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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

APPEAL CASE NO: A357/2019

(1) REPORTABLE: YES / **NO**

(2) OF INTEREST TO OTHER JUDGES: YES / **NO**

(3) REVISED

DATE: 29 August 2024

SIGNATURE

In the matter between:-

B[...] **V[...]** **J[...]**

Appellant

VS

THE STATE

Respondent

Heard on: 30 July 2024

Delivered: 29 August 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 29 August 2024.

ORDER

It is ordered:-

1. The application for further evidence is refused.
2. The appeal is dismissed.

FULL BENCH OF APPEAL JUDGMENT

KOOVERJIE J

(Van Nieuwenhuizen AJ concurring)

- [1] The appeal court is seized with the application to lead further evidence as well as an appeal. The respondent has opposed both the application and the appeal. It is noted that the grounds raised in the appeal centered on the conviction only.

BACKGROUND

- [2] The accused was arraigned on a total of 86 counts relating to the rape and abuse of his minor daughters, D[...] and C[...], between 2008 and 2010. He was however only convicted on certain of the charges which included charges of rape, sexual assault, assault with the intent to do grievous bodily harm, intimidation, and compelled rape.
- [3] Eventually he was convicted on the following charges:
- Count 1: Rape of C[...] between 2008 and 2010 (vaginal/anal penetration of his penis);
- Count 3: Rape of C[...] between 2008 and August 2010 (vaginal/anal penetration with his finger);
- Count 5: Rape of C[...] between 2008 and August 2010 (by placing his penis inside her mouth);

Count 7: Sexual assault of C[...] between 2008 and 2010;

Count 31: Rape of D[...] between 2008 and August 2010 (vaginal/anal penetration with his penis);

Count 33: Rape of D[...] between 2008 and August 2010 (vaginal/anal penetration with his finger);

Count 35: Rape of D[...] between 2008 and 2010 by placing his penis inside her mouth);

Count 37: Sexual assault of D[...] between 2008 and 2010;

Count 43: Accomplice to rape of D[...] between 2008 and 2020;

Count 46: Instigating/inducing/instructing another person to commit a sexual offence in contravention of Section 55(c) of Act 32 of 2007;

Count 67: Assault with intent to do bodily harm (in that he stabbed D[...] with a knife);

Count 68: Assault on D[...] (by hitting and forcing her to consume alcohol);

Count 68a: Assault on C[...] (including forcing her to consume alcohol);

Count 69: Intimidation of D[...];

Count 85: Compelled rape;

Count 86: Compelled rape.

- [4] Having been sentenced to life imprisonment by the Regional Court, the appellant has an automatic right of appeal.¹ Although the appeal was instituted in 2017, the matter only came before court in August 2021.

MATTER BEFORE COURT DURING AUGUST 2021 – NOT HEARD ON THE MERITS

- [5] In August 2021, the then court of appeal, seized with this appeal, had not made a finding on the merits. At the time, the main contention raised by the appellant was that the court *a quo* should have referred the appellant for medical observation in accordance with the provisions of Section 79 as the appellant may not have been fit to stand trial. It was *inter alia* argued that Section 78(2) of the Criminal Procedure Act, 51 of 1977 (“CPA”) should have been invoked as the trial court erred in not referring the appellant for such an evaluation.
- [6] After hearing the parties, the appeal court referred the appellant for psychological evaluation in terms of Section 78(2) of the Criminal Procedure Act.² At that point it then set aside the conviction and sentence until the outcome of the investigation. Notably though the court had not dealt with the merits of the matter.

¹ Section 309(1)(a) of the Criminal Procedure Act, 51 of 1977, as amended, also introduced by section 10 of Act 42 of 2013.

² Paragraphs 34.1 and 34.2 of the judgment by Maumela J read as follows: -

“34.1 The conviction and sentence arrived at and imposed by the court *a quo* against the appellant are set aside.

34.2 In terms of section 78(2) of the Criminal Procedure Act, 1977 (Act No 51 of 1977 – ‘CPA’), the appellant is referred to Weskoppies Hospital and the offence he is charged with is directed to be enquired into and to be reported on in accordance with the provisions of section 79 of the Criminal Procedure Act.” – CaseLines 052-104.

