

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A170/2013

In matter between:

BOESMAN MOTLALENTWA MOFOKENG

Appellant

and

THE STATE

Respondent

CORAM: LEKALE, J *et* MOTLOUNG, AJ

HEARD ON: 25 AUGUST 2014

DELIVERED ON: 5 FEBRUARY 2014

JUDGMENT BY: MOTLOUNG, AJ

Introduction

[1] This is an appeal against both convictions and sentences imposed by the Bethlehem regional court on the 2 October 2012. The appellant was convicted of two counts of rape of two young girls aged 11 years and twelve years respectively, and sentenced to life imprisonment in respect of each count, and the court ordered the said sentences to run concurrently. 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 appellant approaches this court on appeal with leave of the court *a quo*.

Representation of the parties and their respective submissions on appeal

[2] Mr Nel appeared for the appellant whilst Mr Hiemstra appeared for the state.

[3] Both in his heads of argument and in his oral submissions Mr Nel submitted the following:

3.1. The magistrate failed to apply the necessary caution to the evidence of both complainants. Caution should have been applied due to the fact that the complainants were young children, and the special circumstances of this case warranted that.

- 3.2. The magistrate was not impartial in the conduct of the trial. He posed questions not limited to elucidation or clarification of evidence, but meant to favour the state case. The magistrate erred in failing to draw a negative inference from the contradictions between the state witnesses' oral evidence in court and their statements to the police, and in finding that the deviations between the two were not material.
- 3.3. The magistrate erred in failing to find that the version of the complainants was improbable.
- 3.4. The complainants failed to report the alleged rape at the first available opportunity, and their explanation for the delay in reporting it is unconvincing.
- 3.5. The evidence of Dr Radebe was not satisfactory, especially when viewed together with that of Dr van Schalkwyk who testified for the defence.
- 3.6. The magistrate erred in finding that the state succeeded in proving its case beyond reasonable doubt, and that that the version of the appellant was not reasonably possibly true but false beyond reasonable doubt.
- 3.7. On sentence, the magistrate erred in finding that there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of life imprisonment. If the appeal on the merits is not successful, a

sentence of between 15 and 18 years would be more appropriate.

[4] On the other hand, Mr Hiemstra submitted the following in his heads of argument and oral submissions:

- 4.1. The magistrate's judgment was comprehensive and well-considered. Amongst others, the court was alive to and in fact applied the necessary caution.
- 4.2. The magistrate properly considered the delay in reporting the rape. At any rate, there has recently been examples of complaints of sexual abuse being raised decades later, and even then, by complainants far more sophisticated than the complainants in this case.
- 4.3. The magistrate properly considered the contradictions between the oral evidence of the state witnesses and their written statements to the police. Furthermore, our courts have recognized the poor quality of police statements and the dangers associated with placing too much emphasis on contradictions in evidence.
- 4.4. It is trite law that a court of appeal will not lightly interfere with the credibility findings of the trial court, and in this case the magistrate found that the state witnesses left him with a favourable impression.

- 4.5. Although the evidence of Dr Radebe is inconclusive, it is consistent with the version of the complainants.
- 4.6. The accused's defence of jealousy and ill-feeling towards him is inherently improbable.
- 4.7. The questions of the magistrate were reasonable and necessary in the circumstances of the case.
- 4.8. The magistrate was correct in finding that the accused's version was not only improbable, but a fabrication to be rejected as false beyond reasonable doubt.
- 4.9. On sentence: The minimum sentence of life imprisonment is applicable, and the magistrate was correct in finding that there existed no substantial and compelling circumstances justifying a departure from the said sentence. However, during argument he submitted that if the conviction is upheld, a sentence of between 18 and 20 years would be appropriate.

Issues to be decided

[5] This court has to determine, as a court of appeal, whether the appellant was correctly convicted and / or sentenced in respect of each conviction and / or sentence.

Approach by a court of appeal

[6] 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 (court of appeal) 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”.

[7] 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. This was aptly amplified by Msizi AJ in the recent (unreported) decision of **Booi v State, in the Eastern Cape Division** – a decision that was delivered on the 12 August 2014 under case number CA & R 393/13 – as follows:

“...the ambit for the interference by the appeal court on a finding of fact and credibility is restricted to few instances. It is only allowed in instances where there is a demonstrable and material misdirection by the trial court where the recorded evidence shows that the finding is clearly wrong. See S v Hadebe and Others 1997 (2) SACR 641 (SCA) t 645e- f. Factual errors may be errors where the reasons which the trial judge provides are unsatisfactory or where he/she overlooks facts or improbabilities. Also, where the finding on fact is not dependent on the personal impression made by a witness’ demeanour, but predominantly upon inferences and other facts, and upon probabilities. The appeal court is also in an equal position to the trial court”.

[8] 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.

[9] 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.”

[10] 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 evidence led during the trial, but such evidence is not referred to 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. As was stated in **S v Singh 1975 (1) SA 227 (N)** at 228:

“The best indication that a court has applied its mind in the proper manner ...is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses”.

[11] I must, however, make it clear that by requiring the trial court to consider and weigh all evidence is not meant that the judgment of the trial court must also include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led.

[12] In order to apply the above-mentioned legal principles to the facts of this case, this court must determine, as regards the convictions 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 accused or 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.

In other words, this court must consider whether the magistrate considered all the evidence, weighed it correctly and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the convictions and sentences. 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.

[13] Stated differently, in order to determine whether there is any merit in any of the submissions made by the respective parties mentioned above, this court must consider the evidence led in the trial court, juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the said judgment.

[14] In my view, this means that if a court of appeal is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. The appeal court must then consider whether the said 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.

The judgment by the magistrate and his reasons therefore

[15] The state called a total of seven witnesses, being the two complainants (MLM and NMN), the mother of MLM by the name of LAM, the grandmother of MLM by the name of Papadi, the arresting officer by the name of Constable Modupi, the investigating officer by the name of Warrant officer Nel, and Dr Radebe who examined the two complainants. On the other hand, the defence called a total of four witnesses; being the appellant himself, his bother-in-law called RA Mojane, his wife by the name of MJ Masakaneng and Dr van Schalkwyk.

[16] Having correctly reiterated that at the end of a criminal trial the court must make a finding on the totality of the evidence as stated in *S v Chabalala* 2003 (1) SACR 134 (SCA), and having referred to the cautionary rules applicable to the evidence of young children, and further having recognized that there was a number of discrepancies or contradictions between the evidence of the state witnesses (including the two complainants) in their written statements made to the police compared to their evidence in court, the magistrate found that:

16.1. The versions of the two complainants corroborate each other with regard to the substantial parts of their evidence, and although there were contradictions or inconsistencies in their evidence, the said contradictions were minor and immaterial, and consequently not justifying any negative inference against any of the state witnesses (including the two complainants),

16.2. The state witnesses had no motive to falsely implicate the appellant, and

16.3. There were no improbabilities in the evidence of the two complainants.

[17] On the other hand, the magistrate found that, as regards the testimony of the appellant, the crux of his defence was that there was a conspiracy amongst the state witnesses to falsely implicate him, and that the said conspiracy is not only improbable, but that it is a fabrication, untruthful and that it can be safely rejected as false beyond reasonable doubt.

[18] The magistrate concluded by finding that the state succeeded in proving its case beyond reasonable doubt.

