

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Appeal Case no: AR51/2024

In the matter between:

S[...] E[...] M[...]	APPELLANT
and	
THE STATE	RESPONDENT

JUDGMENT

Olsen J (Mossop J concurring)

[1] Mr S E M[...] was charged with the rape of his granddaughter (the "complainant"). He was tried in the Regional Court at Ulundi, convicted and sentenced to life imprisonment. He appeals against both his conviction and sentence.

[2] The complainant was born on 31st October 2009. The rape is alleged to have taken place during 2016. Although the charge sheet refers to the complainant as having been eight years of age at the time, she was six years of age for most of 2016. The complainant first reported the incident in March 2019 when she was nine years of

age and gave evidence in this trial during April 2021 at the age of 11. (This was a trial which was subjected to far too many delays. The evidence was heard in 2021, 2022 and 2023. The appellant was convicted and sentenced in November 2023.)

[3] Until her report of the rape, the complainant lived in the family home of her maternal grandparents, the appellant, and Mrs Z F M[...], who was also a State witness. Of course, the report of the rape put an end to this arrangement. (The complainant's mother lived and worked in Johannesburg.)

[4] Both the appellant and his wife were teachers. They were apparently comfortably off, and their house had four bedrooms. According to the complainant in 2016 three of her uncles (that is to say the sons of the appellant and his wife) also lived in the house. One of them slept in a bedroom with his one year old child and two of them slept together in another bedroom. The complainant slept in the room which would be used by her mother when she was visiting from Johannesburg.

[5] From the outset of the appeal proceedings counsel for the State correctly described this as a difficult case. It requires a more comprehensive account of the evidence, and of certain features of the trial, than would ordinarily be considered appropriate or necessary in an appeal judgment.

[6] The complainant's description of the events which gave rise to the charge went as follows. Her grandmother worked at a school at which she sometimes had to perform night duty. She would be away from home for the night. On one such night in 2016 she found herself scared to sleep on her own and she went to sleep with her

grandfather. He pulled her closer and covered her with his blanket. At some stage he touched her private parts and removed her pyjamas and panties and put his penis into her vagina. "Then he kept on moving and after that touched my buttocks. After that, in the morning he woke me up and told me I should go to school, as if he did not do anything".

[7] Her evidence then traversed the events which gave rise to a first report of the incident in 2019. After that, and when the prosecutor asked the complainant to go back to 2016 in order to seek clarity on some issues, the complainant volunteered that "it happened again a second time. On this occasion he did the same thing as he had done on the first occasion." Her description of the second incident, given when pressed by the prosecutor, was the same course of events that she had already described when dealing with the first incident. It is clear that her evidence to the effect that the incident was repeated came as a surprise to the prosecutor. The charge sheet reflected only one count of rape. It must be noted, however, that the complainant's grandmother, who gave evidence, said that the complainant had reported two incidents to her.

[8] The complainant was asked by the attorney representing the appellant why it was that she returned to her grandfather's bed on the second occasion, given what had happened before. The complainant explained why she was afraid. She thought that ghosts exist, and that they would come and take her away. She thought that there was something walking on the roof and she thought that perhaps they were ghosts which had come to take her. She had told one of her uncles before, that she had heard things walking on the roof and he had explained that it was just cockroaches. But she

was convinced it was ghosts. She also had bad dreams. She dreamt of herself dying or being knocked down by a vehicle. These dreams occurred regularly. She was asked whether, given that her grandfather denied that these events had taken place, she could perhaps have been dreaming that they had taken place. Her response was that the accounts she had given were not dreamt, but reality.

[9] According to the complainant she had a good relationship with her mother and her grandmother. Indeed, prior to these events to which she spoke she had been told by her mother that if anyone touched her inappropriately she must report it to her mother. The complainant made no report and explained that she was afraid that if she did so no one would believe her. She made no report to her best friend, she said, because the story would be spread throughout the school.

[10] Finally, with regard to the incidents, the complainant's evidence was that she suffered pain when urinating afterwards. However she saw no blood, nor any other liquids connected to the incidents.

[11] I turn now to the events of 2019. But first a little background. The Princess Phumzile Primary School, Ulundi, opened in 2018. The complainant was a grade 3 pupil at the school when it opened. Her class teacher was a Ms Mtshali who was a defence witness. In 2019 the complainant's class teacher in grade 4 was a Ms Ntshangase. Ms Mtshali did not teach grade 4 students as she was what she called a "foundation teacher" qualified to teach from grade R to grade 3. The appellant also took a post at the Princess Phumzile School. As they lived in the same household the appellant took the complainant to school every day. Ms Mtshali was, of course, aware

of the relationship between the two. When asked to comment on it she said that the appellant and the complainant enjoyed a good relationship. She gave as an example how sometimes at break time the child would announce that she was going to find her grandfather to get money to buy food.