Paragraph 78(2) of the CPA stipulates:

“If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of Section 79.”

[7] Section 78(2) comes into play when allegations are made that the accused is/was not criminally responsible for the offences charged by reason of mental illness or mental defects. It should be noted that no such allegations were made during the trial proceedings.

[8] At paragraph 13 the appeal court expressed:

“The reading of Section 78(2) of the CPA has the effect that the court a quo was supposed to refer the Appellant to Weskoppies Hospital before proceeding with trial. This is what the court a quo failed to do. However the court does not view it to be proper at this stage to determine the evidence given the fact that we find that it should not have adduced before the court a quo”³

Then at paragraph 24, the court said:

“As indicated under paragraph 13 above, it is not necessary as yet to determine the worth of this evidence given the route suggested.”

[9] On 11 May 2022 the psychiatric report came to light confirming that the appellant does not suffer from any mental illness and neither did he suffer from any form of mental illness during the commission of the offences. As the appellant was found fit to have stood trial, the appeal court reinstated the conviction and sentence and postponed the appeal so that it could be dealt with on the merits. This court is now seized with the appeal on the merits.⁴

³ My emphasis

⁴ Upon receipt of the said report, the appeal court granted the following order:

- “1. *In light of the report received from Weskoppies, the conviction and the sentenced (sic) get reinstalled (sic).*
2. *The matter is postponed sine die for the appellant to put all in place to prosecute the appeal on the merits.”*

THE APPLICATION TO PRESENT FURTHER EVIDENCE

[10] In this hearing, counsel for the appellant indicated that he represented both the appellant as well as Ms J[...] in the application for further evidence.

[11] This court derives the power to hear further evidence in terms of Section 309(3) read with Section 304(2) of the CPA together with Section 19 of the Superior Courts Act, 10 of 2013. It is settled law that a case has to be made out for introducing further evidence before a court of appeal. It is neither in the interest of justice nor in the interests of legal certainty that the question of fact that has already been judicially investigated and pronounced upon should be reopened and amplified or supplemented.⁵ Such applications are often instituted in instances where an accused, who realized his/her difficulties during trial, might fabricate the evidence.⁶

[12] On the same token, it is however appreciated that although finality in litigation is an important consideration, it should never be at the expense of an accused's person's fair trial rights.⁷

[13] The salient requirements that should be complied with before any court of appeal would be prepared to hear new evidence, are that:

13.1 there should be a reasonable and sufficient explanation, based on allegations which may be true, why the evidence which is sought to be led was not led at the trial;

13.2 there should be a *prima facie* likelihood of the truth of the evidence; and

⁵ *State v Roux* 1974 (2) SA 452 (N) at 455A

⁶ *State v De Jager* 1965 (2) SA 612 (A) at 613A-E

⁷ *State v Bezuidenhout* [2021] ZASCA 52 (unreported SCA case number 41/2000, 23 April 2021)

13.3 the evidence should be materially relevant to the outcome of the trial.⁸

[14] The second and third requisites can never be satisfied without giving the court of appeal an indication of the evidence sought to be led. In general, a court of appeal would only be prepared to hear further evidence or remit the case for further evidence in exceptional circumstances.⁹ The respondent argued that the aforesaid requirements have not been met.

First requirement – there should be a reasonable and sufficient explanation

[15] It is peculiar that D[...] proffers a conflicting version more than 5 years since the appellant's conviction and sentence on 1 November 2017. Even when D[...] left her foster parents' home in January 2017, up until the time that the appeal was enrolled in March 2021 and August 2021, nothing was said. D[...] has failed to provide a reasonable explanation as to why she did not present this version during the trial. D[...], in her affidavit of 16 January 2023 now advises that she has decided to tell the truth. For years she never questioned her testimony, which she presented during the trial proceedings.

Second requirement – *prima facie* likelihood that the evidence is true

[16] D[...]’s different version, five years after her father’s conviction and sentence, is highly questionable. During January 2023 she, under oath, presented the new version where she, *inter alia*, stated that:

16.1 her father was not involved in the sexual acts performed on her. It was in fact her brother, D[...], who raped her;

16.2 she had informed the social workers and the police that her father never

⁸ *State v De Jager (supra)* 613 C-D.

