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

Case number: A312/2022

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: **YES**/NO

SIGNATURE:

DATE: 30/10/2024

In the matter between:

MORNE KEMP

FIRST APPELLANT

MARINUS KEMP

SECOND APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

TSHOMBE AJ

INTRODUCTION:

[1] The appellants appeared before the regional magistrate's court for the regional division of North Gauteng held in Pretoria following charges set out in the counts below:

1.1 **Count 1:** The first appellant was charged with 1 count of rape in contravention of Section 3 of the Criminal Law Amendment Act 32 of 2007¹ read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997²;

1.2 **Count 2:** The first appellant was charged with contravention of Section 5(1) of the Criminal Law Amendment Act 32 of 2007

1.3 **Count 3:** The second appellant was charged with 1 count of rape in contravention of Section 3 of the Criminal Law Amendment Act 32 of 2007³ read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997⁴

[2] At the trial the appellants were represented and they pleaded not guilty to all three charges preferred against them. The appellants further confirmed that the provisions of the Minimum Sentences legislation were explained to them and that they understood the explanation.

Upon application by the State, which the court granted, the proceedings were held *in camera* and the evidence of the complainant, M[...] D[...] P[...] ("M[...]") was tendered via CCTV facilities in terms of sections 153 and 158 of the Criminal Procedure Act 51 of 1977⁵.

[2] At the end of the State's case the appellant's counsel made an application in terms of section 174 of the CPA for the discharge of the appellants on the basis that there was no evidence that the appellants had committed the offences referred to in the charges. The court turned the application down, making a ruling to the effect that the evidence that was before the court *a quo* called for an answer from the accused persons.

¹ The Sexual Offences and Related Matters Act.

² The Minimum Sentences legislation.

³ The Sexual Offences and Related Matters Act.

⁴ The Minimum Sentences legislation.

⁵ The CPA

[3] The trial continued and after conviction, the appellants were sentenced as follows:

First appellant:

Count 1: 20 years direct imprisonment;

Count 2: 5 years direct imprisonment. The court ordered that these two sentences run concurrently.

Second appellant:

Count 3: 20 years direct imprisonment.

[4] The appellants lodged an application for Leave to appeal which was granted by the trial court. This is appeal only against conviction.

GROUND OF APPEAL AGAINST CONVICTION:

[5] The appellant's representative submitted that their grounds of appeal relate to the factual and credibility findings made by the court *a quo* pertaining to M[...]’s evidence.

5.1 The appellant's counsel submitted that during a Section 174 application, credibility plays a minor role in determining whether there may be enough evidence placed before the court which would convince the court to find that the State has proved its case.

5.2 The appellant's counsel further contended that the State, not only relied on a single witness but also a child witness to provide evidence that the crime/s had been committed, the mother only having heard of the alleged commission of the crimes almost two years later;

5.3 The appellant's counsel also submitted that although the evidence provided by M[...]s mother constituted hearsay evidence, it was nonetheless of utmost importance as it was the first report of the alleged crime made by M[...].

5.4 The appellant's counsel expressed concern about the finding of the court *a quo* that M[...] was a credible witness, as he (Counsel) held the view that this finding was premature at that stage.

5.5 The appellant's counsel concluded that M[...] was not a credible witness and her credibility was an utmost requirement at the end of the day for various reasons, one of which was that she was a single witness.

5.6 The appellant's counsel further argued that the state must prove its case beyond a reasonable doubt and where inferences are made from surrounding circumstances in corroboration, such inferences must be proved beyond a reasonable doubt.

5.7 The appellant's counsel argued with reference to a number of cases including *S v Vilakazi*⁶ that before convicting the state must not only rely on the untruthfulness of the exculpatory evidence but must be satisfied that the truthfulness and reliability of every element of the offence has been established by the state beyond a reasonable doubt. In this instance, so the argument went, the important part is that the evidence tendered by the State must be truthful and reliable beyond a reasonable doubt.

5.8 Reference was made further to the cautionary rule in respect of evidence by children with reliance on the case the *DPP v S*⁷ where the court, in considering the evidence of children, in sexual and other cases, as single witness, is obliged to apply the cautionary rules before a conviction can be made. Counsel submitted that the state failed to prove its case beyond a

⁶ 2012(6) SA 353 (SCA).

⁷ 2000 (2) S'A 711 T.

reasonable doubt and the appellant's version, which was a bare denial of the committal of the offences was therefore reasonably probably true.

[6] **THE EVIDENCE:**

6.1 Before dealing with the evidence, I find it necessary to summarise the background as provided to the court *a quo*, not only by M[...] but by her mother and the second appellant's wife in order to provide what seems to have been the context and the relationship of the parties. In this background I have selected the portions of the evidence that were not put in issue by either side but this does not mean that these were the only portions of the evidence that were uncontroverted. The appellants are twin brothers who were, at the relevant time, living together at the second appellant's home. The second appellant (Marinus Kemp) and his wife ("Mrs Kemp") were friends with M[...]s parents, and the friendship warmed up to the point where M[...] became friends with the firstborn daughter of the second appellant, ("Megan").

