



**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

High Court Ref No:12/2023
Magistrate's Serial No:01/22
Case No: RCA 118/2017

In the matter between:

THE STATE

And

L N

ACCUSED

Heard: 06 December 2024

Delivered: Electronically on 31 January 2025

JUDGMENT

LEKHULENI J *et* ADAMS AJ

Introduction

[1] This case came before us by way of review in terms of section 85 of the Child Justice Act (*"the CJA"*) read with Chapter 30 of the Criminal Procedure Act 51 of 1977 (*"the CPA"*). The accused faced 10 counts in total, namely: assault, assault with intent to do grievous bodily harm, four counts of kidnapping and four of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. All the charges emanate from three separate incidents, which allegedly occurred on 23 November 2015, 5 December 2016, and 5 August 2017, respectively. The accused was legally represented throughout the trial. During the first incident in November 2015, the accused, whose date of birth was established to be 3 February 1998, was 17 years old, and the proceedings in respect of counts 1 to 3 were therefore conducted in terms of the Child Justice Act 75 of 2008 (*"the CJA"*).

[2] The trial in the Regional Court commenced on 16 October 2019, with pleas of not guilty noted in respect of all the charges. The accused elected to exercise his right to remain silent, and no formal admissions were noted. The court proceeded to hear several witnesses, which culminated in the conviction of the accused on counts 1, 3, 8, 9, and 10 on 4 June 2021. The accused was acquitted on count 2 and counts 4 to 7. In terms of section 71 of the CJA, a pre-sentence report was obtained, and on 8 September 2021, the accused was sentenced as per Annexure K attached to the charge sheet as follows:

"Accused is sentenced as follows:

[1] In respect of **count 1 – Kidnapping**, you are sentenced to 12 months direct imprisonment.

[2] In respect **of count 3 – Rape**, you are sentenced 10 years direct imprisonment. Both on **count 1 and 3** you are sentenced in accordance with the provisions of **section 77 of the Child Justice Act 75 of Act 2008**. And your sentence is antedated in terms of **section 77(5) of CJA** by (4years 18days) which is the time that you have spent in prison from the 20th of August 2017.

[3] In respect of **count 8 - Assault Common**, you are sentenced to 3 months direct imprisonment.

[4] In respect of **count 9 – Kidnapping**, you are sentenced to 12 months direct imprisonment.

[5] In respect of **count 10 – Rape**, you are sentence Life Imprisonment.

[6] In terms of **section 280(2)** the court makes an order that the sentences imposed on **count 1, 3, 8 and 9** shall run concurrently with the sentence imposed on **count 10**.

[7] In terms of **Section 103 of the Firearms Control Act 60 of 2000**, the court makes no order, meaning you are automatically unfit to possess firearm.

[8] In terms of **section 50(2)(a)(i) of Act 32 of 2007** the Court makes an order that your personal details including the offence, date and place of conviction and sentence, court and case number will be included in the Sexual Offences Register. In terms of **section 45 of Act 32 of 2007** your employer or any prospective employer shall before employing you apply to the Register for a prescribed certificate stating whether or not your particulars are not recorded. “

[3] As previously stated, this matter came before us on automatic review in terms of the provisions of section 85 of the CJA read with Chapter 30 of the CPA, as the accused was 17 years old at the time of the commission of the first alleged offences (counts 1 to 3). The record of proceedings from the court *a quo* was placed before us on 09 February 2023. Upon perusal of the record, no concerns were noted with the conviction and sentence in respect of counts 1 and 3; however, following certain concerns noted with the conviction on counts 8 to 10, we addressed specific queries to the Regional Magistrate during February 2023.

[4] Furthermore, we noted that the record was incomplete, and we returned the incomplete record to the Regional Magistrate for the reconstruction of the missing

part of the evidence of one witness, Latoya Morris, as the same was not included when the record was originally submitted to the High Court. The response to these queries was only received after further enquiries were made to the lower court in October 2023. The complete record with the Regional Magistrate's response and the transcription of Latoya Morris' evidence was received on 6 November 2023. Systemic challenges related to loadshedding and CRT machines malfunctioning, which allegedly caused a delay in obtaining the transcription of the missing evidence, were reported to have contributed to the long turnaround time in returning the complete record to the High Court.