[19] I have looked at the number, nature and extent of the inconsistencies or contradictions in the evidence of the complainants, and I am convinced that in the light of the appellant's defence such contradictions and inconsistencies impact negatively on their credibility, regard being had to the appellant's suspicion that the state witnesses conspired to incriminate him falsely.

[20] I, however, agree with Mr Hiemstra's submission that this court should not lightly interfere with the magistrate's finding that the inconsistencies or contradictions that found expression during the trial were minor and not material – in the sense that they did not bear direct relevance to the issues to be determined and decided upon, although they had a bearing on the probabilities.

[21] I, nevertheless, feel constrained to express my serious reservations regarding the magistrate's comments (in relation to the approach to be taken by a trial court in relation to inconsistencies or contradictions between witnesses' statements to the police and their oral testimony in court) to the effect that:

*"I sit in the criminal court every day of my life. I have never come across a police officer who will concede that a statement was never read back. I have never come across a police officer who conceded that there was a misunderstanding with the witness when the statement was taken down. **And the reason for that is that is simply not human nature to readily admit that you did not perform your duties in a prudent way**" (my emphasis).*

I do not share this sentiment, as I have come across some decent and honest members of the police force, who would readily admit to mistakes on their part, if any, and I do not agree with the necessary implication that it is only natural for one to lie in a court of law if one has not done one's job or assignment diligently. Therefore, the magistrate's comments, whilst they may be true for some police officers, are too wide and constitute an unfair and

unwarranted generalization against all police officers. That much for the magistrate's comments regarding how police officers obtain statements from witnesses as compared to how they subsequently testify in court regarding that aspect.

[22] Having found that there is no reason to interfere with the trial court's findings of fact, I am, however, in full agreement with Mr Nel's submission that the trial court did not properly consider and weigh the probabilities or improbabilities inherent in the circumstances or facts of this case.

[23] I also agree with Mr Hiemstra's observation and oral submission that the two complainants were the two main state witnesses, as they were the only ones who could testify to what happened on the day in question - the other state witnesses testified on issues that were, in the main, collateral. In dealing with the probabilities or improbabilities in relation to the evidence of the complainants, the magistrate stated the following:

"To my mind there were no real inherent improbabilities in their evidence and both of them, over all, made a good impression despite their youthfulness".

The magistrate also concluded, in summing up his findings, that:

"... there is nothing improbable in the evidence of the complainants and that they had no motive to falsely implicate him".

I deal below with this finding of the magistrate.

The improbabilities that were never considered by the trial court in its judgment

[24] As stated in the *Booi* decision mentioned above, factual errors may be errors where the reasons which the trial judge provides are unsatisfactory or where he/she overlooks facts or improbabilities. In my view, the trial court did not give due weight and consideration to the probabilities or improbabilities inherent in the circumstances of this case. Even in expressing the view that there were no improbabilities present in the version of the complainants, the magistrate only mentioned his conclusion (that there were no improbabilities) without stating a factual basis for this finding. As stated in the decision of *Singh* mentioned above, the best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment.

[25] I have been unable to find, from a reading of the judgment, the reasons why the trial court concluded that there were no improbabilities present in the version of the complainants. The only reasonable inference to draw from the lack of the factual basis for the said finding is that the trial court failed to consider the probabilities or improbabilities.

[26] This being so, this court is at large to consider the presence or otherwise of the inherent probabilities or improbabilities - being "*in an equal position to the trial court*" as was stated in the *Booi* decision referred to above. I deal underneath with some of them:

26.1. The probabilities of Papadi being told that a rope was used to tie the hands of NMN and asking questions with regard thereto and not getting answers, and then doing nothing about the said allegation. It seems to be highly improbable that Papadi would do nothing to investigate the allegation further, in order to determine exactly what was going on or under what circumstances did that happen. In my view, Papadi's testimony on this aspect is very suspect. I really wonder as to what are the probabilities of a parent or grandparent being informed that a rope was used to tie up a young child with a rope in circumstances that made her so suspicious as to consider it important to ask the question why was the child tied with a rope in the first place, and secondly take it for exhibition to NMN during questioning, during which NMN confirmed she was indeed tied with it but fails to answer why, and also keep it for possible future use (as evidence), but so meekly accept no explanation or answer from NMN when probing why she was tied with the said rope in the first place – particularly after NMN has confirmed that she was tied with the rope and that it was the same rope that was used. I find this extremely improbable.

26.2. Furthermore, this would have meant that Papadi would be having two young children confirming that their grandfather tied one of them with a rope, and upon enquiry as to why, both children strangely refuse to give an answer or explanation. The refusal or failure to give an explanation of when and why NMN was tied with a rope by her grandfather should have in and by itself further fuelled Papadi's concerns and suspicions. Notwithstanding this, there is no evidence that she did anything further about the matter

– not even consulted with their parents or the police to share her mystery with them and possibly hope they could unravel it by providing answers or questioning the complainants themselves with the hope of getting answers.

26.3. Furthermore, it seems improbable that MLM, if she intended to conceal the story about the rape, would have disclosed only the part regarding the tying up of NMN by the accused with a rope – as this could expose her to further enquiries that could finally lead to her telling the full story. The same applies to NMN in respect of confirming that she was indeed tied up with a rope by someone who is supposed to be her grandfather.

26.4. It also seems highly improbable that Papadi, who stayed on the same premises with the complainants and their parents, would not have, at the very least, informed the parents of the complainants about the report made to her by both complainants and her concerns about such reports, instead of just hiding the rope. At best, she could have reported the matter to the police for further investigation or advice.

26.5. There is also, in my mind, the question of why did Papadi actually keep and hide the rope? For what future use did she keep the rope in the light of the fact that she took no further action regarding the report received from both complainants?

26.6. It also seems highly improbable that Papadi would have noticed, according to her statement to the police, that every time that the appellant came to her place carrying his firearm the complainants would not sit in the same room with the appellant and other members of the family, and Papadi would have done nothing about her observation, which obviously worried her if her testimony is anything to go by. The same question remains valid even on the permutation that it happened only once, on the 28 January 2011, if her oral testimony is anything to go by.

26.7. It is even more improbable that Papadi would have noticed MLM running away into the bedroom when the accused took his firearm out in order to clean it, and be so concerned about her observation as to ask her (MLM) why she did that, and be content to leave the matter at that when she received no answer to her question. This the more so as the mountain of concern and suspicion had obviously started piling on the previous occasion when she saw MLM jumping away as if seeing a snake and then telling her that it was because of seeing the rope that the accused had tied NMN with.

26.8. The magistrate does not seem to have considered the possibility that the complainants were unduly influenced by someone to falsely incriminate the appellant - especially the possibility of Papadi, whose cattle were stolen, in order to get even with the accused who was possibly suspected of having stolen Papadi's cattle in order to buy himself a motor from their proceeds.

26.9. The magistrate does not seem to have considered the possibility of NMN having been unduly influenced to confirm the report of MLM by the fact that as a young child she could have been shocked to be unexpectedly confronted by the police with MLM's story, in the presence of MLM, and consequently decided to play along. This is particularly important in the light of the well-known vulnerability and pliability of children.

The power of suggestion inherent in that setting (in relation to a young child) is potentially devastating in my view. Failure to consider this possibility was a misdirection in my view.