6.2 This gave rise to the spending of a lot of especially weekend time by M[...] at the second appellants home with Megan and vice versa. This started when M[...] was some 11 years old and Megan was seven. Whenever M[...] visited, she was treated like anyone of the other children, watching television, playing video games or sitting by the braai area and generally being at home.⁸ In other words, when M[...] was at the second appellant's home, she was not restricted to playing and spending time only with Megan. She enjoyed a homely atmosphere like any of the other children.

6.2 This went on for about 4 years (from 2014 to 2018), M[...] and Megan spent every or alternate weekends with one another and ultimately M[...] saw the second appellant's home as her second home to the point that she asked her parents to speak to the second appellant and his wife to be her God-parents so that if anything were to happen to them (her parents), she (M[...]) could go to the second appellant and wife's home and be looked after by them.

⁸ M[...] was born on 6 April. She testified that at the time of the events she had already turned 14.

This was while she was still in primary school, that is, before she turned 14 and this is indicative of the amount of love and trust she had towards the second appellant and his wife and the household as a whole. These two families even went to Shelley Beach on holiday together in December 2015.

6.3 In time (2018), M[...] proceeded to high school and was moved from an English school environment to an Afrikaans school environment in which she apparently could not adjust. This is not in dispute, and the evidence records that she was suffering in school, it was not going well for her and her problems had to do with the transition from an English to an Afrikaans environment. She joined a gang, started smoking drugs (weed, dagga) and the herbal which she started smoking from around June 2018.

6.4 So, M[...] was clearly not in a good environment and this was unfortunately at a time when she was not having a good relationship with her mother. Whether this was because she had been moved to an Afrikaans school environment or not, that is not in the evidence although it does appear to have been. She was however having a very comfortable and open relationship with Mrs Kemp, whom she saw as a second mother to her.

6.5 In her evidence, Mrs Kemp confirms this and elaborates on how open M[...] was with both herself and her husband. While being led by the appellant's counsel, as a witness for the appellants she states:

*"Up to the point before M[...] went to high school she was a very sweet, well-mannered child. She was accepted as one of our own children, but the moment she went to high school in 2018 everything changed. Her whole demeanor changed. She got involved with the wrong children at school. They were talking about a gang. She started doing things that she was not supposed to do. Everything changed."*⁹

[7] M[...]’s evidence

⁹ Record 209 Lines 11 -17.

Against the above background, the evidence of M[...] in chief is as follows:

7.1 On a particular date between 20 and 29 September 2018,¹⁰ she was at the appellant's home and sometime during the afternoon she had a conversation with the two appellants with regard to drugs and their experiences with regard to certain of them, dagga also being mentioned.

7.2 The conversation led to M[...] telling the appellants about a smoked drug called Herbal following which she then asked if anyone of them could go with her to get some from a nearby adult shop where she knew it was available.

7.3 The first appellant ("Morne") agreed to take her and at the shop he walked in and bought the drugs for her as she was a minor and could not go in. She then promised to pay him back, for both the cost of the drug and the petrol money.

7.4 On the way home, she started smoking the herbal¹¹ and Morne stopped at a Spar along the way. In the parking lot Morne started touching her body, breasts and even her vagina but on top of her clothes. Upon realizing that one of the car guards was looking Morne stopped and walked into Spar.¹² He came back and they proceeded going home.

7.5 As he was driving, Morne took M[...]’s hand and forced her to touch his penis,¹³ which he had taken out of his pants. In protest she uttered the words, "*Nee Morne*"¹⁴ and as soon as she was able to, she got her hand away from his penis, and Morne slipped his hand under her pants and penetrated her vagina with his fingers. At this point Morne uttered the words: "*Dis lekker*"¹⁵

¹⁰ M[...] doesn't remember neither the day nor the date.

¹¹ She mentioned specifically that Morne didn't smoke the drug at the time.

¹² She doesn't know what he bought.

¹³ Record Page 75 Line 5.

¹⁴ She also testified that she was high by this time Record 102 Lines 9-10.

¹⁵ Record 75 Line 15.

7.6 Morne stopped the act on his own and proceeded driving until they got to the house. When they got there, M[...] pretended as though nothing was wrong, just played with the dogs and Megan until about 7pm. She smoked more herbal and went to bed. She slept in the same room with the two girls, sharing a double bed with Megan and the younger sister sleeping on a smaller bed in the same room.

7.7 Sometime during the night she came awake feeling a weight on her body and when she opened her eyes she saw the second appellant on top of her, her pants were already down to her knees and the second appellant was already putting his penis into her vagina.

