's and state's failure to lead any credible evidence on the alleged previous sexual abuse, implicitly accepted that there was indeed previous sexual abuse by the accused, and sought to give an excuse for the state's and complainant's failure by devising its own explanation for such failure.

23.49. It must also be borne in mind that the excuse tendered by the magistrate was never given by either the complainant herself or the prosecutor – but came for the first time like a lightning bolt through the magistrate's judgment. I would have expected the magistrate, at the very least in case he gained the

impression that there was a good excuse for the complainant's failure to testify about her alleged previous abuse at the hands of the appellant – to have openly expressed such opinion on record so that the defence could also be afforded an opportunity of addressing such impression or opinion – either during the testimony of the complainant or during address by both sides - instead of springing up such gained impression for the first time as a surprise in his judgment, when the defence no longer **had** an opportunity to do anything about it.

The trial court's failure to consider the probabilities or improbabilities

[24] Although the magistrate correctly pointed out that he had to apply double caution to the evidence of the complainant because she was a single witness and a child witness, and stated that the court had to be satisfied that the complainant's evidence was satisfactory in all material respects, he merely paid lip service to this noble principle of our law in my view, in that he failed to consider the following improbabilities:

24.1. Both the complainant and her mother testified that the appellant sent her mother to go and borrow money from a friend who stayed at a nearby house. Therefore, the complainant's mother could have returned at any moment as no time had been set for her return. Furthermore, she had not gone to her friend's house to visit, as to give the appellant the idea that she could spend a long time there. If it was the appellant who needed the money, it could be expected that the complainant's mother would

have a reason to return home sooner than later in order to hand the borrowed money over to the appellant. This being so, it seems to defy logic as to how the appellant could have thought that he would have enough time to rape the complainant – which included taking his clothes and those of the complainant completely off.

24.2. Furthermore, the complainant's younger brother, who stayed in the same house, could have arrived unannounced at any moment to catch the appellant in the act. The same applies for the tenants who stayed outside on the same premises. It also sounds so strange that in the said circumstances the appellant would have left the door open.

24.3. Furthermore, if the appellant was used to attacking the complainant when her mother was absent, it does not appear to make for enough sense or logic as to why the complainant would have elected to stay behind and alone with the appellant when her mother left for a nearby house with a friend (to go and fetch money).

24.4. It also does not seem to add up in terms of time or opportunity that the appellant – who is virtually almost caught in the act, would co-incidentally hear the complainant's mother's voice from outside (I wonder what would have happened if the mother had silently come back and also wonder how the appellant could have predicted or foreseen that he would be forewarned by the mother's voice when she was on her way back), and still have the opportunity to stop the rape, get up and instruct the complainant to dress up, then both he and the complainant get

enough time to dress both the pants, underpants and dress respectively, and then search himself for money, then give the complainant R1.50 and ask her not to tell, then both left the bedroom to go to different rooms (if the mother's version that she found the complainant in the dining room and the appellant in the kitchen is anything to go by), before the complainant's mother could enter. In this context one must not lose sight of the fact that the complainant stated during cross-examination that her mother found both of them in the bedroom, which is contradictory to the her mother's evidence that she found her in the dining room and the appellant in the kitchen.

24.5. According to the complainant's mother, she was in the company of S[...] when she returned from borrowing the money on Saturday (30 March 2013) and on Sunday (31 March 2013) when the complainant reported the rape to her. In this respect she contradicted the complainant's evidence to the effect that she was with her mother only when making the report. Furthermore, the complainant never mentioned that S[...] returned with her mother or that she (S[...]) was there when her mother found her crying in the house. The easiest thing that the state could have done, if S[...] was present on both occasions, would have been to call S[...] as a witness to come and confirm where the complainant and the appellant were, that the complainant was crying and the appellant gave the reason testified to by either the complainant or her mother, and that the appellant had indeed sent the complainant's mother to go and borrow money, thus significantly contradicting the appellant's version that he came home to find the complainant alone. This the state failed to do without providing a reasonable

explanation or excuse therefor. In my view, it would have been apposite to draw an adverse inference against the state for this omission if S[...] was available to testify.