26.10. Furthermore, Papadi testified that at the hospital the doctor who attended to MLM told her that MLM had been raped, even before MLM could be interviewed by the social worker. No evidence was led as to where the said doctor obtained the information regarding the rape from. Was it from his own examination of MLM or was it from a report made by MLM to him? Neither LAM nor MLM was asked to clarify this aspect. Even the doctor was not called to shed more light on this aspect. If the doctor had received a report of rape from MLM, he would then be the first person to whom the report was made and it would have been important to know from him how it came about for MLM to make the said report. It is also unclear as to where MLM was at the time that the doctor made that claim.

26.11. This is important to know as one cannot rule out the power of suggestion that this could have had on MLM before she was interviewed by the social worker, if the doctor had uttered the message (of rape) in her presence. If MLM overheard the doctor's

claim, and she was then subsequently referred for an interview with the social worker, it would mean that MLM already knew what the doctor's view was regarding her condition. The judgment makes no reference to this aspect in order to indicate whether the court applied its mind to this possibility or not. In my view, this constituted a misdirection on the part of the magistrate.

26.12. In my view, it was very important for the court to know what actually transpired after MLM was brought to hospital, finally leading up to her reporting the rape, especially because the report was made approximately 4 months after the alleged rape (and not immediately thereafter or at the first available opportunity). Failure to examine this aspect, as the judgment shows that the magistrate failed to do, was a misdirection in my view.

26.13. It seems highly improbable that the accused would rape the two complainants in broad daylight, with a door left open and within a hearing distance of the neighbouring houses.

26.14. It seems improbable that the accused would rape NMN in the presence of MLM, whilst the door has been left open, thus leaving the possibility of MLM escaping during the rape of NMN, and thus possibly raising alarm.

26.15. It seems to make for little sense as to why the accused would use a rope to tie NMN only and not also MLM, and then commence by raping NMN who is tied up, whilst leaving MLM, who is untied, free to escape through the open door if she decided to. It would have made more sense if the accused commenced by

raping MLM, who was not tied, whilst keeping NMN tied up in order to avoid her escape or her picking up the unattended firearm that was placed on the floor whilst he was busy raping MLM.

26.16. It seems highly improbable that the accused would have allowed NMN, after raping her, and after she had cried, to simply leave the house through the open door, whilst approaching MLM in order to rape her, seemingly indifferent to whether NMN has gone away to raise alarm or not from any of the nearby houses.

26.17. It appears even more improbable that the accused would have allowed NMN to escape to the outside naked, in broad daylight, as this alone had the potential to attract unwarranted attention from neighbours. This is particularly so as by this stage the appellant had not yet threatened any of the complainants not to tell anyone or else he would shoot or kill them. This would leave the prospect of NMN raising alarm from nearby houses looming large. In this context one must bear in mind that NMN stated in her first statement to the police, and in contrast to her oral testimony, that the appellant untied her before she left the house. It is also worth noting in this context that no complainant mentioned in any of the four statements to the police (two statements each) that MLM untied the hands of NMN – to the contrary, NMN's first statement states that it was the appellant who did that.

26.18. It seems improbable that the appellant would be indifferent to whether the neighbours heard the cries of NMN or not whilst he was raping her, before she left his house naked with both her hands tied to her back, and then naively proceed to repeat his

crime by raping MLM, who similarly cries, and again he remains indifferent to whether the neighbours heard the cries or not, without instructing them to stop crying, and then naively, in broad daylight, openly throw the clothes of the two naked complainants to the outside whilst openly making his threat to them not to talk. This created the possibility of neighbours hearing and seeing the naked and crying complainants whilst the accused was throwing their clothes to the outside.

26.19. It seems highly improbable that the appellant would be indifferent to the prospects of two naked and crying children, with one's hands tied to her back (which is the best possible way of attracting anybody's attention in broad daylight), being seen outside his house or leaving his house, attracting unwarranted attention.

26.20. It seems improbable that the appellant would have allowed both complainants to leave his house, after their rapes one by one, before warning them not to talk, as he could not have known that they would not rush to raise alarm upon leaving his house before he could threaten them.

26.21. It seems improbable that the appellant would let the complainants leave his house before dressing up, in order to create an impression to unsuspecting passersby or watchers, that nothing is amiss, and without warning them to stop crying and keep quiet. The act of the two naked complainants, aged approximately twelve years (and thus not too young to go around naked in public) getting dressed outside the house could also

attract unwarranted attention. Furthermore, the question goes begging as to exactly how the appellant managed to rape NMN with both her hands tied to the back. No explanation appears from the evidence as to how this happened. Furthermore, it appears improbable that the appellant would have pushed NMN to fall to the floor, whilst both her hands were tied to the back, and thus being indifferent to whether NMN was hurt in the process or not. One must also ask oneself as to how NMN managed to stand up and leave the house whilst both her hands were still tied to her back.

26.22. It seems improbable that the complainants, who up to then seem to have enjoyed a normal relationship with their “grandfather” (the appellant) would allow him to do strange or nasty things things to them without him or them saying a word and them remaining quiet until after being penetrated by the appellant, and only to cry after being sexually penetrated.

26.23. Finally, as a general proposition – rapists do not ordinarily commit their nefarious act (of raping) in public and in the presence of witnesses. It is hard to imagine how the accused did not care that there was at least one witness in respect of each rape – being each complainant in respect of the other’s rape.

Gaps in the state’s case

[27] There are several gaps in the evidence adduced by the state. It is unfortunate that the state did not do the following:

27.1. Although MLM testified that it was only after serious interrogation, at the hospital, that she made the allegation of rape, no evidence was led at all to examine exactly what is it that was done, by who, and under what circumstances, to get MLM to make the allegation of rape for the first time. The form and nature of the interrogation should have been examined by the court. This aspect is particularly important as MLM did not make a report of the alleged rape at the first available opportunity, whilst on the other hand the nurses had twice, on two different occasions, diagnosed her sickness as a hygiene problem. Notwithstanding all these circumstances, the magistrate did not deal with this aspect at all in his judgment. In my view, this was one of the most serious misdirections on the part of the magistrate as the court had to satisfy itself that no undue influence was applied to the complainants in order to make them report the rape – once again regard being had to the applicant's suspicions.

27.2. Linked to this aspect is the fact that even NMN had to be interrogated, after initially denying the rape allegation, when confronted by the police in the presence of MLM. Again, no attempt was made to examine exactly what kind of pressure, and by who, was brought to bear on NMN to change her denial of rape to an admission thereof. Furthermore, on the evidence led, one cannot even determine what role MLM played at that stage - whether MLM was used or participated in the process of

interrogating NMN after she initially denied the rape or not. All that the evidence reflects is LAM stated that NMN only spoke when interrogated by the police, and Cst Modupi testified that NMN initially denied the rape but spoke after interrogation.

And, again, there is no mention or reference to this aspect in the magistrate's judgment. This, in my view, is a serious misdirection on the part of the magistrate.