7.8 He then raped her with his penis for about 5 minutes¹⁶ in her estimation.

7.9 M[...] testified that she was shocked, did not want to move or say anything that would wake up the two girls (especially Megan who was sleeping with her in the same bed) who would then see their dad on top of her and doing what he was doing.¹⁷ She also testified that she could clearly see Marinus's face because the bathroom light which was opposite the room stayed on during the night and it shone into the room.

7.10 She testified further that the second appellant said "*Dit is hoe hy ons gaan terug betaal*"¹⁸ She understood those words to mean that is how she was going to pay them back for asking them to buy herbal for her. Upon being asked whether Marinus ejaculated or not, she responded that he did not.

7.11 M[...] testified that she had suspected the appellants to have these intentions because they had been molesting ¹⁹ her since she started developing breasts at 11 years but, being a child, she didn't know what was going on. She explained that they would grip or touch her breasts, her bum or

¹⁶ During this evidence she testified that she had been wearing a short pants and short sleeved shirt and the second appellant was in knee-high shorts.

¹⁷ She testified that at the time the two families had known each other for 4 years and she used to visit every weekend or second weekend.

¹⁸ Record 81 Line 6.

¹⁹ Record 81 Lines 19 20 Groping her breasts, touching her bum or vagina but on her clothes.

vagina but on top of her clothes. They would also do this while they were drinking and would laugh it off.

7.12 It was only when she started high school and studied certain subjects, the content of which included appropriate and inappropriate ways of being touched, that she realized that what the appellants have been doing to her was wrong.

7.13 M[...] testified that she never gave any of the appellants consent to do what they did to her and the first person she told about this is her former best friend, Abigail Koen after whom she told Rieke Blignaut ("Riekie"), both in 2019 and both of whom were minor children. Neither of the two children first reported to testified in the trial of the appellants. M[...] never told any adult person until April 2020 when she told her mother.

7.14 The disclosure to her mother came about on a day when M[...] told Riekie that she had taken a bunch of pills and was planning to hang herself in the garage of her home that night. At the time Riekie was living at M[...]’s home, having left her house because of a violently abusive step-father.

7.15 Upon hearing what M[...] intended doing, Riekie pulled M[...] together and resolved to wake up M[...]’s mother ("Mrs D[...] P[...]") at around 4 am and there and then got M[...] to talk to her mother. The three of them sat on the porch and M[...] told her mother everything. Responding to a question from the prosecutor as to why she came to these suicidal decisions, taking the pills, and planning to hang herself, M[...]’s response was that: *"The person got the best of me during that time, and I felt that was the only outcome and that no one would ever believe me if I told them what happened because I had a past."*²⁰

7.16 Referring to the psychological and emotional trauma that she suffered, M[...] testified that in October 2018, right after the incident, she ran away from

²⁰ Record 85 - Lines 2 - 5.

home but was fortunately found on the same day. When she was found she was on her way to the train station to get away from all her problems. She testified that she had had multiple suicide attempts, self-harming which, though it had started while she was struggling in high school, continued after the rape incidents, and she further developed pill addiction. She testified that she can no longer be in the same room with a man, she is hugely scared to even hug her dad.

7.17 Regarding the help she has received since the incidents, she testified that she was never exposed to any psychological help before she was admitted to One Military Hospital after her attempted running away from home and she was too ashamed and uncomfortable to tell the story to any of the different interns that attended to her each time she visited there.

M[...]’s Cross - examination:

7.18 Based on the relationship she had with Mrs Kemp, M[...] was asked why she did not report the molesting and rape incidents to her when they were committed. Her response was that at the time they were molesting her she was a child and did not really know what was going on until she was at high school and obtained information on the appropriateness and inappropriateness with respect to being touched. On why she didn’t report the rapes, her response was an expression of her love for both Megan and her sister and that she didn’t want them to grow up without their father. One must also bear in mind that the two brothers were like family to her - she even testified that she saw the second appellant like a dad.

7.19 The appellant’s counsel was rigorous in his cross examination of the complainant on extraneous aspects of the incidents, which were all not of much value, certainly not with regard to whether the crimes were committed or not; for instance:

7.19.1. what utterances were made during the acts;

7.19.2. the discrepancies in her evidence between how long Marinus took to rape her; forgetting that she was shocked, and probably more concerned about not waking up the younger girls;

7.19.3. the discrepancies in evidence regarding clothes she and the appellants were wearing during the acts;

7.19.4. why she asked the brothers to go get the drug at the time she did;

7.19.5. whether she told the second appellant's wife about being raped by her husband as well as molestation and rape by the husband's brother;

7.19.6. whether she smoked drugs or cigarettes or both in front of the second appellant's wife;

7.19.7. whether the second appellant ejaculated or not when he raped her;

7.20 The cross examination also touched at great length on the inconsistencies between M[...]’s testimony and the testimony of Mrs D[...] P[...] (her mother), the content of which was the report that M[...] gave to her and Riekie when she (M[...]) disclosed the rapes and sexual abuse incidents to Mrs D[...] P[...] at Riekie’s insistence. This disclosure session seems to have also been attended by Riekie who allegedly prepared an affidavit in which she set out her version of M[...]’s report. This court has not considered the testimony in such an affidavit on the basis that Riekie did not testify and the affidavit relied upon was not presented as evidence. Consequently, given that none of the two girls to whom M[...] first reported the rape incidents testified, the only other evidence available to the State was the testimony of Mrs D[...] P[...], which was M[...]’s report to her mother about the rape incidents almost two years after the occurrence of the incidents.