24.6. The state did not lead any evidence regarding what happened to the money that the appellant allegedly borrowed from the mother's friend – as to whether the mother returned with it or what she did with it. This would have lent more credence to the state's version that the appellant created an opportunity to rape the complainant by sending her mother away, and contradicted the appellant's version that he found the complainant alone at home.

24.7. If the appellant instructed his wife to borrow money from a friend who was at the appellant's home, by the name of J[...], why did the state not call the said J[...] to disprove the accused's version that when he came home he found the complainant alone? Her evidence would have confirmed that she was there with the accused, his wife/girlfriend and the complainant, when the accused borrowed money from her and asked the mother to accompany her to her home in order to fetch the money. This would have been the easiest and most obvious evidence to lead in order to counter the appellant's version, and in the absence of an explanation why she was not called to testify if she was available the trial court was entitled to draw an adverse inference from failure to call her – which it did not do.

24.8. I find it very odd that the complainant would have played along by quickly and silently getting dressed (which I am forced to infer from the evidence led), instead of welcoming the opportunity

of her mother catching her troublesome and abusive father in the act. To the contrary, she testified that she did not think of getting off the bed and quickly escape when she heard her mother's voice because she thought that the appellant was going to hit her. If she feared that the appellant would hit her, I wonder what happened to that fear by the time she made her report to her mother. If that fear was legitimate, it should have persisted unless some kind of explanation is rendered as to what made it go away. This is simply bizarre in my view, especially as there was no evidence that the appellant threatened her in any way on the 30 March 2013 (the date of the only crime for which he was convicted), and any suggestion of previous threats to stab her with a knife or hit her with a shoe (which was meant to prevent her from reporting the said incidents, as against preventing her from escaping during rape) was not proven.

24.9. It is also not clear as to what could have been the purpose of the appellant using a pillow. This is important as one must consider why the accused used the pillow – was it in order to prevent the complainant from recognizing him or to prevent her from screaming? If for either purpose, it does not seem to fit in with either purpose as he is supposed to have thrown her on the bed, thus exposing his identity and / or affording the complainant an opportunity to scream or call for help – especially with the tenants staying on the same premises, and the door being left open.

Contradictions between the complainant, her mother and her report to the doctor

[25] The magistrate also failed to deal with the contradictions between the evidence of the complainant and her mother on the one hand, and the version that the complainant gave to the doctor who prepared the medical report on the other hand. I mention below some of the said contradictions.

25.1. Whereas the complainant testified that she reported the rape of the 30 March 2013 to her mother on the same day of the rape, the mother testified that she only did so on the next day.

25.2. Whereas the complainant stated that it was only herself and her mother when she reported the rape of the 30 March 2013, her mother stated that they were three – herself, the complainant and a lady by the name of S[...]. She even stated that the complainant would not tell until the said S[...] arrived.

25.3. Whereas the complainant stated that the appellant made up a story that she (complainant) was crying because he sent her to the shop and she refused, the mother stated that he made up the story that she was crying because he sent her to go look for her. Furthermore, on either version it seems nonsensical as to why the complainant would cry for merely refusing to be sent. It would perhaps have made sense if it was alleged that the complainant was crying because she was reprimanded or assaulted by the appellant for refusing to be sent – and there was no such evidence.

25.4. Whereas the complainant told the doctor who compiled the medical report that the appellant raped her on the 30 March 2013

in his bedroom and on his bed, she testified in court that the appellant took her to her bedroom where he raped her.