[5] Upon perusal of the complete record that was belatedly submitted, we were deeply concerned with the conviction of the accused on counts 8 to 10. These counts did not trigger the supervisory powers of this court as contemplated in section 85 of the CJA. To this end, we issued a memorandum setting out the difficulties inherent in the proceedings in relation to counts 8 to 10 and forwarded it to the Director of Public Prosecutions (DPP), Western Cape, as well as the Provincial Executive of Legal Aid South Africa (LASA), Western Cape extending an invitation to them to present arguments in respect of the mentioned counts (8 to 10). Copies of the record were subsequently made available to the DPP and LASA for their consideration

[6] Subsequent thereto, written submissions were received from the DPP and LASA in late August 2024. We are indebted to them for their written submissions which were of great help to this court. Consequently, a date for oral argument was set for 6 December 2024 and both parties confirmed their availability. At the hearing on 6 December 2024, the submissions of Mr Calitz, the accused's Counsel, centred around the material contradictions in the State's case which impeached the credibility of the complainant. Mr Calitz contended that these contradictions relate to various aspects of the complainant's evidence which differed with her written statement and the evidence of other witnesses.

[7] In addition, Counsel contended that the eyewitness, Zanele, who was present with the complainant at the time when the alleged offenses occurred, was available in court throughout the proceedings. According to Counsel, Zanele had the potential

to provide significant corroboration for the complainant's testimony; however, the state did not call her as a witness. The prosecutor had indicated on the record that she consulted with Zanele but ultimately opted not to call her as a witness. Counsel asserted that a negative inference should be drawn against the state for its failure to call this eyewitness to testify.

[8] On sentence, Mr Calitz contended that the complainant in count 8 was already 16 years old at the time she claimed to have been raped, and thus, the minimum sentence did not apply. However, considering the finding by the learned Regional Magistrate that the complainant was raped more than once, Counsel submitted that the prescribed minimum sentence applicable in those circumstances would be life imprisonment. Furthermore, there were no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence.

[9] On the other hand, Mr Breyll, the State advocate submitted that the presiding officer during the hearing of the matter was in the best position to make credibility findings. Mr. Breyll conceded that the learned Magistrate erroneously conflated the facts concerning the evidence provided by the accused for counts 1 to 3. In these counts, the accused admitted to slapping the complainant; however, no assault charge was put against him regarding this incident (assault). The Magistrate subsequently convicted the accused on count 8, basing this conviction on the admission made by the accused in relation to the assault incident in counts 1 to 3. Nonetheless, Mr Breyll was unwilling to concede that the conviction on the assault count cannot stand. He submitted that the evidence demonstrated that the complainant was slapped albeit that there are contradictions regarding the number of times she was slapped as well as the exact circumstances under which that incident happened.

[10] The state additionally submitted that the court *a quo* considered the evidence wholistically and used the version of the accused to find corroboration for the version of the complainant. As it will be demonstrated hereunder, these submissions are not borne out by the facts of this case. Notwithstanding, Counsel implored the Court to confirm the conviction of the accused on review.

[11] We pause to state that a careful reading of the judgment on the merits illustrates that sound reasoning underpins the verdict with respect to the findings made on counts 1, 2 and 3. There is a clear distinction between the strengths inherent in respect of the case presented by the State on counts 1 and 3 and the shortcomings in the State case concerning count 2. The Regional Magistrate clearly and succinctly sets out the corroboration found for the evidence of the complainant in the form of the witness who was present during the incident albeit outside the room, as well as the medical report corroborating the complainant on crucial aspects and the concessions the accused made in his evidence.

[12] The proper analysis and evaluation of all evidence presented form a well-reasoned basis for the conviction in respect of counts 1 and 3. No concerns were noted in respect of the conviction on counts 1 and 3, and that portion of the proceedings are found to be in accordance with justice. Similarly, the reasons presented for the sentence imposed in respect of count 1 account for all the factors and circumstances that must be taken into account in considering an appropriate sentence. However, the same cannot be said in respect of the sentence imposed in count 3. In our view, the sentence imposed in respect of count 3 was not consistent with the provisions of the CJA.

[13] We are mindful that a court exercising review or appellate jurisdiction cannot, in the absence of a material misdirection by the trial court approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it as that will be usurping the sentencing discretion of the trial court. (See *S v Malgas* 2001 (2) SA 1222 (SCA) at para 12). However, where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is entitled to consider the question of sentence afresh.

[14] As stated above, in respect of count 3, the court sentenced the accused to 10 years direct imprisonment in accordance with the provisions of section 77 of the CJA. The sentence was antedated in terms of section 77(5) of CJA by 4 years and 18 days, which was the time that the accused spent in prison before the sentence. In our view, this sentence is incompetent in that it offends the provisions of section

77(5) of the CJA as amended. The trial court did not have the statutory power to antedate the sentence in terms of section 77(5) of the CJA.

[15] Perhaps it is apposite to remind ourselves that before section 77(5) of the CJA was amended, the section read as follows:

“(5) A child justice court imposing a sentence of imprisonment must antedate the term of imprisonment by the number of days that the child has spent in prison or child and youth care centre prior to the sentence being imposed.”