[12] The complainant was nine years of age in 2019. She gave the following account of the relevant events.

- (a) One day her teacher asked the pupils in her class to draw pictures of their families. The complainant drew a picture which depicted her grandfather "eating my grandmother's hot dogs". (No questions were asked of the complainant to obtain a clearer understanding of what it is she had drawn.)
- (b) When the other children saw the picture the complainant had drawn they reported to the teacher that the complainant was disrespecting her grandfather. Why that picture might have generated that response from the pupils was never explored in evidence.
- (c) The complainant's teacher then asked her why she was teasing or disrespecting her grandfather. According to the complainant her answer was that her grandfather had sexually assaulted her.
- (d) According to the complainant "her" teacher that she was speaking about, and to whom she gave this account of events, was Ms Mtshali. According to her Ms Mtshali then said that she would call the social workers the next day.
- (e) The social workers were there the next day. They appear to have played a game, setting up three robots of the three customary colours in a room, and asked the children to line up upon the basis that those who felt they had

been abused should line up behind the red robot. When that was done the other students were dismissed back to class and the social workers then dealt with the ten or so pupils who had lined up behind the red robot. One of the social workers was a Mr Mkhize, who assisted the complainant. According to the complainant she told Mr Mkhize everything.

(f) Her grandmother was called to the school and when she arrived the complainant also told her everything.

(g) The next day her grandmother took her to be medically examined. According to the complainant the doctor asked her nothing but simply examined her. She said that the doctor had asked her grandmother all the questions. But the complainant must have been relying on a report from her grandmother to that effect because she, the complainant, was not present when this happened.

[13] The state called only two witnesses besides the complainant: Mrs M[...], the complainant's grandmother, and a Dr Mathenjwa who examined the complainant.

[14] On the day that the social welfare officers performed their duties at the Princess Phumzile School, Mr Mkhize went to the school at which Mrs M[...] worked and advised her of what the complainant had said. Mrs M[...]’s evidence is that she could not believe it and did not believe it when she arrived at the school that day and spoke to the people there. She said she only believed what she had been told when she spoke to the complainant herself.

[15] Mrs M[...] says that the complainant told her that the appellant had sexually violated her in 2016 on two occasions. The complainant told her how it had happened. She said she was having bad dreams and decided to go and sleep in the bedroom with her grandfather. Her grandfather instructed her to undress herself and take off her pyjamas. Upon the assumption that Mrs M[...]’s evidence to this effect is true, it contradicts the complainant’s evidence that it was her grandfather who undressed her. The complainant then told her that her grandfather got on top of her and sexually violated her. This also contradicted the complainant’s evidence which was to the effect that she was lying on her side during these incidents.

[16] When Mrs M[...] asked the complainant why she did not report these occurrences to her grandmother the answer given was that the two of them were married and that Mrs M[...] might not believe her. This accords with the complainant’s evidence.

[17] Mrs M[...] was asked whether she enquired of the complainant as to why she was now speaking up about the incidents. She said that she did, and that the complainant’s reply was that they had been asked to draw pictures of their families, and that the teacher’s enquiry was as to why the appellant was not depicted in the drawing. This report to Mrs M[...] also contradicts the complainant’s evidence as according to her the complaint was that the picture depicted the appellant eating her grandmother’s hotdogs.

[18] Mrs M[...] confirmed that she was at the Mkonjeni Hospital when the complainant was examined. The complainant was taken there in a police car and Mrs

M[...] had followed. She was not present in the room when the complainant was examined. She saw the doctor at the hospital, but she did not say that she furnished the doctor any information by way of the history of the complaint. After the examination was done the nurse and not the doctor showed her a sketch or drawing and explained what was depicted on it.

[19] Finally Mrs M[...]’s evidence was that she went to report the matter to the appellant’s parents. She said that she told them what the child had said. The appellant was called to the meeting. According to her he said "such a thing did happen in the year 2016" and, as far as her somewhat confusing account of this meeting is concerned, it does appear that her evidence is that the appellant offered the excuse that he was smoking dagga. She confirmed that her son K[...] M[...] was also present during this meeting at the home of her parents-in-law.

[20] It appears from the record that Mrs M[...] was highly emotional during the time that she gave evidence. The magistrate records that at the end she was sobbing uncontrollably. Her husband, the appellant, had been granted bail and it was of course a condition that he should stay away from what had been the matrimonial home. By the time the trial was underway divorce proceedings had commenced.