25.5. Whereas the complainant told the doctor that the appellant had been sexually abusing her since the year 2011, and that she informed her mother thereof who would not believe her, the complainant testified in her oral testimony that she never reported any of the previous sexual abuse incidents to anyone. Her mother also contradicted her version to the doctor to the effect that she reported the previous incidents to her, and that she would not believe her. If the doctor's report is correct – and it was admitted as exhibit “A” by consent between both sides – it then means that the complainant has the capacity to lie on a very important aspect. She either lied to the doctor or in court during the trial. Furthermore, if she told the doctor the truth, it would mean that she most probably lied in court in order to protect her mother against the accusation of not having taken her complaints up when she should have, and this would lead to the question of who influenced her to subsequently lie during the trial. On either assumption that she was influenced by someone to lie in favour of her mother, or that she lied on her own initiative and volition, she would just look bad as an untrustworthy witness.

25.6. Whereas the complainant had testified in her evidence-in-chief that she did not report the previous incidents of sexual abuse due to the fact that the appellant had threatened to either stab her with a knife or hit her with a shoe, she later testified under cross-examination and when questioned by the court that she did not report them as she thought that her mother would hit her if she did.

25.7. Whereas the complainant denied any knowledge of having reported to the appellant, at some point, that her school friend had sexual intercourse with some boy on some school sports day, her mother confirmed that there was such a report by the complainant.

The right of this court to interfere

[26] As stated above, the trial court should have approached the evidence of the complainant with caution, and it did not. Although the magistrate stated that the complainant's evidence needed to be treated with caution, it, however does not appear that he critically evaluated the complainant's evidence as a single witness nor did he consider all the evidence and the attendant probabilities and/or improbabilities before deciding whether it is reliable or not. Furthermore, the magistrate did not even refer to a single contradiction, unsatisfactory feature or improbability in the state's evidence in his judgment. Stated differently, the magistrate erred in failing to apply caution and consider the contradictions and improbabilities mentioned above, and this amounted to a misdirection. This being so, this court is at large to consider the matter afresh and make whatever order it deems fit. See the *Dlhumayo* and *Mlumbi* decisions mentioned above.

Fresh consideration of the matter

[27] The facts of this case can be summarized as follows: The essence of the state's case is that the complainant, a girl aged 11 years in the year 2011 and 13 years as at the 30 March 2013,

stayed with the appellant (who is her biological parent), her mother and her younger brother in the main house. There were tenants also staying on the same premises in a shack. The complainant was subjected to sexual abuse by the appellant at the common home on a number of occasions when her mother was not present since the year 2011. The complainant did not report this history of sexual abuse until after the last incident of the 30 March 2013.

[28] She reported the rape of the 30 March 2013 to her mother shortly thereafter (be it on the same day according to the complainant or the next day according to her mother). After the complainant reported the rape of the 30 March 2013, the crime was reported to the police and the complainant was examined by a medical doctor on the 1 April 2013, who also prepared the medical report handed in as exhibit "A". It was during the said medical examination that the complainant repeated her report of the rape that occurred on the 30 March 2013 and also reported the previous incidents of sexual abuse to the doctor, who noted such reports in his report.

[29] As regards the rape of the 30 March 2013, the appellant took the complainant to her bedroom whilst the door was open. He forced himself upon her and penetrated her vagina with his penis, but only a bit. On hearing the complainant's mother talking through the open door, the appellant stood up, instructed the complainant to get dressed, got dressed himself and took the complainant's panty and placed it into his pocket. According to the complainant, her mother found both of them still inside the bedroom, whilst according to her mother she found the complainant in the dining

room and the appellant in the kitchen. According to the complainant's mother, when she asked why the complainant was crying, the appellant told her a lie that the complainant was crying because she refused to be sent by the appellant to go look for her, whilst according to the complainant the appellant said she refused to be sent to the shop.

[30] According to the complainant, she reported the rape incident of the 30 March 2013 to her mother on the same day, whilst according to her mother she only did so on the next day and to both herself and S[...], after which the matter was reported to the police, and the complainant was taken to the doctor for medical examination.