7.21 In her response M[...] made it very clear that since the incidents took place, she was doing her best to wipe them from her memory and therefore her memory on extraneous detail or detail unrelated to the gist of what happened was poor. In this regard it must also be noted that when the first incident of rape occurred M[...] was already high from the herbal drug she had smoked. In response to further cross examination, she also explained that she could not tell Mrs Kemp about what her brother-in-law had done because these people were family and she did not think she would be believed. Of further note, she was a child and she suffered a massive breach of trust from people in a family that she considered her second home. It is not difficult to see her dilemma if one also considers that she also did not enjoy a good relationship with her mother at the time. She was a child and dealing with a major trust and relationship breach for her mind to retain matters like who said what, when, who was wearing what, when. For instance, she testified that she smoked more herbal before she went to bed but could not be sure who she smoked with.

7.22 The appellant's counsel also questioned M[...] about why she had to leave her friend (Megan) and drag Morne from the braai to go and buy her the herbal drug. The suggestion was as though she forced Morne to go and buy this drug meanwhile she persistently testified that she asked if one of them could take her and Morne offered. She also testified that when she was there, she was not confined to be only with and playing only with Megan.

7.23 Appellant's counsel further questioned her extensively on Marinus saying to her and Morne, he will stay and look after the braai and will tell his wife that Morne wanted to buy a lotto ticket and M[...] went with, just in case she asked. The issue was spun by Counsel and appellants as though since M[...] has never been alone in a car with either of the two appellants, the second appellant's wife *would never have allowed it*²¹. This had a strange and improbable sound to it coming from people who described M[...] in the following terms: *M[...] felt to me like my own daughter, I did many things for*

²¹ First appellant Record 227 Lines 2-3.

*her, for her and my own children. I just got to love her a lot. She felt like my own child.*²² The appellant's counsel emphatically put it to M[...] that even if the first appellant had to go and buy a lotto ticket, it still needed to be explained why M[...] had to go with him when she has never driven with him in a car - this sounding like a rule that had been decreed. If there was such a rule, the evidence clearly shows that M[...] was never advised of it.

[8] ***The evidence of M[...]’s mother (“Mrs D[...] P[...]”)***

8.1 Before I deal with Mrs D[...] P[...]’s evidence I must clarify again that this court has approached such evidence as it concerns M[...]’s report to her mother about the actual rape and sexual abuse incidents she suffered during and before September 2018. As indicated above, there were inconsistencies between M[...]’s testimony and what Mrs D[...] P[...] testified was reported to her. The inconsistencies were on certain matters of detail; for instance, Mrs D[...] P[...]’s testimony of what M[...]’s report to her on whether it was the first or second appellant who raped her on the bed, whether it was after or before buying the herbal that Morne sexually abused and raped her daughter by penetrating her vagina with his finger, whether the two brothers drove together on the day the herbal drug was bought.

8.2 However, once again the inconsistencies were all on extraneous matters, which were not relevant to whether the acts of sexual molestation and rape took place or not; and on these matters, M[...]’s evidence in court was no different from what her mother testified to have been reported to her by M[...]. Accordingly, for the above reason, this court is not concerned about the inconsistencies that were raised especially because, even if this evidence were to be regarded as the testimony of first report, the value thereof would have been the credibility that serves to prove whether there was consent or not, which was not an issue in this matter.

²² Second- appellant Record 233 Lines 5 -7.

8.3 Mrs D[...] P[...]’s further testimony pertained to her own observations regarding M[...]; for instance: the change in M[...]'s personality in 2018, an appearance of being broken, having anger issues, how she stopped spending weekends at the appellant's advising her mother that she had outgrown Megan, withdrawal and refusing to talk when asked what was wrong with her, to the point where she indicated that she would like to enroll in boxing classes.

8.3 The above view is also fortified by M[...]'s testimony; that she did everything she could to put both experiences out of her mind. She tried to wipe what happened from her memory. What she says is further borne out by the fact that she doesn't remember the date of the incidents, details like she did not immediately (in her evidence in chief) remember what she said to the first appellant when he started touching her, the date she ran away from home, a detail she had testified to but could not remember during cross examination. Clearly therefore, the report given by M[...] to her mother could not have been exact to the utmost detail.