[16] This section was amended by section 4 of the Judicial Matters Amendment Act 14 of 2014 which came into effect on 19 May 2014. In terms of the new amendment, instead of antedating the sentence, a court must take into account the period that the child offender spent in prison when imposing a sentence. For completeness, the amended section provides as follows:

“(5) A child justice court imposing a sentence of imprisonment must take into account the number of days that the child has spent in prison or a child and youth care centre prior to the sentence being imposed.”

[17] It is thus abundantly clear that the trial court did not have the statutory competence to antedate the sentence. Section 77(5) no longer empowers a trial court to antedate its own sentence. The correct approach for the trial court in terms of the new amendment would have been to consider a lighter sentence by reason of the period spent by the accused in custody awaiting trial. We emphasise that antedating a sentence of imprisonment is only permissible after a review or appeal court has set aside such a sentence, and another sentence of imprisonment is imposed in its place. It is not permissible to be imposed during trial proceedings. (See *S v Sileni* 2005 (2) SACR 576 (E)). Consequently, the court *a quo* erred in imposing the sentence it did on count 3. It is a misdirection which demands interference from this court.

[18] We are also of the view that a sentence of direct imprisonment which is partly suspended will be appropriate in the circumstances. While we accept that the

accused invaded the dignity and privacy of the complainant, we also appreciate that the accused was a minor when the crime was committed. He was impetuous, immature, and less deserving of harsh punishment. We are also mindful of the guiding principle in section 3(f) of the CJA, which states that a child offender must not be treated more severely than an adult would have been treated in the same circumstances. On review, we are of the view that a sentence of ten (10) years imprisonment, four (4) years of which is suspended for five years on condition that the accused is not convicted of rape, or attempted rape, which is committed during the period of suspension, would be appropriate in the circumstances.

[19] As previously stated, a careful reading of the trial court's judgment on the merits illustrates that with respect to the findings made on counts 1, 2 and 3, sound reasoning underpins the verdict. However, the picture in respect of the findings, which underpin the conviction in respect of Count 8 – 10, is a horse of a different colour and was a significant part of the reason for returning the record to afford the Regional Magistrate an opportunity to comment. As indicated above, the comments were received and clearly set out the daily difficulties experienced in our courts due to systemic failures fuelled by loadshedding and defective court recording equipment.

[20] In respect of counts 8 to 10, the State, in presenting their case, called two witnesses. The State also presented the affidavit deposed to by the complainant, which the court marked exhibit A, and the J88 medical report compiled by Dr Bongwalanga, which was received into evidence by the Court as Exhibit H. For the sake of completeness, we deem it proper to briefly set out the evidence that was presented before the trial court in respect of these counts.

Evidence of the complainant – Counts 8 to 10

[21] The complainant in these counts was 16 years old at the time of the alleged incident. On the afternoon of 5 August 2017, she was in the company of her friend, Latoya Morris, on their way to buy food when they encountered the accused, who was in the company of friends. The complainant indicated that she knew the accused only in passing and that she was propositioned by him on one occasion prior to the

incident. On the afternoon in question, the accused pulled her by the arm and used unsavoury language towards her. The accused told Ms Latoya Morris to go as he was going with the complainant. Latoya left as she feared the accused.

[22] She testified that the accused pulled her and slapped her once. She cried. On the way, they met an unknown guy that the accused spoke to. The complainant could not run away because the accused was 2 to 3 meters away from her when he spoke to the unknown guy. When the accused went around the corner, the complainant asked this guy to delay the accused so she could get a chance to get away, but the guy refused out of fear for the accused. The accused came back, and they walked to his house.

[23] When they got to the house, she did not see any dogs, and the accused put her inside the house. She was unsure whether a dog was inside the house or just on the chains. When the accused left her alone, the complainant went outside but returned to the house upon seeing the dogs. When the accused returned, the complainant cried, wanting to go home and then asked to use the toilet. The accused told her to come out of the toilet naked and slapped her when she did not comply.

[24] The accused threw her on top of the bed and undressed her by pulling down her panties and lifting her dress. She cried, begging him not to do it. The accused opened her legs, took out his penis and inserted it into her vagina, with the complainant crying, telling him to stop. The accused told her to stop crying for fear of what his big brother would say if he found her crying. The complainant was crying because it was late, and she wanted to go home. The accused refused to let her go.