27.3. I am also of the view that it was extremely undesirable of the police, when dealing with a young child like NMN, to approach NMN in the manner they did – when she was on her way from school. I can only imagine for myself what impression NMN was left with when she was confronted by the police in the presence of MLM. Did she think that MLM was under arrest or what? Did she think that she was also going to be arrested like MLM? Worse still, what went through her mind when she was confronted with the allegation that MLM had already told the story that both of them (herself involved) were raped by the accused? It is obvious that the police must have told her at the outset that MLM had already told them what happened, and all that they were seeking from her, was a confirmation of the story. In my view, the potential of the power of suggestion being overwhelming (to NMN) in these circumstances is palpable. I ask myself why did the police not fetch NMN in a neutral atmosphere, after school and from her home, and let the social worker (preferably a different one from the one that interviewed MLM) interview her – without making her aware that MLM had already made the allegation that both of them were raped, and by the same identified person who happened to be the appellant. It is clear that the magistrate did not consider the

possibility or probability of NMN being unduly influenced by the setting stated above, and this was a misdirection in my view, as a court must always be on tenterhooks as regards the possibility of the pliability of young children, especially in the light of the appellant's defence.

27.4. Neither the complainants nor Cst Modupi were asked to explain the nature and extent of the interrogation. In my mind, it was of crucial importance for the court to know whether the force that was brought to bear on the complainants, in both instances, was undue or legitimate. For an example, was there a threat to thrash or arrest the complainants unless they told the truth? On the available evidence, this enquiry cannot be answered.

28.5. I also ask myself as to why the mother of NMN was not called as a witness, whilst the mother of MLM was called. There was no evidence or suggestion that she was not available to testify or make a statement to the police. She surely could have shed more light regarding her observations in respect of the behaviour of the complainants (especially in respect of her daughter, NMN) after the alleged rape. If she was not available, the father of NMN could possibly have played this role. In this context one must bear that there existed a close familial relationship between the complainant MLM, her mother LAM and Papadi, the grandmother of MLM and mother-in-law of LAM. This consideration finds more weight in my mind in the light of the fact that the appellant suggested a possible motive for Papadi (and by extension those on her side of the family) to falsely implicate him. The presence of independent witnesses not related to those on Papadi's side of the

family could possibly lend more credence or weight to the state's case.

The way the trial court dealt with the accused's suggestion of a possible motive to falsely implicate him

[28] The magistrate found that relations between the appellant and members of his family on the side of Papadi must have been good, and that the appellant's suspicion that it was because of bad relations that he was being wrongly accused of the rapes, was not plausible. In my view, the magistrate misdirected himself on this fact as Papadi actually confirmed, by necessary implication, that relations between the two sides of the family were not good. She only challenged the reason for the bad relations. According to her, whereas the appellant alleged that the bad relations started from her side after she suspected him of having stolen her cattle, the source of the bad relations was the appellant himself. To borrow from her own words, she stated that *“Actually it is the other way around. He is the one who is causing trouble or problems for me”*.

[29] Therefore, there was nothing startling about the evidence of the brother of the appellant's wife that he fetched the appellant's wife from Papadi's place, as the magistrate found. The fact that Papadi stayed with the appellant's wife notwithstanding the existence of bad relations between the appellant and Papadi is not an antithesis of the existence of bad relations. Even the appellant's wife confirmed the existence of bad blood emanating from the appellant buying himself a motor vehicle after the alleged theft of

Papadi's cattle's and a suspicion that the appellant was responsible for the said theft.

[30] Many people stay together despite not enjoying good relations. Sometimes it is because of circumstances forcing them to do so. For an example, in many divorce hearings one comes to hear that the parties (husband and wife) had been staying together for years whilst relations between them were very bad. In this case it was confirmed by LAM that she even physically fought with the appellant's wife. The appellant suggested that this contributed to the further straining of relations, and I find nothing wrong or improbable with this suggestion.

[31] To the contrary, I have tested the appellant's version against the version of the complainants and other state witnesses, and I am of the view that the trial court adopted a very simplistic method of evaluating the evidence and I am of the view that the appellant's version (of conspiracy and jealousy) cannot be rejected on the basis of the improbability of Papadi hosting his wife against allegations of bad blood and jealousy between the two sides of the family. In my view, his version cannot be rejected on the basis that it is so inherently far-fetched or improbable, or so improbable that it cannot reasonably possibly be true, as to be dismissed as false beyond reasonable doubt.

[32] Furthermore, Papadi confirmed that her cattle, which were being herded by the appellant, strangely got lost in the sense that only hers were stolen, and this happened before the appellant could move from the Coenan farm, and there is also the uncontroverted evidence of the appellant that it was against that background that he bought himself a motor vehicle, and became the only person to own a motor vehicle on the farm. Furthermore, LAM confirmed that she even fought physically with the appellant's wife, who consequently suffered epileptic fits. Furthermore, the appellant's wife's brother testified that although he sometimes visited the appellant and his sister (the appellant's wife), he never went to Papadi's house, which is on the same premises, and did not even enter it (but waited outside in his car) on the day that he went with his mother to fetch the sick appellant's wife. The record shows that he repelled any subtle suggestions, when questioned by the magistrate, that Papadi cared for his sister before he could fetch her. Whilst the record does not show why there seemed to be such a distant and cold relationship between Papadi and the appellant's brother-in-law, I have taken note of what appears to have been a strange relationship between them, in my view. In my view, these undisputed facts are not inconsistent with the appellant's assertion of bad blood between the two sides and, therefore, with his suggestion of a possible motive to falsely implicate him.

[33] Even if I am wrong in respect of my view regarding the appellant's suggestion of a possible motive to falsely implicate him, and it were to be found that his suggestion is so improbable as to be rejected outrightly as false beyond reasonable doubt, no adverse inference should be drawn against him simply on this basis. In **S v Lesito 1996 (2) SACR 682 (O)**, 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”.

[34] A distinction should be drawn between a situation where an accused is proved by the totality of the evidence led to have lied on the facts – as distinct from being wrong on his suggestion or suspicion of a possible motive. Where the court finds that the accused is an incredible liar - in circumstances where the surrounding circumstances and probabilities excluded any reasonable possibility that someone other than the accused perpetrated the offence – it may find that such proof (of the accused as an incredible liar) constitutes support for the state's case. See **Mudau v The State (764/12) [2012] ZASCA 56 (9 May 2013)** and **Thebus and another v S [2002] 3 All SA 782 (SCA)**.

[35] However, where the court finds that the motive suggested by the accused as the possible reason why the state witnesses could falsely implicate him, is implausible, it becomes a neutral point that does not disadvantage the accused or support the state's case. In this case, even a total rejection of the accused's suggestion of a possible motive (not evidence on the merits or the facts), does not entitle the trial court to draw an adverse inference which contributes to supporting the state's case against him.

[36] In my view, the appellant's defence amounted to nothing more than a suggestion of a possible motive as to why the state witnesses would falsely implicate him in the commission of the offences. This being so, the trial court was not entitled to draw an adverse inference against the accused even if it found his suggestion of a possible motive to be implausible.

[37] The magistrate clearly placed a lot of reliance on the rejection of the appellant's suggestion of a possible motive to falsely implicate him in order to find that the state had succeeded to prove its case beyond reasonable doubt. In delivering the judgment, the magistrate stated the following in relation to his assessment of the version of the appellant (viewed in the context of the testimony of his witness, the brother-in-law) as contrasted with that of his sister, Papadi:

“When this witness [brother-in-law] was questioned by the court, he made the following startling statement. He said that when he went to fetch his sister, she was at the house of Papadi. This confirms the version of Papadi and raises serious doubt over the whole conspiracy theory of the defence. If the relations were so bad that Papadi or other family members went so far as to orchestrate false charges of rape, what was the wife of the accused doing at Papadi’s house?”