8.4 M[...]'s mother's further testimony is also to the effect that M[...] tried to run away from home on 15 October, 2018, that when she was found she tested positive for dagga, she was wild and difficult to control. She was at that stage taken to One Military hospital and was treated as an out-patient there until the doctors could identify the treatment that suited her. Her mother conceded that going into an Afrikaans environment was difficult for her and clearly because everything happened during the same year it is not possible to separate the results of the challenges M[...] faced from the school environment from the results of the trauma from the rape and sexual abuse incidents.

8.5 After the attempt to run away, Mrs D[...] P[...] testified that M[...] told her that: *"Mommy, I really need to do boxing classes, because I have anger in me which I want to get rid of"*²³ Mrs D[...] P[...] testified that she and her husband did not understand and thought it was all because of the change from an

²³ Record Page 185-186 Lines 22-24.

English to an Afrikaans environment. It was only in 2020 when she relayed the story about the rapes that they understood after M[...] had sessions with the psychiatrist on what happened to her. In her evidence, M[...]’s mother also testifies that her daughter only shares what she wants to share and when she has decided that she is not going to talk she does not.

[9] ***An analysis of all the evidence:***

9.1 When the first appellant was asked in cross examination by the Prosecutor if he has ever communicated with the complainant, his answer was *"Never with her"*²⁴. The Prosecutor repeated this question in terms whereof he asked: so would you visit your brother, you two would never say anything to each other?" His answer was *"No, never"*²⁵. When the same question was posed by the court, he realized that this was likely going to sound improbable and changed his answer when the court asked: *Are you saying you have never spoken to the complainant?"*²⁶ This time the answer was: *Your worship I have spoken to her before, but that was when we would braai together ...*"²⁷

9.2 During M[...]’s cross examination the appellant’s counsel asked her about her relationship with Mrs Kemp (the second appellant’s wife) and the question and answer went like this:

Question: "And just to understand the nature of the relationship, did you also discuss with tannie Nadia your relationships on a more sexual, or more sexual nature?"

Answer: "No, sir"

Question: "When you went to high school that specific year, 2018, were you sexually active?"

Answer: "Yes, sir"

²⁴ Record 228 Line 10.

²⁵ Record 228 Lines 11-13.

²⁶ Record 232 Lines 6-7.

²⁷ Record 232 Lines 8-9.

Question: "And that happened during the first half of the year, or the first quarter of the year already, is that correct?"

Answer: "In July"²⁸

The point here is that when Mrs Kemp was cross examined by the Prosecutor, he confronted her with M[...]’s mother’s evidence that M[...] ran away in October of 2018, she replied:

That’s impossible. It was in the beginning of the year²⁹

Now, if M[...] ran away from home at the beginning of the year and she was no longer visiting by, about June/July, how was it possible for the two of them (Mrs Kemp & M[...]) to discuss M[...]’s sexual life that took place in July.

9.3 At the beginning of the testimony of Mrs Kemp as she was led by the appellant’s counsel, she described M[...] as having been a very sweet and well- mannered child, to the point where she was accepted as one of her own. She testified that M[...]’s change in behaviour happened when she started high school.³⁰

9.4 In response to a very pertinent question, still by the appellant’s counsel as to whether Mrs Kemp told M[...]’s mother of this state of affairs, Mrs Kemp answered:

"I tried first talking to M[...] myself. **My husband and I both did**, but the behavior continued."³¹

9.5 The evidence of the second appellant, once again as led by their counsel does not echo his wife’s evidence above. This comes out in the question and answer below:

²⁸ Record 90-91 Lines 25 &1-9.

²⁹ Record 219 Lines 22-23.

³⁰ Supra, paragraph 6.5

³¹ Record 209 Lines 23 - 24.

Question: "...we have also heard and M[...] also testified that since she went to high school in 2018, she experienced a lot of changes, behavioural changes. Did you notice that?"

Answer: "M[...] shared a lot of things with my wife, Nadia. So, my wife Nadia, told me everything that M[...] told her."³²

9.6 The above answer is a far cry from a man who became aware of the behavioral changes of the magnitude that M[...]’s behavior had descended to and who not only became aware but actually engaged M [...], as testified to by his own wife. He does not testify to this, neither does he give an account of how the conversation went, he does not tell the court what he did about the problem, knowing M[...]’s father and mother as he did. This is what any reasonable man who had the interests of a little girl at heart and who came across such information, would have done.

9.7 Mrs Kemp, once again while she was led in her evidence in chief by the appellant’s counsel, testified that:

*"She (M[...]) **confided in my husband and I** one evening that they left school and they went to a party where they smoked marijuana and they swam in someone's pool naked, then she lost her virginity but she could not remember to whom she lost her virginity" ³³*

9.8 The above must be seen together with M[...]’s testimony (which was denied by the appellants) where she relates conversations with both first and second appellants on drugs, dagga and ultimately her telling them about this new drug called 'Herbal' where she said:

"I told them that I smoked it and that I would occasionally smoke weed or herbal, and they would further tell me that they as well smoked it

³² Record 234 Lines 10 - 16.