⁹ *S v Sterrenberg (supra)* at 93G; *R v Jantjies* 1958 (2) SA 273 (A) at 279B-F.

raped her. The social worker manipulated her to accuse her father. Ms Magriet van Schalkwyk had pressured her on numerous occasions that her father was involved. Ms van Schalkwyk informed D[...] that she had learned from her sister, C[...], that her father had raped both the girls. D[...] explained that her confusion and anger, at the time, caused her to accuse her father;

16.3 she was ready to tell the truth as she was back on the streets and she has reunited with her mom, her father as well as her brother;

16.4 she had also informed her foster parents that it was her brother who committed the sexual assaults;

[17] The respondent persists with the argument that D[...] has belatedly changed her version to suit her own personal needs. She does so despite her disclosure that her brother D[...] raped her more recently when she was 22 years old. She further expressed that she had not laid criminal charges against him as she *“is not up to going through another trial like she had with her father’s case”*.

[18] Her new version now is that:

“My dad did not partake in sexual events where I was involved;

My dad never raped me;

I decided to tell the truth about my dad not raping or sexually assaulting me about a year ago when I ended up back on the streets. I also reunited with my mom who has been in Weskoppies mental facility since the case started about 13 years ago.”

[19] I am in agreement with the respondent that D[...]’s new version is unlikely to

be true for the following reasons, namely:

- 19.1 her testimony was detailed during the trial proceedings. She testified extensively of the abuse both she and her sister suffered. She explained how her mother was ordered by her father to sexually assault both her and her sister;
- 19.2 she described, in detail, the first time she was raped by her father. She explained that her brothers were ordered to throw her on her parents' bed and thereafter her father raped her. She was traumatized and in extreme pain thereafter;
- 19.3 D[...] was 16 years old when she testified. Her evidence commenced on 11 December 2014 and cross-examination only proceeded on 7 September 2015, almost 9 months later. Her testimony during these periods remained consistent. She did not contradict herself in any material respect in this time;
- 19.4 furthermore D[...]’s evidence corroborated C[...]’s evidence on many common aspects;
- 19.5 there were further numerous incidents of abuse that D[...] testified about that C[...] had not mentioned;
- 19.6 the trial court considered D[...]’s evidence independently as well as in comparison to C[...]’s evidence. Her version that she projected D[...]’s conduct onto her father is highly improbable. D[...]’s former testimony pertaining to the first time her father had raped her, is unlikely to be a lie. In that incident D[...] testified that the appellant directed her brothers to push her down on the bed before he raped her. It is therefore incomprehensible how D[...] could project the actions of her

father to D[...] particularly in the said instance;

19.7 D[...] and C[...], in their separate testimonies, testified of similar incidences. D[...] confirmed C[...]’s testimony, namely that other adults were present in their house and that they had to dance naked for them. Both listed the music that they were required to dance to- for example “Poker Face” by Lady Gaga and then D[...] added that it was also “Baby Chocolates” and “Kaptein”. D[...] testified in more detail and explained that they not only danced for these men but they also had sex with them;

19.8 there is no evidence that D[...] was coached. After the first incident, D[...] also testified that her father had raped her many times. She explained how she was ordered to conduct other sexual acts with him, that he had anal sex with her and that she was raped at least 50 times by her father;

19.9 It is emphasized that D[...]’s statement was taken before Magriet van Schalkwyk or Ms V[...] (her foster parent) even met her. In such statement attested to she independently accused her father of raping her.

[20] In paragraphs 11 to 13 of her said affidavit supporting her application to lead further evidence, D[...] stated the following:

“11. During this time, I also realized that I need to see my dad to try and fix things where I went wrong. In December 2022, I went and saw my dad in prison, the first time after about 13 years. We were granted a physical visit and for the first 30 minutes we just cried.

12. After the emotions subsided, we had a very good discussion, and my

dad apologized to me for what he did to me and asked for forgiveness. My dad was a horrible person in my early childhood, and he would verbally abuse me and physically assault me.