[25] The accused and the complainant later went to the accused's brother's room, which is situated outside on the side of the main house where they found the complainant's friend Zanele and the accused's brother. Zanele asked the complainant why she was crying, and the complainant told her. The accused's brother also asked why she was crying, and the complainant told him that she wanted to go home, and that the accused slept with her by force. The accused's brother said she must not cry, as it shows that the accused loved her. The accused and his brother left for the tavern to buy alcohol, leaving her and Zanele behind in

the room of the accused's brother. They could not leave as the dogs were unchained outside, and another dog with puppies was inside the room. The accused and his brother returned after twenty minutes, and the accused forced her to consume alcohol against her will which she refused.

[26] The complainant asserted that she again begged the accused to let her go home because she was going to get a hiding at home, but to no avail. The accused told her to stop crying and took her back from his brother's room into the house. She assured the accused that she would not tell anybody what happened, and the accused did not heed to her request. The accused's mother arrived, and she (the accused's mother) wanted her to go, but the accused refused. They remained there until the next morning as the accused did not want to let her go home. The accused informed her she would go home during the day. The accused had sex with the complainant again, and she told him it was painful. Later that afternoon, around 14h00, the accused accompanied the complainant and Zanele home.

[27] On the way home, the complainant told Zanele that she was experiencing difficulty walking, and it was painful. Zanele told her that she would heal. On the way, they met Baso, who asked where the complainant was as she had been looking for the complainant for a long time. Zanele told Baso that they were coming from her house. Baso wanted to know why the complainant's face was swollen, and the complainant broke down and reported what had happened. Both Baso and the complainant cried, and Baso asked what the complainant would do when she got home, to which the complainant replied that she would tell the truth. They sought assistance from the Metro police, who took the complainant to the Khayelitsha Day Hospital, where she was examined.

The evidence of Latoya Morris

[28] This witness testified that she was with the complainant on the way to buy vetkoek when they encountered a man named Asiphe who told them their friend Zanele was looking for them. They left, and when they arrived at the place that was indicated, Zanele was not there, but instead, they found the accused and his friends busy smoking. The accused, who appeared to be under the influence of alcohol,

called the complainant. The accused and complainant were conversing off the side, and it was difficult for this witness to hear what was being said. However, she saw that the accused slapped the complainant 3 or 4 times, and then people intervened. The accused and the complainant then resumed normal conversation, after which the two walked towards the accused's home.

[29] The witness followed them initially because she wanted the complainant to hurry up so they could get the vetkoek. The accused told Morris not to interfere in matters between two people, and when the complainant said nothing, she stopped following them. The accused and complainant disappeared from her view, and she asked some children who were playing on the sidewalk, who told her that they saw the accused walking with the complainant, assaulting her. This piece of evidence constituted hearsay evidence, which the court *a quo* allowed and referred to in the summary of facts in its judgment, notwithstanding that no substantive application was made for its admission. We will deal with this aspect later in this judgment.

[30] Ms Morris left and went to inform Baso that the complainant had left with the accused. She saw the complainant again the following day around 17h00 in Baso's company. The complainant was wearing the same clothes she had on the previous day, and she noticed her eyes were red, and it appeared that she had been crying. When she made enquiries, the complainant did not want to disclose what had happened initially, but after she went inside to allow the complainant to compose herself, upon her return, the complainant was crying and reported that the accused had raped her. When Morris asked how she was walking, the complainant indicated she could not close her legs. The complainant fully disclosed what had happened to Ms Morris in the following way:

[31] In her retelling of the events, the complainant indicated to Ms Morris that she saw the dogs upon entering the accused's premises and that they were vicious dogs. She went in with the accused because you cannot enter on your own; you have to go in with someone. In addition, the accused threatened to set the dogs on her if she did not go in with him. The complainant explained to her further that when she got there, she saw Zanele, who was also there. Zanele said she was there to report to the accused's brother that the accused had choked her.

[32] The sequence of events relayed by Ms Morris as to what the complainant told her happened is completely different to the version narrated to the court by the complainant herself. Ms Morris also indicated that the complainant told her she asked Zanele to go to the toilet with her, but the accused offered to go with her, and while she was in the main house toilet, the accused locked the door in the front. The accused then told the complainant that they must go to the room and that the accused had a knife with him, which he placed on the table. The accused told the complainant that they must do the deed; otherwise, he would kill her. The complainant was crying and pleading while the accused undressed her by force and then did what he did to her.

[33] Ms Morris also disclosed to the court that at one stage, the accused had given the complainant a cell phone, which the complainant had for some time, which again was information that the complainant chose not to disclose to the court. As already indicated in her evidence, Ms Morris suggests that partly because the complainant said nothing when the accused told her not to interfere in the affairs of two people, she decided to stop following them and not because the accused told her to go as the complainant had indicated.