[38] Furthermore, in summing up his five findings that led him to conclude and find that the state succeeded in proving its case beyond reasonable doubt, the magistrate listed his findings regarding the appellant’s suggestion of conspiracy and lack of possible motive on the part of the state witnesses as his first two findings. In my mind, this shows the level of importance that the magistrate attached to his findings in rejecting the appellant’s suggestion of a possible motive – which constituted a misdirection in my view with reference to the *Lesito* decision mentioned above.

[39] The SCA seemed to be worried by a similar approach which was adopted by the trial court in the decision of **Mangoma v S (155/13) [2013] ZASCA 205 (02 December 2013)**. Salduker JA stated the following at paragraphs [12] and [13] in expressing her worry at the comments or remarks made by the trial court in assessing the evidence of an accused as contrasted with that of the state witnesses closely related to him:

[12] The evidence of the State witnesses must be considered as against the common cause fact that there was bad blood between the complainant's mother and the appellant due to the fact that he wanted to bring his second wife into their home. Despite their denial, this is something that the children could not have been unaware of.

[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)'.

[40] The magistrate's finding on this point must also be viewed against the background that he did not make any finding regarding whether the appellant's wife was still present on the farm in September 2010 (the time of the alleged rape) or not. Therefore, one is unable to know whether he accepted or rejected the testimony of the appellant's wife and his brother-in-law, who both testified (like the appellant) that his wife was still present on the farm in September 2010, and was only fetched by her brother in December 2010 due to ill-health.

[41] If the magistrate had reasons to dismiss their testimony on this vital point, he should have done so in his judgment and also stated his reasons for dismissing it. He did none of the two. Even if one was to assume that by convicting the appellant the magistrate, by necessary implication, rejected their testimony, one would have expected the judgment to state his reasons for doing so – which it does not. This point is important as the magistrate must have applied his mind to it in considering whether the accused's version

(that his wife was still present in September 2010, and thus there would have been no need, in the first place, for anyone, including Papadi, to do his washing, which would have necessitated sending the complainants to him in connection with the clothes) was possibly true or not. In my view, failure to consider this aspect was another misdirection by the magistrate.

The application of caution to the evidence of young children

[42] 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).*

[43] As stated above, the trial court should have approached the evidence of the complainants with caution. Firstly, in the case of MLM, the trial court should have examined when, how and to whom did she make her first rape report. The court should have examined the kind and level of interrogation used to get her to make the said report. This was not done. Secondly, in the case of

NMN, the trial court should have examined the possibility of her being unduly influenced by being confronted by the police together with MLM with a version already made by MLM – where the police clearly required her to confirm a version already before them. The court did not consider these possibilities, in the light of the dangers of the pliability of children or being vulnerable to the power of suggestion.

[44] The recent SCA decision of **Mangoma v S (155/13) [2013] ZASCA 205 (02 December 2013)** seems to be on point in relation to this appeal in many respects. It bears very striking similarities to the facts of this case. The facts of that case were briefly as follows: The appellant 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 on the grounds that evidence of the state witnesses was riddled with contradictions and inconsistencies, and the admissibility and reliability of the medical report relied upon by the trial court was also challenged, and the trial court was also criticized for having descended into the arena, and it was contended that the accused did not have a fair trial as a result thereof. During the trial, the state's case rested on the testimony of the complainant and her 12-year old brother. The complainant testified that she was raped by her father (the accused) when she arrived home from the playground at 15h00 on the afternoon of 8 February 2001, and that the rape was witnessed by her younger brother. Her younger brother also testified that he indeed witnessed the rape by looking into the house through a window. The accused's defence, on the

other hand, was one of alibi. He testified that he was not at home at the time the rape allegedly occurred as he had been looking for employment in Sibasa, having left home around 8h00 and returned later that same evening, and thus could not have committed the alleged act of rape. He called two witnesses in his defence, a taxi marshall, his alibi witness, and his second wife.

[45] 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).

[46] The appeal court 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.

[47] In my view, the particular circumstances of this case, where there was no corroboration of the complainants' evidence (for an example, by way of medical evidence which is not neutral), call 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 complainants – particularly in the light of the pliability of children and the improbabilities I have referred to above. Therefore, in my view, the trial court misdirected itself on this aspect too.

The way the magistrate conducted the trial and the applicable legal principles

[48] This brings me to the point raised by the appellant regarding the manner in which the magistrate conducted the trial. The conduct expected of a presiding officer has received the attention of the SCA on a number of occasions. Fairly recently, in **Leon Smith v The State (595/2012) [2013] ZASCA 38 (28 March 2013)**, Schoeman AJA, writing the unanimous decision of the court, stated the following between paragraphs [13] and [17]:

“Unfair trial

[13] Even before the present constitutional dispensation, it has been a principle of our law that an accused person is entitled to a fair trial and this ‘necessarily presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules and principles or the procedure which the law requires.

[14] Every accused has the right to a fair trial in terms of s 35(3) of the Constitution. What exactly that right encompasses has not been

circumscribed. In S v Dzukuda; S v Tshilo it was set out as follows. 'It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. In what follows, no more is intended to be said about this particular right than is necessary to decide the case at hand. At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution.'

[15] In S v le Grange it was stressed that it is essential that a judicial officer who presides should not ask questions during the trial in a manner that does not subjectively and objectively demonstrates his impartiality: 'It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is important that the public should have confidence in the courts. S v Tyebela 1989 (2) SA 22 (A) at 29. S v Dzukuda; S v Tshilo 2000 (2) SACR 443 (CC) para 11. S v Le Grange 2009 (1) SACR 125 (SCA) para 21. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer.'

And at para 13: 'Where the offending questioning sustains the inference that in fact the presiding judge was not open-minded, impartial, or fair during the trial, this court will intervene and grant appropriate relief. . . . In such a case the court will declare the proceedings invalid without considering the merits.'

And at para 27: 'In the end the only guarantee of impartiality on the part of the courts is conspicuous impartiality. Judicial officers are not umpires. Their role is to ensure that the parties' cases are presented fully and fairly, and that the truth is established. They are not required to be passive observers of a trial; they are required to ensure fairness and justice, and if that requires intervention then it is fully justifiable. It is only when prejudice is caused to an accused that intervention will become an irregularity.'

[17] In S v Rall Trollip AJA set out the standards expected of a presiding officer when he or she poses questions of witnesses. The most important

aspect is that justice must be done. But, it must also be seen to be done: ‘He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused.’ S v May 2005 (2) SACR 331 (SCA) paras 28-29. S v Rall 1982 (1) SA 828 (A) at 832A—833A”.

[49] In my view, the record of the proceedings is replete with instances where the magistrate appears to have gone too far out of his way to underplay and weaken those aspects of the state’s case that tended to support the appellant’s case. I will only refer to a few of them in order to demonstrate the point.