13. *I could see that my dad was a changed person and that his mannerism and attitude towards me was pleasant and for the first time in my life I experienced love from my dad, something I did not know before. I forgave my dad completely and there is no hard feelings or animosity between us.”*

[21] It is clearly no coincidence that her statement was deposed to on 16 January 2023, a month after she visited her father in prison (for the first time after 13 years). Consequently there is no *prima facie* likelihood that her evidence is true.

The third requirement – the evidence should be material for the outcome of the trial

[22] The third requirement - that the evidence should be material for the outcome of the trial – has most certainly not been met. Her “new” evidence, if allowed, would make no material difference to the effective sentence imposed on the appellant due to the fact that his life sentence would still remain in place regarding the offences committed against her sister, C[...]. D[...] does not deny that her father had raped and sexually assaulted her younger sister.

[23] In conclusion, it is not in the interest of justice to allow D[...]’s new evidence.

THE APPEAL

[24] There were two documents which were filed for the purposes of the appeal. The one titled the “*Kennisgeving van Appèl*” which seem to be filed at court twice, namely on 13 December 2017 and on 4 April 2019. The second, a

document titled “*Appellant’s heads of argument*” was filed on 8 November 2022. In the latter heads, the following submission is made:

“The appellant refers to the given judgment on appeal A54 of 2018¹⁰ in this matter, and especially to paragraphs 21 to 33 (pages 7-9) and avers that the appellant had an unfair trial due to the presence of many irregularities in its calling of witnesses (paragraph 21, 22, 25, 29, 30 and 33).”¹¹

[25] The main contention was that the appellant had an unfair trial due to the irregularities. This was highlighted before the previous appeal court. It was argued that since that court held the view that there were irregularities in the proceedings, this court should take heed thereof.

[26] I pause to emphasize that the trial court had in fact already addressed the irregularities now raised by the appellant which were that:

26.1 the evidence of the child witnesses (D[...] and C[...]) was highly improbable and untrue as they were coached to falsely accuse their father, the appellant. It was submitted that C[...] had a vivid memory and in many instances was hardly able to answer the questions and on numerous occasions testified she could not remember the events and persons involved. The repetition in her testimony demonstrated that she was coached;

26.2 the evidence of D[...] was false and the court failed to consider how the evidence of a single witness and a minor should be evaluated;

26.3 the evidence against the appellant was further inconclusive as certain important witnesses were not called to corroborate the girls’ version.

¹⁰ Case number incorrectly referred to – should have been appeal case number A357/2019.

¹¹ The appellant refers to the judgment of Maumela J (Full Bench) at CaseLines 052-14.

For instance, Jacqueline was not called by the State to confirm whether D[...] had informed her of the sexual abuse she encountered at home;

26.4 C[...] and D[...] were influenced by Ms van Schalkwyk to accuse their father (the appellant) of the wrongdoing.

[27] It is settled law that a court of appeal may only interfere with the trial court's findings if there was a clear misdirection on the part of the trial court. It is accepted that a trial court is best placed in a position to make such findings and it should not be interfered with unless it is found that the trial court's assessment of the evidence was clearly wrong.¹²

[28] A trial judge is in the best position to take into account a witness' appearance, demeanour and personality. Hence a court of appeal would not simply be inclined to reject the trial judge's findings of fact.¹³

[29] An appeal court's approach to findings of fact by a trial court was crisply summarized in **State v Hadebe and Others** where the court expressed:¹⁴

*"... In the absence of demonstrable and material misdirection by the trial court its finding of fact was presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong."*¹⁵

[30] In my deliberation, I found it necessary to highlight the circumstances under which both daughters, C[...] and D[...], disclosed that they were sexually and physically assaulted. At the time of the commission of the offences C[...] was

¹² In *S v Francis* 1991 (1) SACR 198 A at 204 A-E the court held:
"Bearing in mind the advantages which a trial court has of seeing, hearing and appraising a witness. It is only in exceptional cases that this court would be entitled to interfere with a trial court's evaluation of the oral testimony."