[21] The question of the so-called confession is a distraction which should be disposed of immediately. Mr K[...] M[...] was called as a defence witness. His evidence reads as that of an impressive witness. It was his idea that a report should be made to the appellant’s parents. He confirms that his mother gave an account of what had been reported to her by the complainant. His aged grandfather was hard of

hearing and he, Mr M[...], had to repeat what his mother had said, speaking very loudly so that it could be heard by his grandfather. When his father arrived at the meeting his grandfather told him what had been reported to him by his daughter-in-law, the appellant's wife. Mr M[...]'s evidence was that "my father responded by saying that he was not aware of such a case; that it came to him as a shock as well." When challenged on this evidence Mr K[...] M[...] explained that his mother was distraught during the course of this meeting. It is difficult to accept that he would dishonestly contradict his mother's evidence on this issue. He was living with her at the time when he gave evidence. The magistrate did not make a credibility finding against Mr K[...] M[...]. When dealing with this issue in his judgment, the magistrate described the son's version as "neutral". If the magistrate intended thereby to convey that Mr K[...] M[...]s evidence did not actually contradict his mother's version of the meeting, that the appellant admitted the allegations made against him, then the magistrate misdirected himself. Judging from the record of the evidence, I have no hesitation in concluding that Mr K[...] M[...]s evidence on the subject of this meeting with his grandparents is preferable to that of his mother's evidence. His defence of his mother, that she was distraught at the meeting, has the ring of truth. She may very well have been confused as to what transpired during the meeting, and especially as to what was said by her husband, the appellant.

[22] I turn to the medical evidence led by the state. Dr Mathenjwa examined the complainant more or less three years after the alleged incidents took place. He made only two observations upon which the state sought to rely as corroboration of the complainant's version. They were:

(a) the presence of a healed tear or fibrosis on an otherwise intact hymen at 6 o'clock; and

(b) a foul smelling watery discharge.

According to Dr Mathenjwa, in the case of a young child the hymen is closer to the outer structures of the genital organ than it is later on. If there was penetration it was not beyond the hymen, although he was quick to advise the court of what the magistrate clearly knew, that any level of penetration counted as such. In his evidence in chief, he expressed the view that the healed tear (the length of which he neither noted nor mentioned in evidence) was highly suggestive of attempted sexual penetration. He expressed the same view regarding the cause of the watery discharge. This may be contrasted with the conclusions which he recorded on the form J88. The passage reads as follows.

"Hymen configuration with healed tear at 6 o'clock in keeping with previous attempted penetration. Vaginal discharge noted."

Two things can and must be noted about this contemporaneous record of his observations made two years before he was giving evidence. The first is that no conclusion was sought to be drawn from the presence of the vaginal discharge. Secondly, and more importantly, to say that a phenomenon is "in keeping with" (i.e. consistent with) an incident is not at all the same thing as saying that the phenomenon is "highly suggestive" of the incident.

[23] It is trite that the prosecution is expected to prepare and present the evidence in rape cases with the utmost care. This is especially the case when the complainant is a child. I see no reason why the same level of care ought not to be employed by the medical profession. If as a matter of fact it is justified to express the opinion that a

healed tear at 6 o'clock (as opposed to any other healed tear in the hymen) is "highly suggestive" of sexual interference (as opposed to any other blunt intrusion or force) the expert witness must explain and justify the opinion by furnishing the reasons for that conclusion. Wessels JA explained the rule as follows in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Fur Schadlingsbekampfung MBH* 1976 (3) SA 352 (A) at 371F.

"As I see it, an expert's opinion represents his reasoned conclusion based on certain facts or *data*, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert."

[24] Dr Mathenjwa was cross examined at some length by Mr Moala, the attorney who represented the appellant until the close of the State case. He was pressed on the views he expressed in his evidence in chief concerning the significance of the healed tear and the vaginal discharge, and the best that can be said for Dr Mathenjwa's response to the questioning is that it was evasive in the extreme. The court was left quite in the dark concerning the doctor's reasons for expressing an opinion which went materially beyond what he had noted on the form J88. The magistrate ought to have been quite unpersuaded by the proposition that there was any significance at all to be attached to the presence of a vaginal discharge three years after the alleged events. The magistrate ought to have accepted that the best that could be said (from the State's perspective) for the medical evidence was that the healed tear in the hymen (undescribed save for its position at 6 o'clock) could have

been caused by an attempt at penetration by a blunt object during the course of an attempt at penetration. The corroborative value of that evidence is questionable, given the complainant's description of penetration of her vagina accompanied by movements which lasted for perhaps ten minutes on two occasions.

[25] Before leaving the medical evidence I must refer to the fact that on the form J88, under the heading general history, Dr Mathenjwa noted the following.