The medical evidence

[34] Dr Belinga Patrick Bongwalanga examined the complainant in counts 8 to 10 on 6 August 2017 at 21h00. His clinical findings were noted in 3 categories, namely general, gynaecological and anal examination. In relation to all these categories, the physician found nothing of note. In the general examination, no injuries were noted, and no clinical evidence of alcohol or drugs was noted at the time of examination.

[35] Similarly, with the gynaecological examination, the parts of the body examined were found to be normal, with no abnormalities or injuries noted. The anal examination also did not show any evidence of abnormalities or injury. The conclusion reached by the doctor was that the: "Patient story, physical examination and findings are not consistent with assault. The patient story, gynaecological examination and findings are not consistent with forced vaginal penetration, but this

doesn't exclude rape...", and in relation to the "anal examination, normal anal examination and findings not consistent with forced anal penetration." That was, in short, the evidence of the State.

[36] The accused also testified in respect of all the counts levelled against him. However, as far as counts 8 to 10 are concerned, the accused explained to the court how he met the complainant in these counts. He explained that he had known the complainant since 2017, when he was released from jail. He met the complainant through Zanele, with whom he smoked dagga. He met the complainant two months before the alleged incident.

[37] The accused's evidence was that two days after he was released from prison, he went to meet his friend Qozo. It was around 13h00, just after school. As Qozo was exiting the school gate, two girls were with him. He knew one of the girls as Zanele and did not know the other. He then walked with Qozo, and on the way, he called Zanele and asked her about the lady she was with and who she was. In response, Zanele asked the accused if he was interested in her, and he answered in the affirmative. Zanele told the accused not to worry and promised to come with the said lady when she later came to buy dagga during that day. Later, around 15h00, Zanele came back with the complainant, as well as Latoya.

[38] The accused stated that on the day of the alleged incident, it was a Saturday, and he visited a friend that he smoked dagga with. Upon arrival at his friend's place, there was a group of boys, and amongst them were Latoya and Zanele. The complainant's premises was just opposite where the boys were standing. He asked his friend to call the complainant. It was not for the first time that he asked his friend to call the complainant on his behalf. Five minutes later, his friend came with the complainant. They then walked together. As they were walking, Latoya came from behind and saw that the accused was now lighting dagga to smoke. Latoya asked for a *skyf*.

[39] The accused told Latoya that she does not have to include herself on two people's *zol*. In response, Latoya said I am your friend referring to the complainant. The complainant looked back at Latoya and continued walking with the accused. On

the way, they met Avito. On the road, they also passed Mr Masilakhe, a police official who was concerned that the accused was out of prison within two months of incarceration. The accused thereafter continued to his house with the complainant. He got home and found his elder brother with Zanele inside the house. They had half of the Viceroy. He did not say anything and continued to drink and smoked dagga. The complainant did not drink.

[40] Later, around six, the accused and the complainant went to a tavern to buy liquor. On the way, they took pictures of him and the complainant. He still has these pictures. They both went into the tavern and later went to the Somalian shop, where they bought Sprite for his elder brother. They then walked to the house. He then went to the flat and continued to drink with his brother and Zanele. Later, he heard the gate opening, and he peeped through the window and saw his mother leaving the premises. He went into the main house with the complainant.

[41] His testimony was that he was drunk, and he could not do anything or move and ended up sleeping. He woke up the following day at 08h00 in the morning. That morning, when he woke up, he started to have sex with the complainant with her consent. This was the first time he had sex with her. He was not aware that she was 16 years old at the time. When he was accompanying her back home, he learned that the complainant was the cousin of the guys he had bad blood with. They are his competitors in the selling of drugs. Customers no longer bought from these people but were now buying from him.

[42] According to him, these must be the reasons the complainant reported a false charge against him. He testified that one of the complainant's cousins at one point shot him on his left foot. As a result of the shooting, he went to the hospital, and when he came back, in revenge, he stabbed the complainant's cousin 17 holes until the said cousin became unconscious. This altercation was all about the selling of drugs. He testified that he had sexual intercourse with the complainant with her consent. He refuted the allegations that he raped the complainant as alleged or at all.

The Relevant Legal Principles and Discussion

[43] It is well established in our law that the duty to prove an accused's guilt rests fairly and squarely on the shoulders of the State. The accused need not assist the State in any way in discharging this onus. (*S v Mathebula* 1997 (1) SACR 10 (W)). In assessing whether the State has discharged the onus of proving its case against the accused beyond a reasonable doubt, the court must consider all the evidence in concluding whether to convict or acquit an accused. In other words, a court's conclusion must account for all the evidence presented before it. (*S v Van der Meyden* 1999 (1) SACR 447 (WLD) at 449h).

[44] The correct approach to the evaluation of evidence in a criminal trial was enunciated by the Supreme Court of Appeal as follows in *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15, where the court stated:

'The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: *S v Van Aswegen* 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence... .'