³³ Record 211 Lines 12 -17.

*before when they were younger and they do not mind if I smoke it, they do not have a problem."*³⁴

9.9 The above testimony must again be seen in conjunction with M[...]’s testimony with regard to when she started smoking. The testimony was during M[...]’s cross examination by the appellant’s counsel and it went as follows:

Question: "When did you start smoking? For how many years have you been smoking now?"

Answer: "Marinus introduced me to smoking when I was 12 years old."

Question: "How did he introduce you, please explain that?"

Answer: "Some nights he would be drunk and he would be alone in the kitchen while me and Megan played video games on the TV,"

Question: "And what then?"

Answer: "And then he would be drunk and he would call us and Megan, and then in a way he would get Megan out of the kitchen, and the one day he asked what do I choose between cigarettes or drinking, what is healthier, and that is when I told him smoking. He lit a cigarette and handed it to me and told me to smoke."

Question: "Did you smoke since that day?"

*Answer: "Not permanently, but after that I did until 2013, sometimes when he would give it to me again, but I smoked permanently since 2018."*³⁵

9.10 The above evidence was uncontroverted. This evidence certainly belies both appellant's denial that they ever discussed drugs with M[...].

9.11 The above evidence must further be read in conjunction M[...]’s evidence with regard to discussions with the appellants on smoking dagga, once again during cross examination by the appellant’s counsel. It went as follows:

³⁴ Record 119 - 120 Lines 25 & 1 - 3.

³⁵ Case Lines 1 -118 Lines 4-23.

Question: "M[...], why did you have this discussion with the accused, both of them?"

Answer: "Because I was comfortable to discuss it with them."

Question: "And was this during 2018 that you had these discussions?"

Answer: "Yes Sir, I started smoking weed in 2018"³⁶

9.12 This evidence was also uncontroverted and of particular importance is that these discussions were between two men both aged 43 years and a child of 14 years, young enough to be a daughter to either one of them. In the circumstances, whatever doubt one had about M[...]'s testimony that she was introduced by the second appellant to smoking³⁷ disappears, especially as such testimony was never put in issue. **Accordingly, this court rejects the second appellant's testimony that he saw M[...] as his own daughter and the denial by both that they discussed drugs with M[...].**

9.13 M[...] testified that she tried very hard to put the rape and sexual abuse events out of her mind. She tried to erase them as to try and get a point where she can treat them as never having taken place. In that state, given also the passage of time, she couldn't possibly be expected to remember the details surrounding the events, for instance what clothes she had on, the clothes either of the two appellants had on, how long the rape by the second appellant took. What she would remember is what happened to her and what was done to her given the fact that the drug did not render her mind disassociated from her body.

9.14 Further, the aspects which she forgot or on which there were discrepancies in her evidence do not only relate to the actual acts of rape. For instance, she testified that she never had intimate conversations of a sexual nature with Tannie Nadia meanwhile she had told Tannie Nadia about being sexually active. She later conceded though, in the same cross examination that she did tell Tannie Nadia that she had started being sexually active but her sexual activity started in July 2018.

³⁶ Record 120 Lines 11 -13.

³⁷ Record 95: Lines 5 - 23.

9.15 Although the relationship between M[...] and her mother was not good when she transitioned into high school in 2018, M[...] testified during cross examination that she didn't recall telling Mrs Kemp that she wanted to move in with them permanently and that she did not want to stay at her house as seemingly conveyed by Ms Kemp to the appellant's counsel. What she testified to though was that she asked her parents to speak to Mr & Mrs Kemp (the second appellant and his wife) to become her godparents so that she could go and live with them should anything happen to her parents. She made this request before high school, obviously when things between the two families were still going well and at the time she saw the second appellant as a dad.

9.16 All of the above is indicative of the conflict that M[...] was going through. She explains that even though her not telling Mrs Kemp about the events that took place was because she did not want to cause a rift between her (Mrs Kemp), her husband and brother-in-law, she also did not think that anyone would believe her because she had a past and the past is clearly what had happened to her since she started high school. She further did not want to inflict trauma on the second appellant's children (Megan in particular). She testified that she was shocked and numbed; and given her brokenness at that time, she possibly did not want to put an end to the one part of her life which seemed to have been her refuge.

[10] **THE LAW:**

AD CONVICTION

10.1 *Proof beyond a reasonable doubt:*

10.1.1 In criminal litigation, the State must prove its case against an accused beyond a reasonable doubt. The accused bears no onus and if his version is reasonably possibly true, he is entitled to receive the

benefit of the doubt and be discharged.³⁸ It is also trite law that proof beyond a reasonable doubt does not mean proof beyond all doubt. In *Monageng v S*³⁹ the court described proof beyond a reasonable doubt as:

"... evidence with such high degree of probability that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged. An accused's evidence therefore can be rejected on the basis of probabilities only if found to be so improbable that it cannot reasonably possibly be true."