49.1. When Mr Le Roux put it to NMN during cross-examination that if it was true that the things she testified about happened, she would have run to one of the neighbouring houses to seek help, she said that *“I could not. I was unable to”*. It was put to her that *“Your feet were not tied, it is only your hands [that were tied] according to you”*, the magistrate interjected and said the following, *“She already explain also that she was naked at the time, Mr Le Roux. That was the reason that she didn’t go. Carry on”*. It was immediately thereafter put to her that the accused will say that there were problems within the family, and before she could answer, the magistrate interjected and rephrased the question to *“Were you aware of those, of any problems?”*, to which she said that she was not. In my view, the magistrate intervened inappropriately, at a crucial stage of cross-examination, on an important point regarding the improbability of the complainant’s version, and did so not to clarify any point, but did so to even provide an additional answer for the complainant. NMN had only provided the reason for not seeking help from neighbours as being

tied, but the magistrate topped that answer by adding that she was, after all, also naked. This was clearly prejudicial to the appellant's case, at least as a perception to a reasonable observer – it tended to strengthen the reason why not to find NMN's version to be improbable.

49.2. When Mr Le Roux sought to cross-examine MLM by quoting from her statements to the police, after she had stated that the signatures appearing on both statements purporting to be hers are those of her mother, and that the police never read the statements back to her, and she did not know the contents thereof, the magistrate immediately weighed in to state that *“Mr Le Roux, my problem is the following. It was not read back to her, she never signed anything, she does not know what was written down there. So you will have to prove those statements. I will allow you to ask her, but please do not get into semanticsLike pushing or pulling or pressing down. That is just purely semantics. Thank you”*. The remarks of the magistrate again came at a crucial stage of cross-examination regarding a crucial aspect of allegations or statements allegedly previously made to the police, and whilst allowing Mr Le Roux, correctly so, to provisionally ask questions based on the contents of the statements, the remarks were concluded in a manner that created the impression, be it correctly or incorrectly so, but justifiably so in my view, that they were designed to scare Mr Le Roux off his line of cross-examination, and trivialise whatever questions he would pose based on the statements, in advance. They also, in my view, created an impression that the magistrate had already made a credibility finding regarding the complainant – to the effect that the contents of the statements,

which tended to show that she previously made inconsistent or contradictory allegations to the police, could not be held against her, thus weakening the appellant's defence.

49.3. After NMN stated under cross-examination that the appellant's wife was not there at that time, as she had gone to her parental home, and that was in September 2010, when it was put to her that the appellant will say that his wife was fetched by her brother-in-law a day before Christmas, she agreed thereto. When asked why she earlier said she went away in September, she insisted that that was true (whilst this was clearly a contradictory statement), to which the magistrate interjected and instructed Mr Le Roux to carry on – *"Carry on, Mr Le Roux"*. Mr Le Roux then asked her, *"What is now the truth, December or September?"*, to which the witness said *"It was in September"*, to which Mr Le Roux asked her, *"So you lied to this court when the court also asked you is it before Christmas?"*, and before she could answer the magistrate interjected and stated that *"But she just conceded, Mr Le Roux, I think it is a little bit unfair"*. In my view, there was nothing unfair about the questioning by Mr Le Roux – the question was perfectly legitimate and justified in the light of the witness' obviously contradictory answers on the same point. The way the magistrate intervened created an impression that he wanted to take the steam out of the glaring contradiction which had just been made by the witness, thus weakening the appellant's defence.

49.4. After the investigating officer W/O Nel confirmed her earlier answer under cross-examination to the effect that she was under the impression that both children were tied with the rope, the magistrate then referred to MLM's statement which read that "*Hy het vir NMN met 'n tou vasgemmak (haar hande) en toe myne*", and then pointed out to her that the words "*toe myne*" had been scratched out, and initialled for, and asked her why she did that, to which she conceded to the magistrate's suggestion that MLM must have indicated during questioning that she was not tied with the rope. The magistrate then suggested to her that she must have forgotten about that when she answered Mr Le Roux (that she was always under the impression that both complainants alleged that they were both tied with a rope) – by stating that "*Toe u geantwoord het vir mnr Le Roux het u vergeet daarvan, ne?*", which she confirmed. In my view, the manner in which the magistrate suggested an answer – to the effect that the witness had forgotten about the amendment – was inappropriate. The magistrate could have, instead, asked the witness why she answered Mr Le Roux by stating that she was under the impression that both complainants were tied, in the light of the amendment she had brought onto MLM's statement – without actually suggesting an answer to the witness.

The way the magistrate dealt with this aspect could reasonably create an impression that he had already created a favourable credibility finding in favour of MLM in so far as the version of MLM was concerned, thus conversely a negative finding against the appellant.

49.5. After Cst Modupi had testified that he read back and interpreted the statements to the complainants in Sesotho, the magistrate intervened to point out that he could not even correctly spell the words vagina and semen, and said “*That is about how good his English is*”. This remark, made at a crucial stage of cross-examination regarding whether the complainants and the police officer understood each other and whether the officer accurately recorded the allegations made by the complainants, created an impression that the magistrate did not like the part of the evidence which tended to prove that the complainants previously made inconsistent or contradictory allegations to the police, as that would weaken the state’s case and embolden the appellant’s case. It leaves an impression that the magistrate had already made a credibility finding against the witness, which would in turn strengthen the versions of the complainants, and conversely weaken the appellant’s case. This impression would be perfectly legitimate in the light of the magistrate’s other remarks regarding the evidence of W/O Nel, to the effect that he (magistrate) still had to meet a police officer who would be candid and truthful with the court and confess that he or she had not done his or her job properly, by not interpreting and/or reading back a statement to a witness - effectively making a general credibility finding against all police officers that their evidence on this aspect must be treated with the contempt it deserves – as they will most likely come and lie in court on this aspect, although the court secretly knows that they are most likely lying on that aspect .

49.6. After Cst Modupi had testified about how he communicated with the complainants in their own language of Sesotho, and that he accurately recorded their accounts in their statements, the magistrate went to great lengths to make the point that Cst Modupi's testimony on this point must be treated with caution at the very least, and not unreservedly accepted, by pointing out in a question form, that he had to take the statements in either English or Afrikaans due to historical reasons inherited in this country, and if he had a choice he would have preferred to take them down in Sesotho, because Sesotho is his mother tongue and he would be better in Sesotho. The magistrate put it in these terms *"I know what the problem is here. You are a Sotho man, having to work in English and Afrikaans, am I right?"*. He was asked whether the children were calm or upset at the time he took their statements, and he said they were calm at that moment, to which the magistrate responded, *"They were calm, alright. But they are young children"*, which the witness confirmed. In my view, the above-stated line of questioning by the magistrate was not aimed at seeking clarity on any point, but geared at proving that the witness could not vouch for the correctness of his recording of the complainants' versions, and that even if the complainants could be said to have been calm, there still remained a problem of unreservedly accepting that (because they were calm) the recording was accurate as they were young children. This created an impression that the magistrate wanted to do everything possible to ensure that he could finally dismiss whatever inconsistencies or contradictions that would emanate (as against their oral testimony) as being unproven against them, or trivial. The magistrate followed a similar line of questioning with W/O Nel, in order to make the

point that there was room for miscommunication as the complainants came from a different cultural background to that of W/O Nel. This approach, coupled with the magistrate's remarks about how a big fuss is always made by the defence in criminal cases around inconsistencies or contradictions between witnesses' statements to the police and their oral testimony in court, could legitimately create an impression that the magistrate was not going to seriously consider whatever inconsistencies or contradictions which could count in favour of the appellant's case.