[31] The complainant, who was hurt, crying, sobbing and anxious, told the doctor that she was raped by the appellant since the year 2011, and she reported such previous incidents to her mother who would not believe her. According to her report to the doctor, in so far as the incident of the 30 March 2013 was concerned, the appellant raped her in his bedroom and on his bed, whereas according to her oral testimony in court the incident took place in her own bedroom. Thereafter, the appellant gave her panty back on the next day 31 March 2013 at the same crime scene.

[32] During examination of the complainant, the doctor observed that there was a white thick mucus discharge around the cervix, which was possibly semen-like fluid and the complainant's hymen looked irregular in shape. She also observed that her clitoris was slightly swollen and bruised. She also noted redness and erosion

on the said clitoris and other vaginal parts. There were also scars and indications of previous tears due to penile vaginal penetration. There was, however, no visible fresh injuries regarding the general examination, although such absence of injuries does not exclude the occurrence of the alleged sexual assault of the 30 March 2013. The doctor compiled a report regarding her examination and it was handed in, by consent, as exhibit "A".

[33] A sealed exhibit bag also containing the complainant's panty was subsequently sent to the forensic laboratory for scientific DNA analysis. The results came back stating that no semen was detected on the exhibits and consequently no DNA comparison could be carried out, and that the panty would be sent back to the complainant's address. The said results were handed in by consent as exhibit "B".

[34] On the other hand, the appellant's defence is that he disputes the allegations against him, and he was informed by the complainant's mother, while visiting him in prison after his incarceration and before the trial could commence, that she (mother of complainant) had influenced the complainant to falsely implicate him of the rapes because she was angry with him after the argument they had on the 30 March 2013. According to him, he had arrived home around 17h00 on the 30 March 2013 and found the complainant alone. He asked her if she was not hungry and she said no, but indicated that she needed chips, to which he responded by giving her R1.50 so that she could go buy the said chips. He also asked her to go look for her mother at her friend's (mother's friend) house.

[35] As the complainant was about to leave the premises of the common home, next to the gate, the complainant indicated to him that her mother was coming. After the complainant's mother arrived, they (appellant and complainant's mother) argued after he raised her neglect of household duties like cooking for the family with her, and the complainant's mother would not let the matter pass without staking her case. He spoke to her in a loud voice, and as he did so, the complainant returned from buying the chips, and was distressed by the ongoing argument or fight. The complainant even asked him not to assault her mother and he indicated that he was not going to do so and even apologized to her (complainant) for what was going on.

[36] He subsequently got arrested on the 31 March 2013 on the trumped up charges of rape, and he was informed by his wife (the complainant's mother) on one of her prison visits that she actually coached the complainant to falsely implicate him as stated above, for the reasons stated above.

The application of caution to the evidence of young children

[37] Although the state led the evidence of two witnesses, being the complainant and her mother, and also led medical evidence and DNA results referred to above in the form of exhibits "A" and "B", the state's case rests mainly, and almost entirely on the evidence of the complainant only. Therefore, it is of crucial importance that the evidence of the complainant, which must in any event be approached with caution as a young child, be

satisfactory in all material respects. For me to be so satisfied, it means that I must be satisfied that the complainant's version, viewed against the totality of the evidence led – including that of her mother, the medical report and DNA results (which were admitted as exhibits “A” and “B” respectively) and viewed in the light of the attendant probabilities or improbabilities – must be beyond reasonable criticism in all respects, and must finally meet the requisite standard of proof beyond reasonable doubt.