[45] This salutary approach was quoted with approval in *S v Trainor* 2003 (1) SACR 35 (SCA) para 9, where the court emphasised that a conspectus of all the evidence is required. The court noted that reliable evidence should be weighed alongside such evidence that may be found to be false. Independently verifiable

evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must be evaluated, as must corroborative evidence, if any.

[46] In the present matter, we emphasise that the failure or unwillingness to call the witness Zanele who was present at the house when the alleged incident took place, means that in respect of the charge of rape, the complainant is a single witness with the attendant cautionary rule governing the evaluation of her evidence on those aspects.

[47] Section 208 of the CPA provides that an accused person may be convicted of any offence on the single evidence of any competent witness. It is well established in our law that the testimony of a single witness should be clear and satisfactory in all material aspects. In *S v Rugnanan* [2020] ZASCA 166 (unreported, SCA case no 259/18) (10 December 2020) at para 23, the Supreme Court of Appeal held that the cautionary rule does not require that the evidence of a single witness must be free of all conceivable criticism'; the 'requirement is merely that it should be substantially satisfactory in relation to material aspects or be corroborated'.

[48] We have noted in the present matter that counts 4 to 7 and counts 8 to 10 involve allegations of the taking of a young woman from the streets under duress to the home of the accused. Both involve allegations of the young lady being held against her will and then allegedly raped by the accused inside the house and/or his room. In both incidents, both complainants are single witnesses in relation to the events that transpired at the accused's home. Witnesses who were with the complainants and who could have provided valuable assistance to the court in deciding the matter were not called, and, in both instances, the medical report was not particularly of help in deciding the matter.

[49] Notwithstanding, it must be stated that in respect of counts 8 to 10, an additional witness was called. However, the witness, Zanele, who was also at the house of the accused in the company of the accused and the complainant at the time the alleged incident occurred, was not called despite her being available and present at court. On 20 February 2020, Zanele was available in court, and the prosecutor

informed the court after the complainant's testimony that Zanele was the only witness the State intended to call on these counts to corroborate the complainant's evidence. The matter was subsequently postponed for the evidence of this witness. On 18 March 2020, notwithstanding that, the prosecutor had on more than once, indicated on record that she wanted to call Zanele as a witness, informed the court that she consulted with Zanele and Ms Morris and was no longer going to call Zanele as a witness. Still, instead, she would only call Ms Morris.

[50] Another witness, Baso, mentioned by the complainant, who allegedly saw the swelling on the complainant's face, was not called to testify to corroborate the complainant's evidence. No reasons were given for not calling this witness. As will be discussed later in this judgment, the witness, Ms Morris, who was called to corroborate the complainant on counts 8 to 10, presented challenges as her evidence was inconsistent with that of the complainant. Instead of corroborating each other, their evidence contradicted one another on several material aspects.

[51] In dismissing the complaint in counts 4 to 7, the trial court placed reliance on the following aspects: The complainant did not scream even though she knew her friend was inside the tavern. The court found that the complainant in these counts alleged that she was pulled by the braids, smacked, and dragged, but this is not corroborated by the lack of injuries found in the medical report. Furthermore, the court found that there is no indication that the complainant informed the doctor that she had been assaulted, pulled, and dragged. If this really happened, the court found, why did the complainant not inform the doctor about it? The trial concluded that if the complainant had surely informed the doctor about this, the doctor would have noted it in the J88.

[52] The trial court, quite correctly so, questioned several inconsistencies in the complainant's evidence. In addition, the court *a quo* was concerned with the inability of the complainant (in counts 4 to 7) to satisfactorily explain the inconsistencies and discrepancies in her evidence as well as the contradiction in her evidence in court as compared to the evidence she gave under cross-examination and what is contained in her statement. The trial court lamented the fact that there are no injuries to support or corroborate the evidence of the complainant that she was raped by the accused

for two hours and thereafter raped again. The court found that in those circumstances, 'surely one would have expected to see injuries on her.'

[53] In this regard, it must be noted that the absence of injuries should not be overemphasised unless the circumstances justify an adverse inference. For these reasons and because the accused denied the allegations, the trial court, in our view, was correct in finding that it was unable to determine who was telling the truth between the complainant in counts 4 to 7 and the accused.

[54] We have indicated hereinabove that the circumstances and evidence underpinning the case for the State in counts 8 to 10 are eerily similar to that found in respect of counts 4 to 7. The only difference between these two incidents is that regarding counts 8 to 10, the State called an additional witness in the guise of Ms Latoya Morris. However, when the evidence of the complainant and this witness is evaluated, it is up for debate as to whether the evidence of this witness aided the trial court in making a finding or whether it muddled the waters even further. There are material differences between the evidence of the complainant and Ms Morris on material aspects of the matter, which leaves one with doubt whether the accused committed the offence he was charged with as alleged or not.