49.7. I found that some of the questions posed by the magistrate, like those posed to Cst Modupi and W/O Nel mentioned above, were in essence leading questions. The dangers of a presiding officer asking leading questions, even in circumstances where justified, in order to seek clarification or complete a picture, have been alluded to in the past – as a witness who realizes what a preferred answer would be from the manner a presiding officer poses a question, is less likely to disappoint such a presiding officer by giving an undesired or undesirable answer. Questions that are inherently highly suggestive of the desired answer from the bench must, as a rule, be discouraged, if not prohibited. A witness who realizes that a presiding officer is likely to be impressed by a certain answer that he has already suggested in his question, is likely to agree with the suggested answer – especially with the answer coming from the presiding officer – who is the person to make the final decision on the matter.

[50] In the *Smith* decision mentioned above, the SCA found it inappropriate for a magistrate to have made certain remarks during the trial. The court stated the following at paragraph [11]:

“Mr Omar attempted to show during cross-examination of one Mrs Tromp, an employee of Bankfin, that Bankfin was not the owner of the motor vehicle at the time it was alleged to have been stolen. The magistrate dismissed this line of cross-examination by saying:

‘No no let us not argue about those technicalities. If I say ownership put it in averted commas.’

[51] Similarly, in the *Mangoma* decision referred to above, the Salduker JA remarked as follows at paragraph [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)’.

[52] In my view, the remarks made by the magistrate in this case go far beyond those recently found inappropriate by the SCA in the *Smith* and *Mangoma* decisions. I am thus of the view that Mr Nel’s submission that the magistrate was not impartial in the conduct of the trial, and that he posed questions not limited to elucidation or clarification of evidence, but had the effect of favouring the state’s case, is not entirely without merit.

Justification for this court to interfere

[53] In my view, the misdirection of the trial court in respect of not considering the gaps in the state's case, coupled with the failure to consider the number, nature and extent of the improbabilities inherent in the circumstances of the case, and failure to exercise sufficient caution in approaching the evidence of the complainants and other state witnesses (especially the possibility of Papadi and those on her side of the family to falsely implicate the appellant), is such that they justify interference by this court. This means that this court is at large to consider this matter as if it was a court of first instance, and substitute its own findings of fact and law if necessary.

[54] Over and above the misdirections mentioned above, the manner in which the magistrate conducted the proceedings left much to be desired. Mr Nel made it clear that, whereas the appellant is raising irregularities in the way the magistrate conducted the trial, it was not the appellant's case that the appellant did not receive a fair trial. In my view, once this court is satisfied that there were irregularities during the trial, it is not bound by the views of either party as regards whether such irregularities amount to an unfair trial or not, and the court is at large to make its own finding in this respect. On the facts of this case, I am of the view that the number, nature and extent of the irregularities committed by the magistrate in the trial, on their own, amounted to the appellant not receiving a fair trial, and that this fact alone, justifies interference by this court. I, however, am not of the view that the irregularities are of such a nature as to set the

conviction and sentence aside without even delving into and considering the merits of the matter. I will only interfere to the extent of considering the matter afresh on its merits.

Fresh consideration of the charges, the accused's plea, the evidence led and application of the applicable law or legal principles to the said facts

[55] In my view, the following is a proper evaluation and summary of the evidence led by the respective parties, which culminated in this appeal: The state's case rested on the testimony of the two complainants who were aged 11 years and 12 years respectively at the time of the alleged rape. I agree with the concession rightly made by Mr Hiemstra that Dr Radebe's evidence can be legitimately ignored for purposes of this matter. I do so, not in the least because it does not take this matter any further in arriving at a proper verdict. I take the same view of Dr van Schalkwyk's testimony.

[56] The essence of the state's case was that the complainants were raped by the appellant in his house, during the day, after they had both simultaneously arrived at his house sometime in September 2010, in order to deliver the accused's clean clothes which had been washed by Papadi, to him. The appellant's defence, on the other hand, is that he disputes the allegations against him, and he has no idea what caused the complainants to falsely implicate him, but suspects that it all had to do with the bad blood between his side of the family, on the one hand, and Papadi's side of the family, on the other hand. He also contends

that at the time he is alleged to have raped the complainants, his wife was still present at his house and, therefore, Papadi had no reason to wash his clothes. In my mind, his defence, by necessary implication, also extends to the contention that he could, consequently, not have been alone at the time of the alleged offence, as his wife was present during September 2010. In support of his defence, the accused called his wife and brother-in-law, who both confirmed his version that the accused's wife only left the accused's home in December 2010 (and not in September 2010).

[57] I am of the view that, just like the SCA did in the particular circumstances in the *Mangoma* decision referred to above, it is unnecessary, for purposes of this verdict, to make any conclusive finding regarding the plausibility or reliability of the accused's suggestion of a possible motive for falsely implicating him, and I thus refrain from doing so. The reason I say so is that a proper verdict can be arrived at in this matter without the necessity of a finding on the said aspect, for the reasons mentioned below in this judgment.

[58] An analysis of the totality of the evidence led shows that the only crucial evidence for the state's case is that of the two complainants. They are the only witnesses to the alleged rape. I have already alluded above to the reasons for discounting Dr Radebe's evidence. The other state witnesses testified on collateral issues. The evidence of the police witnesses and the family members of the complainants does not provide any corroboration of the complainants' evidence.

[59] I agree with Mr Hiemstra's submission that this court may safely ignore the medical evidence of Dr Radebe completely. The main reason for this, apart from the fact that it is inconclusive as readily conceded by Mr Hiemstra, is that it is effectively neutral as it does not implicate the appellant. His evidence does not corroborate the complainants' version as it does not connect or link the appellant as the specific person who committed the rape - it remains just neutral. There are also other good reasons for ignoring it – Dr Radebe's testimony was not only unsatisfactory in many respects, but also downright contradictory in some material respects.

[60] The same principle applies to the evidence of members of the complainants' family in so far as they seek the court to draw certain adverse inferences against the appellant, and in support of the state's case against the appellant, from certain conduct of the complainants that in and by itself does not and cannot link the appellant to the crime. For an example, the state obviously wanted the court to infer that when MLM jumped away when she saw the rope, as if she was seeing a snake, this tends to support the complainants' version that it was used to tie NMN during the rape. This evidence, even if it was to be accepted – a point on which I find it unnecessary to rule – would not be of any corroborative value in that it cannot, on its own and independent of the allegations made by the complainants, provide corroboration of the fact that NMN was indeed tied with a rope, and also that it was nobody else but the appellant that tied her with it. It would similarly not provide proof that the appellant (and nobody else) raped the

complainants. Stated differently, such evidence (of jumping away or the complainants identifying the rope) would, absent the allegations by the complainants implicating the appellant, not have independently provided corroboration or support of any rape by nobody else but the appellant. It only makes sense if you couple it up with the evidence of the same persons it is supposed to corroborate – the complainants. It thus does not completely have a separate source, and thus cannot be of corroborative value to the evidence of the complainants.