[38] In **S v Cele (AR48/2012) [2012] ZAKZPHC 42; [2012] 4 All SA 182 (KZP) (17 July 2012)** the court stated the following at para [16] regarding the pliability or vulnerability of children to the power of suggestion or undue influence:

*“[16] The evidence of a young child has been said to be unreliable because of the child's inexperience, imaginativeness and suggestibility to influence. In S v Jackson case, supra, the court dispensed with the cautionary rule in sexual cases on the ground that the application of the cautionary rule to sexual assault cases was based on irrational and outdated perceptions. Therefore, it follows that the state is simply obliged to prove the accused's guilt beyond reasonable doubt. **However, a particular case may call for a cautionary approach, for instance, where imaginativeness and pliability of a young witness is a potential risk**” (my emphasis).*

[39] When considering and evaluating the contradictions between the complainant and her mother on the one hand, and the complainant and her previous report to the doctor on the other hand, and the absence of explanations for the said contradictions, I am of the view that the complainant's evidence was unsatisfactory and that the said contradictions impacted negatively on her reliability and credibility.

[40] Furthermore, I have already found that there is a number of improbabilities in the circumstances surrounding the alleged commission of the rape, like raping the complainant whilst the door stayed open, in a yard where there are tenants who could walk in at any moment, the opportunity for the appellant and complainant to stand up, dress etc with the complainant's mother virtually inside the house (having walked through an open door) etc. In my view, the said improbabilities further weaken the credibility and quality of the complainant's version.

[41] Furthermore, I am of the view that the fact that the complainant's mother initially confirmed the appellant's version that she influenced the complainant to falsely implicate him did not do the state's case any good. In fact, in my view, it did the state's case a lot of harm. No explanation was given as to why the complainant's mother initially admitted such a far-reaching and game-changing submission when it was put to her under cross-examination. Furthermore, her subsequent answers to the questions from the magistrate on this aspect were even more worrisome. When viewed against the appellant's defence that the complainant was influenced by her in order to falsely implicate him, it is a development I cannot ignore. In my view, it was the most significant and defining moment of her cross-examination. In the light thereof, the appellant's defence that he did not commit the alleged rape and that she coached the complainant to falsely implicate him is not entirely without merit, and can, therefore, not be dismissed as not being reasonably possibly true or false beyond reasonable doubt. I may also add that I am of the view that

there are no improbabilities inherent in the appellant's assertion that the complainant's mother influenced her to falsely implicate him – especially when viewed against the complainant's mother's initial answer (of nodding) when the proposition was put to her.

[42] In my view, the particular circumstances of this case - where the submission that the complainant's mother coached her to falsely implicate the appellant cannot be dismissed without much ado, call for a cautionary approach. In applying such caution, I need to find some guarantee elsewhere, other than from what falls from the lips of the complainant, that the complainant's evidence is true and reliable in all material respects.

[43] I am unable to find such guarantee anywhere outside the complainant herself. To the contrary, I see the warning signals flashing all over the state's case. Such warning signals began with the state asking the complainant leading questions on very important aspects of the case and culminated in the contradictions in the state's case. Although corroboration of the evidence of a young witness who is a complainant is not an absolute requirement, I am of the view that corroboration in the form of medical evidence or any other form of worthy corroboration, would have been a welcome tool in the particular circumstances of this case. See *Cele*'s decision referred to above. There was no form of corroboration of the complainant's version on any aspect whatsoever.

[44] In **Fletcher v S (171/09) [2009] ZASCA 169 (1 December 2009)**, Tshiqi AJA (as she then was) writing the unanimous decision of a five-judges bench stated the following between paragraphs [10] and [17] as regards the meaning of corroboration:

"[10] In answering this question sight should not be lost of the following statement by Cloete JA as to the meaning of 'corroboration' in S v Gentle: 'The representative of the State submitted on appeal that (I quote from the heads of argument): "(T)here was sufficient corroboration or 'indicators' to support the occurrence of the rapes." It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, on the issues in dispute (cf R v W 1949 (3) SA 772 (A) at 778-9). If the evidence of the complainant differs in significant detail from the evidence of other State witnesses, the Court must critically examine the differences with a view to establishing whether the complainant's evidence is reliable. But the fact that the complainant's evidence accords with the evidence of other State witnesses on issues not in dispute does not provide corroboration. Thus, in the present matter, for example, evidence that the appellant had sexual intercourse with the complainant does not provide corroboration of her version that she was raped, as the fact of sexual intercourse is common cause. What is required is credible evidence which renders the complainant's version more likely that the sexual intercourse took place without her consent, and the appellant's version less likely that it did not.'