10.1.2 The above establishes a tension between proof beyond a reasonable doubt and the reasonable possibility that the accused's version may reasonably possibly be true. In order to resolve the tension that exists between the two seemingly separate but in essence the same test, the court must look at all the evidence in its totality. In other words, the court must not look at the evidence exculpating the accused in isolation and neither must it look at the evidence implicating the accused in isolation. This therefore means that a court does not base its conclusion, either way, on only part of the evidence. The conclusion of the court must account for all the evidence.

10.1.3 In the Van der Meyden matter (*supra*) Nugent J stated as follows:

*"In order to convict, the evidence must establish the guilt of the accused beyond a reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable: each being the logical corollary of the other. In whichever **form the test is expressed, it must be satisfied upon a consideration of all the***

³⁸ S v Van Der Meyden 1999(1) SACR 447 W; S v Shackell 2002(2) SACR 185 at para [30].

³⁹ [2009] 1 All SA 237 (SCA) Para [14].

evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond a reasonable doubt and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true"³⁹ (emphasis added).

10.1.4 The classic decision was formulated by Malan JA, a couple of decades ago at a time when the popular argument that was to the effect that proof beyond a reasonable doubt requires the prosecution to eliminate every hypothesis, which is inconsistent with the accused's guilt or which, as it is also expressed is consistent with his innocence. Malan JA rejected this approach and preferred to adhere to an earlier approach which was eventually adopted and is now preferred by the courts.⁴⁰

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case" (Emphasis provided)

10.2 ***The law on the testimony of a single child witness:***

⁴⁰ R v Mlambo 1957(4) SA 727 at 738 A-C.

10.2.1 While section 208 of the CPA⁴¹ provides that an accused can be convicted of any offence on the single evidence of any competent witness, it is nonetheless established in our law that the evidence of a single witness must be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility. The correct approach to the application of this cautionary rule was set out by Diemont JA in *S v Sauls and Others*⁴¹ as follows:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness... The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told."

10.2.2 In the above case, the Judge of Appeal held the view that the cautionary rule may be a guide to the correct decision but it does not mean that any criticism, however slender, of a single witness's evidence, is well founded.

10.2.3 Further, on the evidence of a child witness, the law is that a court may convict on the single evidence of any competent witness.⁴² To ensure that such evidence can be relied upon, in the case of *Woji v Santam Insurance Company Ltd*⁴³, the court, held as follows on the trustworthiness of such evidence:

"...depends on factors such as the child's powers of observation, his power of recollection, and his power of narration on the specific matter to be testified ...".

⁴¹ 1981 (3) SA 172 (A) at 180E-G.

⁴² Section 208 of the CPA

⁴³ 1981(1) SA 1020 A@ 1028 B-D.

Even though the courts have watered down the nature of the above as a double cautionary rule, the view is that it should not be used to disadvantage a child witness on that basis alone. On this view what is required of a child when testifying is appropriate communication. The ability to frame and express intelligent answers. The essence of their allegations must stand and the evidence must not change dramatically.

10.3 *The law on the First report witness in a rape or sexually related matter:*

10.3.1. The conviction in this case was, in the main, based on the evidence of a single witness, that is, M[...]. Apart from being a single witness to the two acts of rape and one of sexual assault, M[...] was a child, both at the time of the acts and during the trial itself. There was no further corroboration, medical and otherwise of her evidence given that she did not report the rape acts at a time when such medical corroboration could still be obtained. For reasons that she has elucidated in her evidence, it also took her quite some time to report the rape incidents. However, consistent with legal developments with respect to previous consistent statements and how long it takes rape victims to accept and be able to deal with the offence, the resultant rules contained in Sections 58 and 59 of the Criminal Law (Sexual Offences and Related Matters Act) Amendment Act⁴⁴, this court does not draw any negative inferences arising from the delayed reporting.

10.3.2. In the light of this court's approach to Mrs D[...] P[...]’s evidence, who was the first adult M[...] reported the rape and sexual assault incidents to; and who actually testified, it becomes necessary to define what a first report statement means and its actual value to rape trials. Two authors of the Law of Evidence define a first report statement as the “...the statement by a person to whom the victim of rape first

⁴⁴ Act 32 of 2007

reported the incident"⁴⁵ With reference to the inferences that can be drawn from the admission of a first report the only one still supported by the courts is the complainant's consistency, thus supporting the complainant's evidence that she was not involved in consensual sexual intercourse, only to later scream she has been raped. Accordingly, the first report would also support the credibility of the complainant⁴⁶.