[61] The same principle applies to the evidence of Cst Modupi that he found the social worker busy interviewing MLM, who implicated the appellant in the alleged rape, and that NMN also ultimately confirmed that the appellant raped them. It is not corroborative of anything against the appellant as the complainants cannot create corroborative evidence against the appellant by repeating the rape allegation to other people. Furthermore, the rule applying to the exception to inadmissibility of hearsay evidence in rape cases is not applicable to the testimony of Cst Modupi as he is not the so-called first report – the person to whom the complainant MLM first made the report of rape. On the evidence before the court, that person would have been either the social worker who interviewed MLM or the doctor who informed Papadi on Sunday, even before Papadi was given a referral letter to take MLM for an interview with the social worker on the following day, Monday, depending on who MLM made the first report to.

[62] Since the state's case rests mainly, and almost entirely on the evidence of the two complainants only, it is indeed of crucial importance that the evidence of the complainants, which must in any event be approached with caution as young children, be satisfactory in all material respects. The court must be satisfied, after taking all evidence, and not only their oral testimony in court, but including their written statements to the police, which were admitted as exhibits "D" and "E", that they both told the truth, and that the said truth meets the requisite standard of proof beyond reasonable doubt.

[63] I have already found that there are so many improbabilities in the circumstances surrounding the commission of the rape, like raping them in the presence of each other, with a door ajar in relative close proximity of other neighbouring houses, and allowing the complainants to cry without any attempt to make them keep quiet, allowing the tied and naked NMN to go out first crying with both hands bound at her back, the appellant throwing their clothes out in broad daylight whilst they stood outside naked, why NMN waited outside whilst the accused went for MLM and still waited outside after hearing MLM also cry inside the house, and not seek help from neighbours. The list goes on and on as mentioned above. I am of the view that the number and quality of the improbabilities that I find inherent in the whole episode come down tumbling against the strength of the state's case.

[64] On the other hand, I find that there were no material contradictions between the appellant and his witnesses. His wife corroborated his version that there was bad blood between the two families after the appellant was accused by Papadi of stealing her cattle in order to buy himself a motor vehicle, and that Papadi's daughter-in-law even physically assaulted her and caused her to suffer epileptic fits. As stated above, even Papadi confirmed that in her view the appellant was the cause of bad relations between the two families.

[65] The appellant's wife and his brother-in-law also corroborated the appellant's version that she (wife) was still around in September 2010 – the time it is alleged the offences were committed in her absence, and I have not found any reason to dismiss their evidence on this crucial aspect.

[66] Furthermore, even if the appellant's supposition that the complainants were falsely implicating him because of the bad relations between the two families was to prove not tangible or plausible, I may not draw an adverse inference against him simply because I think that his suspicion is not plausible. It is clear that the appellant's defence was not that he knows it as a fact that the bad relations was the cause of the false implication, but the essence of his so-called defence was that he had no clue why he was being falsely implicated, and that if he was to hazard a guess, he could only think of the bad relations as the possible reason. At the trial the appellant pleaded not guilty to both charges and stated in an explanation of his plea that *"he does not have any clue about the crimes [as] he was not involved"*.

[67] In **S v Shackell 2001 (4) SA 1 (SCA)** at para 30, Brand AJA said the following regarding how to deal with the accused's version viewed against the probabilities:

"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true" (See also *S v V 2000(1) SACR 453 (SCA)* paragraph 3).

[68] As far as the complainants are concerned, I also find that in my application of the cautionary rule, I cannot exclude the possibility that MLM could have been unduly influenced to lie against the accused by anybody – including by Papadi and her family, in order to get even with the appellant whilst he thought he could enjoy the fruits of his theft, in their view.

[69] Furthermore, I cannot exclude the possibility that the first seeds of the rape story or suspicion were planted in Papadi's mind from the time she took the rope and put it in a plastic bag and hid it, and then started wondering why the appellant always carried his gun on him when coming to her house (according to her statement

to the police), or suspicion arising from her seeing the child standing up to run into a bedroom when the appellant took his firearm out in order to clean it (according to her oral testimony).

[70] I also cannot exclude the possibility that MLM could have heard the doctor, whom the state failed to call – thus leaving a gaping hole regarding what was the source of his allegation (made to LAM) – make the rape allegation and then decided to go along with it, due to the vulnerability and pliability of children. Even if one was to accept that the first report of rape was made by MLM to the social worker, there similarly exists a gaping hole regarding what prompted MLM to make the disclosure, as the state did not call the social worker to testify – in circumstances where I think more could and should have been done to procure her testimony – especially in the light of the fact that it came approximately four months after the date alleged by the complainants.

[71] NMN's evidence must be viewed with increased suspicion as she initially denied the report, in the presence of MLM and the police, and had obviously been told what MLM's version was before she could tell the so-called truth in front of the police. After all, both complainants were interviewed or interrogated together at the police station before NMN could finally yield to confirming MLM's version. In my view, although the complainants are two different witnesses, they must, in the particular circumstances of this case, be deemed to be one witness, and thus their evidence be dealt with as if it is that of a single witness – which calls for more caution on the basis that the evidence of a single witness must be approached with caution.

[72] I also can neither exclude the possibility that the complainant MLM was merely suffering from a hygiene problem, as the nurses had told Papadi on two separate occasions, nor that whatever Dr Radebe's medical examination revealed, was the result of something that occurred after September 2010. The fact that neither Papadi nor MLM's mother (LAM) noticed anything wrong with the complainants, and they behaved normally immediately after the alleged rape until January 2011 when MLM was taken to hospital (which is approximately four months later), militates against the rape allegations as far as the probabilities are concerned. It is hard to imagine how the complainants – being two different children – could successfully put up such a façade over such a fairly extended period of time, without their own parents or relatives realizing anything untoward in their behaviour.

[73] The proper approach in assessing conflicting versions between the state and the accused was stated as the following in **S v Singh 1975 (1) SA 227 (N)** at 228:

*“Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witness and that of an accused. **It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected.** The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the*

*guilt of an accused has been established beyond all reasonable doubt. **The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses***” (my emphasis).

[74] 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.”

[75] I am of the view that the number of difficulties in the state’s case is such that it cannot withstand scrutiny even if it was to be viewed on its own – as if the appellant had no version or defence at all. Therefore, I need not even make any definite finding regarding the plausibility or otherwise of the appellant’s suggestion of a possible motive for falsely implicating him. Suffice it to mention that I am of the view that there are no improbabilities inherent in the motive the appellant seeks to ascribe to the state witnesses for falsely implicating him – especially with respect to the complainants and their parents (Papadi and LAM).

[76] 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.

[77] In my view, the state has not succeeded in proving its case beyond reasonable doubt, especially in the light of the improbabilities inherent in the circumstances of this case, the gaps existing in the state's case (including failure to call the other doctor and the social worker, and evidence regarding what form of interrogation culminated in both complainants making the disclosure), the lack of corroborative evidence (which I would have sought in the light of the particular circumstances of this case as a form of guarantee), which would have assisted me in my exercise of caution in relation to the evidence of the complainants as young children.

[78] Accordingly, I am of the view that the state did not discharge the onus of proving beyond reasonable doubt that the appellant raped the complainants.

[79] In the circumstances, I am of the view that the appeal should succeed and the conviction accordingly be set aside.

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

80.1. The appeal is upheld.

80.2. The convictions and sentences are set aside.

I. MOTLOUNG, AJ

I agree and so it is ordered.

LEKALE, J

For appellant: Adv SJ Nel

Instructed by: Honey & Partners

Bloemfontein

For respondent: Adv HJ Hiemstra S.C

Instructed by: Director of Public Prosecutions

Bloemfontein