¹³ *State v Robinson and Others* 1968 (1) SA 666 (A) at 675G-H

¹⁴ 1997 (2) SACR 641 (SCA) at 645e-f

¹⁵ See also *State v Livanje* 2020 (2) SACR 45 (SCA)

between 3 and 5 years old and D[...] was between 9 and 11 years old. They were removed from their parents' care in August 2010. They were initially placed in safety and thereafter placed in foster care. The trial commenced four years thereafter (in September 2014). During this time both the girls were living in separate foster homes and hardly had contact with each other. This was evident from both their testimonies at the trial.

[31] They were removed after D[...] complained to her social science teacher that they were being assaulted by their father. At the time, C[...] was initially placed in foster care with Ms W[...]. Ms W[...] testified extensively during the trial proceedings. She explained that when C[...] was placed in her care there were no allegations of sexual assault. However, shortly thereafter C[...] started verbalizing and physically demonstrating how she was raped and/or sexually assaulted by not only her father but her mother and brothers as well.

[32] Ms W[...] testified that as a result of the sexual abuse, C[...]’s behavior was strange. She was only five years old when Ms W[...] met her. It was argued that a child of this age would only be able to describe the extent and detail of sexual performances if she herself had personally experienced same.

[33] Ms W[...] further testified that C[...] left Ms W[...]’s house in December 2010 due to the trauma that her own children suffered as a result of C[...] divulging her experiences, which she often did inappropriately and in the presence of strangers. The respondent argued that the nature and extent of C[...]’s conduct and the disclosures made to Ms W[...] confirmed C[...]’s evidence as true.

[34] D[...] had also divulged the sexual abuse she encountered shortly after she was placed in foster care to her foster parents.

[35] Dr Grabe examined C[...] on 22 September 2010 and D[...] on 4 November 2010. In the medical examination of D[...] on 4 November 2010 where D[...]

was 11 years old, Dr Grabe found evidence of both vaginal and anal penetration, which materially corroborated the evidence of the victims and contradicted that of the appellant. In respect of C[...], Dr Grabe found that although there were no visible injuries, it did not exclude the possibility of penetration. She explained that visible signs of penetration are found in less than 10% of cases where children were previously penetrated.

[36] For many years the evidence of a child witness, particularly as a single witness, was always treated with caution. This was because in cases prior to the advent of the Constitution (which provides in section 9 for equality of all before the law) stated *inter alia* that a child witness could be manipulated to falsely implicate a particular person as the perpetrator, thereby substituting the accused person for the real perpetrator. To ensure that the evidence of a child witness can be relied upon as provided in Section 208 of the CPA, the Supreme Court of Appeal in *Woji v Santam Insurance Company Limited*¹⁶ held that the court must be satisfied that the evidence is “trustworthy”.

[37] The Supreme Court of Appeal has, since *Woji*, cautioned against what is now commonly known as the double cautionary rule.¹⁷ The test is that the evidence of a child witness must be considered as a whole, taking into account all the evidence. At the end of a case, a single child witness’ evidence, tested through (in most cases rigorous) cross-examination, should be “trustworthy”. A child witness’ evidence must be consistent and the essence of the allegations should stand. Since that case, a court is bound to accept the evidence as satisfactory in all respects, having considered it against that of an accused person. “Satisfactory in all respects” should not mean the evidence line by line, but in the overall scheme of things. Accepting the discrepancies that may have crept in, the evidence can be relied upon to decide upon the guilt of an accused person.

¹⁶ 1981 (1) SA 1020 (A) at 1028B-D.

¹⁷ *Vilakazi v S* 2016 ZASCA 103; 2016 (2) SACR 365 (SCA) and cases cited therein. See also *State v Maila* (429/2022) [2023] ZASCA 3 (23 January 2023).