[55] We observed that immediately prior to the cross-examination of the complainant, the prosecutor asked her some questions, which led to some concerns about the answers she provided. For example, when she testified, she initially indicated that she was slapped in the road and again when she came out of the bathroom still fully clothed. When the prosecutor asked her how many times the accused slapped her, she responded, "Once on the road as we were walking." In a follow-up question, she was asked whether there were people around at that time, and her response was no.

[56] However, the evidence of Latoya Morris paints a different picture to that of the complainant. Ms Morris mentioned people intervening at the stage when the accused slapped the complainant 3 or 4 times. The prosecutor later prompted the complainant about the slap after she came out of the bathroom, and the complainant confirmed the slap. Further questioning by the prosecutor also muddled the waters

relating to whether the complainant was aware of and saw the dogs when they entered the house. Initially, the complainant indicated that she only became aware of the dogs when she tried to go out after the accused left and then she immediately returned inside. Later, when the prosecutor asked her how she knew it was the accused's house, she indicated that when she saw him unchain the dogs when they got there, she realized it was his home.

[57] Furthermore, the cross-examination of the complainant led to contradictions relating to her alcohol consumption on the night in question. Several omissions from her evidence, which formed part of her affidavit, were also put to her. She confirmed that she did depose to the affidavit and gave the relevant information to the police but did not explain why this information was not included in her viva voce evidence in court. These are important aspects as it relates to threats that the accused would kill the complainant if she did not have sex with him, and that his brother, together with the mother, attempted to stop the accused when he raped her. These aspects, which constitute new information, also do not fit with the sequence of events the complainant described in her evidence in chief.

[58] The evidence of the complainant makes it seem as if running into the accused was a chance encounter as they were going in search of vetkoek, however, the evidence of Ms Morris in this regard is that they were told that their friend Zanele was looking for them and they went to the creche in search of her but found the accused instead. The other difference between the complainant and Ms Morris' evidence is the extent of the relationship of the complainant and the accused. The complainant was adamant that they only knew each other in passing and she quickly corrected the prosecutor that the accused professing his love for her only happened once.

[59] Ms Morris paints an entirely different picture, which points to the accused and complainant being in the same company on a few occasions and ends with the accused giving the complainant a cell phone, which, according to Ms Morris, the complainant held onto for some time. From Ms Morris's evidence, it is abundantly clear that the complainant was not open, candid, and truthful to the court. She hid

the information that she knew the accused before she met him on the date alleged by the State in the charge sheet.

[60] The prosecutor asked Ms Morris whether the complainant left with the accused of her own volition or under duress, to which the witness could not provide an answer either way. This is certainly not the scenario painted by the complainant, as she indicated she was pulled and assaulted to get her to go with the accused. As previously stated, Ms Morris's evidence also contradicted how well the complainant knew the accused. This witness indicated that there were occasions prior to the alleged incident where they were in the same company of the accused and that she saw something developing between the complainant and the accused, or in her words, "there was something they were trying."

[61] Regarding the information that the complainant omitted from her viva voce evidence, which was contained in her affidavit, we are mindful that the witness statement is not intended to be a precursor to that witness' evidence in court. We are also cognisant of the fact that a witness is free to include in her statement whatever the witness deems to be relevant and important, and there are no laws governing this, namely what to say and what not to say in such a statement. We are also recognisant that a witness is not expected to relate in his statement what he saw in infinite detail. Should a witness, through a lapse of memory or any other valid reason, omit some detail which later could become important, he should not be branded as untruthful.

[62] Most importantly, in *S v Govender and Others* 2006 (1) SACR 322 (E) at 326C, the court held that the mere fact that a witness deviates in a material respect from what he said in his statement does not necessarily render all his evidence defective. In the final analysis, the court will consider the evidence in its entirety to determine in what respects the witness' evidence may be accepted and in what respects it should be rejected. (See also *S v Mafaladiso en Andere* 2003 (1) SACR 583 at 593e - 594h).

[63] In the present matter, the complainant could not give a plausible explanation for the differences. The inconsistencies between the statement and her evidence in

court are highly irreconcilable. Crucially, it must be remembered that the details the complainant omitted are that she was threatened with death and of people coming to her aid, which is something unlikely to have been omitted during her evidence in chief. At the same time, she gave a detailed account of the events in question. These averments are central to the charge that is levelled against the accused. We are of the firm view that from the holistic analysis of the evidence, if indeed, the complainant was threatened with death to walk with the accused to his house and that the accused's mother aided or attempted to assist her from the clutches of the accused, she would have included this in her statement and disclosed during her evidence in chief.