10.3.3. There are requirements to the admissibility of a first report statement into evidence. These are: the statement must be made voluntarily; the complainant must testify at trial and that statement must have been made at the first reasonable opportunity. The value of the last requirement has mostly been in sexual offences where the absence of consent is an essential element.

10.4 ***The appeal court's powers re: Credibility findings***

10.4.1 With reference to the appeal on conviction, there are three legal principles that are applicable to this matter, the first being that a court of appeal should only interfere with the findings of the trial court where there is a material misdirection on the facts and credibility findings of the witnesses.⁴⁷ In the case of *S v Monyane*⁴⁸, Ponnann JA referred with approval to the case of *S v Hadebe and Others*⁴⁹ and held that the appeal court's powers to interfere on appeal with the findings of fact of a trial court are limited. The learned Judge of Appeal pronounced

⁴⁵ DT Zeffertt & AP Paizes the South Africa Law of Evidence.2 ed (2009) at 971.

⁴⁶ *S v Hammond*-2004(2) SACR 303 (SCA).

⁴⁷ *R v Dlumayo and Another* 1948 (2) SA 677(A) and *S v Francis* 1991(1) SACR 198(A) at 198j-199a "The power of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence-a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony".

⁴⁸ *S v Monyane and Others* 2008 SACR 543 (SCA) Paragraph [151].

⁴⁹ *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e f the court held:

"...in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

further that in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

10.4.2 Similarly to the Monyane case, *in casu* a thorough reading of the record does not indicate any doubt as to the correctness of the findings of the trial court. The trial court traversed the evidence of the victim and one state witness as well as the defense witnesses; and, in spite of being a single witness who was subjected to a rigorous cross examination, the victim was not shaken on the evidence relating to the actual committal of the offences in spite of all the circumstances she faced prior and post the rape incidents. The explanations she provided on her memory retention of the events was also satisfactory to this court to cover all the inconsistencies that arose.

10.4.3 The appellants could also not adduce any demonstrable evidence that could have supported a different finding by the court *quo* with respect to the evidence led by the State's witness on the charges faced by the appellants. Therefore, not only was the evidence of the state witness credible and constituted proof beyond reasonable doubt but the version by the appellants could not reasonably probably be true.

10.5 Admissibility of hearsay evidence

Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 ("the Hearsay Act") defines hearsay evidence as evidence whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence, Therefore, as a general principle, hearsay evidence is not admissible but there are exceptions.

There are legal exceptions to the general rule like: when the interests of justice require such evidence to be admitted. In this case however, the

evidence of Mrs D[...] P[...] that this court accepted was the report which she received from her daughter on the actual criminal acts in point as well as evidence that she had personal knowledge of, for instance, she testified as a fact that:

M[...] ran away from home on 15 October 2018;

M[...] as not admitted to One Military hospital and thus did not get any psychological assistance from there before 15 October 2018;

M[...] is a private person, will not speak when she doesn't want to;

[11] **CONCLUSIONS:**

11.1 This court has found some inconsistencies in M[...]s evidence. However, such inconsistencies are not about whether and how the crimes were committed-.they are all about the surrounding or extraneous facts which do not relate to the criminal acts for which: they were on trial. This has been demonstrated right through the record of the evidence that was led in court. The evidence by M[...] is satisfactory in every aspect that is to do with the crimes committed. Therefore, there was sufficient evidence to prove the case against the appellants beyond a reasonable doubt. As per Diemont JA, in S v Sauls, this court is satisfied that the truth was told.

11.2 It is trite that the appellants do not have an onus - all that is needed is for an appellant's version to be reasonably probably true. At the beginning of the appellants' case, counsel for the defense stated that the version of the appellants is going to be a bare denial because they are saying the whole incident never took place. However, in the little substance there is of the case for the appellants there are some important aspects of improbability that have been identified in the analysis of all the evidence in paragraph 9 above that remove any probability of the truthfulness of the defense's case.

[12] **THE ORDER**

1. The appeal against conviction is dismissed.
2. The appellants' bail is hereby revoked.
3. The appellants must surrender themselves within 7 days of this order to the Investigating Officer in this matter alternatively to Pretoria-North Police Station for arrest.
4. The appellants are to commence serving their sentence at Kgosi Mampuru II Correctional Centre, Pretoria.

N. L TSHOMBE
ACTING JUDGE OF THE HIGH COURT,
PRETORIA

I agree,

MJ MOSOPA
JUDGE OF THE HIGH COURT,
PRETORIA

APPEARANCES:

FOR THE APPELLANT : ADVOCATE JANSE VAN RENSBURG

INSTRUCTED BY : HAMAN AND BOTHA ATTORNEYS

FOR THE RESPONDENT : ADVOCATE RAMCHURAN

INSTRUCTED BY : DIRECTOR OF PUBLIC PROSECUTION,

SOUTH AFRICA