[38] The trial court *in casu* dealt with the evidence of both the child witnesses extensively. The court not only evaluated their testimonies separately, but further compared their testimonies. C[...]’s evidence was further compared with Ms W[...]’s version. When comparing the girls’ evidence, the court pointed out instances where they corroborated one another and where the evidence of the one strengthened the other due to various similarities. For instance, the court stated:

“Beide het getuig dat beskuldigdes 1 en 2 hulle aangesê het om kaal te dans voor mense wat hulle kom besoek het, en dat hulle ook daar deur beskuldigdes 1 en 2 aangesê is om dan mekaar se vaginas te lek en hulle vingers in mekaar se vaginas te druk tydens hierdie dansery. Hulle staaf mekaar soos ons weet, selfs oor die feit oor welke musiek gespeel is tydens hierdie aangeleenthede, naamlik Lady Gaga se musiek.”¹⁸

[39] The court concluded that although C[...]’s evidence was not faultless, it however contained no material contradictions or inherent probabilities. The court noted that since both witnesses, and particularly C[...], had testified four years after they were removed from their parents’ home, one could not have expected them to remember every detail. Furthermore C[...] had under oath stated in an affidavit to the police shortly after they were removed that she was raped by the appellant.

[40] The court went on to state that:

“Die waarskynlikhede in die saak moet ook aandag geniet en ook saam met die getuienis oorweeg word. Dit kan volgens die hof nie net bloot toevallig gewees het dat twee meisies uit dieselfde huis bewerings maak van onsedelike dade wat met hulle gepleeg is deur sekere familieledede nie. Hulle

¹⁸ Page 770 from line 16.

*beskrywing van wat beskuldigde 1 sou gedoen het tydens hierdie dade stem ook ooreen, alhoewel die een nie noodwendig by was as dit met die ander gebeur het nie, behalwe nou die ooggetuïenis van C waarna ek reeds verwys het.*¹⁹

[41] The court, in assessing their evidence, further stated:

*“In die lig hiervan vind die hof dat dit onwaarskynlik is dat hulle saam ‘n storie sou opmaak. ‘n Mens moet ook in gedagte hou dat hulle ongeveer 12 en 5 jaar oud was toe hulle weggeneem is. Dit is volgens die hof bloot inherent onwaarskynlik dat hulle so ‘n gedetailleerde weergawe sou kon optower, uit niks, dat hulle bloot hulle verbeelding kon gebruik. Daarvoor is daar toe (sic) reeds vermeld, te veel grafiese detail, en ook stawing...”*²⁰

[42] The trial court found that overall D[...]’s evidence was reliable and truthful and that she had not materially contradicted herself.

[43] The trial court, in conclusion, stated that both victims impressed the court and he found them to be truthful and reliable witnesses. It expressed:

“Op die ou einde is die hof van oordeel, en dit is my beskeie bevinding en submisie dat die twee klagsters het ‘n gunstige indruk op die hof gelaat. Hulle het die kruisverhoor, wat deeglik was, van die regsverteenwoordigers, goed deurstaan. Die hof het die indruk gekry dat hulle na die beste van hulle vermoë gebeure probeer weergee het. Hulle getuïenis was nie foutloos nie. En (sic) ek het die tekortkominge uitgewys. En (sic) die hof het, soos ek reeds hier bo aangetoon het, daar is heelwat verskille en gebreke. Maar ten spyte daarvan bevind die hof dat hulle beide geloofwaardige en betroubare getuies was, wat mekaar ook oor wesenlike aspekte gestaaf het, en oor ander aspekte

¹⁹ Page 771 from line 6.

²⁰ Page 772, lines 20 to 25.

mekaar se getuienis versterk het. Die hof moet egter dadelik vermeld dat hulle ten opsigte van talle aspekte enkel getuienis gelewer het. En die blote feit dat hulle geloofwaardige getuies was, nie beteken dat hulle getuienis sonder meer voldoende bewys van die beweerde misdade daarstel nie."²¹

- [44] Much was also made on the appellant's behalf that his right to a fair trial was infringed due to the influence of another prosecutor present in court during C[...]’s evidence in chief. This issue was also dealt with by the trial court. The prosecutor involved in the trial explained that he had independently dealt with the matter. The other prosecutor was not involved in any way, neither did she interfere in the proceedings. She was merely interested in the matter.
- [45] It was further argued that the defence never suggested how the presence of this person would have detrimentally affected the rights of the appellant or why it would have rendered the trial unfair.²²
- [46] The contention that C[...] was coached was addressed extensively by the trial court. The trial court found that C[...] had not been coached to present a false version, particularly if one has regard to her independent disclosure to the police and Ms W[...]. The trial court found no material discrepancies between her evidence and the contents of her statement. The court noted that the evidence in her statement to the police was also not challenged during cross-examination.