[64] Concernedly, a careful perusal of the record reveals that there were several witnesses who were available at court and ostensibly competent to testify, who were not called. In this regard, the witness Zanele and Baso referred to earlier come to mind. The medical report makes it clear that the report given to the doctor and his findings were incompatible with the complainant's evidence.

[65] In light of the trial court's concern about the absence of injuries noted in counts 4 to 7 and its misgivings on why the complainant did not tell the doctor about her ordeal, one wonders why the swollen face of the complainant in counts 8 to 10 observed by Baso that same afternoon and her difficulty to walking were not observed or was not pointed out to the doctor who examined the complainant that evening immediately after the alleged assault. As the court *a quo* found in respect of counts 4 to 7, if it had been pointed out or noticed by the doctor who examined the complainant, surely, the doctor would not have noted a finding of no injuries in respect of, at the very least, the general examination. In our view, the doctor would have also observed and noted the swelling on the complainant's face and the difficulty the complainant had in walking.

[66] The evidence of Ms Morris called by the State could, at best, provide corroboration on peripheral aspects such as what transpired when they encountered the accused. As the summary of their evidence lays bare, there are material differences in the evidence of these two witnesses relating to what led to the

encounter. These differences, viewed from a holistic analysis of evidence, impeach the complainant's credibility.

[67] We regrettably observed that the trial court made findings on these counts that were unsupported by the evidence presented. In its judgment, the court *a quo* did not discuss or even acknowledge that there are differences between the evidence of the complainant and Ms Morris. The trial court indicated that the witness, Ms Morris, confirmed that she saw the accused slapping the complainant and then, in error, indicated that the accused admitted that he slapped the complainant. The Regional Magistrate indicated that 'based on the accused's own admission, a conviction on assault common would be justified. This finding was made in circumstances where no such admission was made by the accused and where the evidence of the complainant relating to injuries she suffered is not born out by the available evidence.

[68] The trial court confused the evidence in relation to counts 1 to 3 vis-à-vis the evidence in counts 8 to 10. The accused admitted having slapped the complainant in counts 1 to 3, but he steadfastly denied the allegations as contained in counts 8 to 10. He denied that he assaulted the complainant as alleged or at all. He averred that the complainant went with him to his house willingly, and he had sex with the complainant with her consent. We are of the view that the trial court erred in this regard.

[69] The concerns regarding the deficiencies and defects, as well as the gaps in the evidence, which created cause for pause with the Regional Magistrate in respect of counts 4 to 7, are visibly present in respect of counts 8 to 10.

[70] Lastly, the record reflects that on a number of occasions and without substantive applications for its inclusion, hearsay evidence was allowed to form part of the record and repeated by the trial court in its summary of the evidence without properly dealing with it on the basis of the provisions of section 3(1) (a), (b) or (c) of the Law of Evidence Amendment Act 45 of 1988. The evidence was never dealt with by the Regional Magistrate in the sense of whether it was included in the evidence she considered. This evidence relates to hearsay of the accused assaulting the

complainant and choking the witness Zanele, which is extremely prejudicial to the accused. The evidence is referred to in the judgment of the trial court.

[71] Still, no indication was given whether it was excluded on the basis of its hearsay nature or if it was considered part of the evidence presented and, if so, to what extent. In our view, the court erred in accepting hearsay evidence without following the injunction set out in section 3 of the Law of Evidence Amendment Act.

[72] On a conspectus of all the facts presented, we are of the view that the convictions on count 8, 9, and 10 are not supported by the evidence and, thus, not in accordance with justice. In our view, the presiding magistrate committed a material misdirection that demands interference from this court.

Order

[73] In the result, the following order is granted.

73.1 The conviction and sentence proceedings in respect of count 1 are held to be in accordance with justice and are confirmed. The sentence in count 1 will run concurrently with the sentence imposed in count 3.

73.2 The conviction on count 3 is confirmed and the resultant sentence is reviewed and set aside and replaced with the following sentence: The accused is sentenced to 10 (ten) years imprisonment, four (4) years of which is suspended for five years on condition that the accused is not convicted of rape or attempted rape committed during the period of suspension. In terms of section 282 of the Criminal Procedure Act 51 of 1977, this sentence is antedated to 08 September 2021.

73.3 The proceedings in respect of counts 8 to 10 are held not to be in accordance with justice. Consequently, the conviction and the resultant sentences on counts 8, 9 and 10 are hereby set aside.

LEKHULENI JD
JUDGE OF THE HIGH COURT

ADAMS MF
ACTING JUDGE OF THE HIGH COURT