[11] So, what we are looking for are indications on the undisputed facts which lend support to Bianca's version and at the same time renders Fletcher's conflicting version so unlikely that it cannot reasonably possibly be true ...

[15] Her behaviour immediately after the incident also gives credence to her version. She asked to be taken to the police station to report the rape in her half naked state. It is highly unlikely she would have gone to two police stations in such an undignified state to falsely incriminate

two men she had met that same evening and who did nothing but offer her a lift home. She persistently informed the police and the doctor that she had been raped. Even her physical and emotional state at the time was consistent with her version. There is no basis for such an emotional state if Fletcher's version is accepted, ie that she had completely relaxed and was in fact, enjoying herself when they left her with De Kock. (S v Hammond 2004 (2) SACR 303 (SCA) para 22). There is therefore no reason to find that Bianca was not telling the truth

*[17] Finally De Kock's behaviour in the veld gives credence to Bianca's version and is inconsistent with that of Fletcher. It is inexplicable why De Kock would find it necessary to nudge Fletcher whilst he was straddling Bianca if all he was doing was to try and calm her down. Moreover, if she had not been raped it would have been unnecessary for De Kock to behave as he did thereafter. **The evidence of Fletcher was therefore correctly rejected by the trial court**" (my emphasis).*

[45] The passages quoted above show that the approach of the SCA on what corroboration is, means that even if the court accepts that the complainant cried, this is no corroboration of her version, as her crying is not inconsistent with the appellant's version that she cried due to witnessing the argument between him and her mother. Similarly, the medical evidence of the history of previous sexual activity on her part does not corroborate her as no credible evidence of such history was led, and even if it had, it would not have been inconsistent with the appellant's suspicion that the complainant, like her friend she once reported to him, might have been engaging in sexual intercourse with boys.

[46] On the other hand, I find that there were no material contradictions or inconsistencies in the appellant's version.

[47] In **S v V 2000 (1) SACR 453 (SCA)** at 455 a-b Zulman JA said the following:

“It is trite that there is no obligation upon an accused person, where the State bears the onus, to convince the court. If his version is reasonably possibly true he is entitled to his acquittal although his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused’s version is reasonably true but one subjectively believes him is not the test.”

[48] In *S v Chabalala* Heher JA formulated the principles in evaluating the evidence of the state and an accused person in a criminal trial as follows:

“The trial court’s approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt”.

[49] The state must prove its case by proving each and every element of the offence beyond reasonable doubt, and there is no onus on the appellant to prove his innocence, and where the court is left in doubt as regards any of the elements of the offence, the benefit of such doubt must accrue in favour of the appellant.

[50] I am of the view that the number of difficulties in the state's case that I have alluded to above is such that it fails to meet the required level of proof in a criminal case – being proof beyond reasonable doubt.

[51] Consequently, I am of the view that the state did not discharge the onus of proving beyond reasonable doubt that the appellant raped the complainant, and consequently the appeal should succeed and the conviction accordingly be set aside. Therefore, there is no need to deal with the issue of sentence as it automatically falls off because of the appellant's acquittal.

[52] In the premises, I propose the following order:

52.1. The appeal is upheld.

52.2. The conviction and sentence are set aside.

I. MOTLOUNG, AJ

I agree and so it is ordered.

LJ LEKALE, J

For appellant: Adv S Makhene

Instructed by: Bloemfontein Justice Centre
Bloemfontein

For respondent: Adv WS Sampisi

Instructed by: Director of Public Prosecutions
Bloemfontein