²¹ Page 776, lines 2 to 8.

²² The fact that the prosecutor, who possibly was friends with C[...]’s foster mother, had requested the court’s permission to be present in court and then sat next to the prosecutor whilst C[...] testified, was raised during the trial as having constituted an irregularity. This was dealt with in an interlocutory application and the magistrate ruled that the aforesaid did not constitute an irregularity. It was also argued by the appellant in this court that the presence of this person in court was irregular.

During argument the prosecutor in the court *a quo* referred to the matter of *Salisbury v Rex* 1934 PH 118 (TPD), where Greenberg J held that:

“The fact that an attorney for an interested party suggested questions to the prosecutor during the criminal trial and that the magistrate allowed such prompting in spite of an objection raised by the defence, did not amount to an irregularity.”

[47] It was necessary for C[...] to be assisted by an intermediary as she was only 9 years old when she testified. A child victim in a sexual offence who testifies without the assistance of an intermediary faces a high risk of exposure which includes undue mental stress. The object of Section 170A of the CPA (as amended) read with Section 170A(3) of the CPA is designed precisely to impede the risk of exposure. It makes provision for a child under the biological age of 18 years to testify through an intermediary.²³

[48] As part of the trial preparation, Ms Stander had reminded C[...] to testify without feeling ashamed or scared, hence the repetitions. The trial court stated:

“Sy het getuig dat sy haar getuienis met behulp van een, Wanda, sosiale werker, oor en oor herhaal het en so geleer het, volgens haar, om haar te help om nie skaam te wees om oor al hierdie lelike goed te praat nie.”

[49] The trial court relied on C[...]’s first testimony (as per her statement to the Police) as well as the disclosure made to Ms W[...] and found that even if she was asked to repeat or recite certain things, her testimony remained probable.

[50] C[...]’s horrific descriptions could not be made up. They included evidence that her father put his “tollie” inside her mouth and then “piepie” inside her mouth, that the appellant would hold her hands above her head so as to prevent her from screaming, that he would frighten her at night and rape her both anally and vaginally and that she was forced to lie on her back with her legs open. She also disclosed her mother’s and two brothers’ involvement and the various sexual acts committed on herself and D[...].

[51] In conclusion, I find that there is no merit in this appeal. The trial court had not misdirected itself when convicting the accused. It extensively considered the

²³ *Mabalane v S* (CA) 41/19 [2023] ZANWHC 97 (15 June 2023).

evidence before it and was mindful of how the evidence of child witnesses ought to be evaluated. The court further sufficiently addressed the irregularities now raised on appeal.

[52] In relation to the appellant's version it is trite that the proper approach to evidence is to look at the evidence holistically when determining the guilt of the accused.²⁴ In this regard, the magistrate did not find the appellant to be a credible witness and the magistrate was unimpressed by his evidence. His evidence was difficult to follow and he seldom gave direct answers. He was argumentative, aggressive and gave explanations that were irrelevant to the questions asked.

[53] It was also contended that the trial court erred in not accepting the evidence of the four defence witnesses as corroboration of the appellant's version and so as to reject the versions of the complainants. It cannot be gainsaid that these witnesses would deny their involvement as they had a vested interest in the matter.

[54] In the premises, there is no merit in this appeal.

²⁴

S v Van der Meyden 1999 (1) SACR 447 (W) at 448. This approach was reaffirmed by the court in *Tshiqi v S* [2020] ZASCA 92 (SCA) as follows:

"In a criminal trial, a court's approach in assessing evidence is to weigh up all the elements that point towards the guilt of the accused against all that which is indicative of their 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."

See also *Maila v S* (*supra*).

**H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I agree,

**M. VAN NIEUWENHUIZEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Appearances:

Counsel for the appellant:

Adv De Jager

Counsel for the respondent:

Adv Coetzee

Instructed by:

The State Attorney, Pretoria

Date heard:

30 July 2024

Date of Judgment:

29 August 2024