"The sexual assault happened multiple times".

Dr Mathenjwa cannot recall the source of the historical information he was given. Although not clear, I believe that his evidence is that he would normally get it in a case like this from the guardian. If one accepts Mrs M[...]s evidence that she was told by the complainant that this had happened twice, then that is presumably what she would have told the doctor. The complainant denied that she gave the doctor any history; but if she was mistaken in that, she might also have said to the doctor that it happened twice, although the fact that the prosecution was unaware of this clouds the issue. Nevertheless, it seems improbable Dr Mathenjwa would have used the term "multiple times" if he had been told that there were two incidents.

[26] As the appellant's conviction in the court a *quo* evidences, the magistrate rejected the appellant's evidence as false beyond reasonable doubt. In the main I have no difficulty in supporting the credibility findings made against the appellant by the magistrate, and the general tenor of the magistrate's analysis of the appellant's evidence as unreliable. The obvious example is the appellant's protestation that the complainant never slept in his bed. The evidence of the appellant's son, Mr S[...] M[...], contradicted that assertion. He said it was a common thing for the child to sleep

with the appellant. There is no reason to reject that evidence. The witness's evidence reads well and shows no bias. There is nothing improbable or unnatural about a six year old girl, the only female in the household when her grandmother was away doing night duty, preferring, at least at times, to sleep in the security of her grandfather's room rather than alone in her own room.

[27] It was a central feature of the appellant's evidence that his wife must have put the complainant up to accuse her grandfather of molesting her sexually. It does appear from the record that from perhaps 2018 onwards, if not earlier, the marriage was not what it had been before. The appellant's attempts to suggest a motive for his wife to descend to the depths of manipulating her granddaughter to the point of soliciting a false accusation from the child, were quite unconvincing. He suggested disputes over money matters, and alleged infidelity on the part of Mrs M[...], as motives. There was no evidence, however, that the complainant was thus influenced by her grandmother.

[28] The appellant protested that as a diabetic he was unable to gain an erection and therefore could not have done what he was accused of. However the magistrate was correct in finding on the evidence that this diagnosis was only made in 2018.

[29] In terms of section 35(3)(h) of the Constitution every accused person has a right to a fair trial which includes the right to be presumed innocent. The presumption of innocence is displaced by proof beyond a reasonable doubt of the accused person's guilt. It is uncontentious that in deciding whether the presumption has been displaced all the evidence in the case must be considered. To that extent the full force of the presumption comes into play only at the end of the trial of an accused person.

However, it exists at the outset and endures throughout the trial. In my view it is necessary, when for good reason it is found that an accused person's evidence on certain issues is not credible, for a judicial officer to consider the question as to whether, and to what extent, that circumstance is logically inconsistent with the presumed innocence of the accused person. On the evidence before the trial court, out of the blue one day during 2019, a nine year old bright, intelligent child suddenly disclosed that when she was six years old her grandfather had raped her. He was a man over 50 years of age who had pursued a career teaching children of similar age to his granddaughter. On all the evidence before the court the relationship between the grandfather and the granddaughter was a loving one. They had lived for some years in the same household, perhaps from quite soon after her birth. No one in the household, not even the child's grandmother who ultimately took her part in this trial, noticed anything untoward or unusual in the relationship between the grandfather and the granddaughter at any time. If one assumes the appellant's innocence, what was he to make of his situation? The terribleness of it undermined his very person, his family, and the career in which he seems to have been well valued as a teacher of small children. Nothing had happened between the two of them which could be presented as a reason for her suddenly to turn against him and make the accusations she did. He was in a desperate situation. From an uninvolved objective standpoint it is easy enough to say that the appellant should have adhered to the truth and left it to due process to reveal his innocence. Nevertheless, his situation was such that it is understandable that, notwithstanding his innocence, he might choose to invent a false narrative, claiming sexual incapacity and that the child never ever slept in his bed; and making wild allegations which he could not substantiate to the effect that things had gone so wrong between him and his wife that she might have induced the child to

make a false accusation of sexual molestation. In my view the fact that the appellant resorted to a false narrative is not necessarily inconsistent with his denial of the allegation that he molested his granddaughter. (As to the foregoing see *S v Steynberg* 1983 (3) SA 140 (A) at 146 - 147.)

[30] I do not wish to be misunderstood to be conveying that, without more, the appellant's mendacity should be regarded as a neutral factor. Such a conclusion would involve the cardinal error of assessing the evidence of a single witness otherwise than in the context of all of the evidence. It is a wholistic approach to the evidence in the case which generates an assessment of the impact, one way or the other, of the appellant's mendacity. The point to be made is that the magistrate was duty bound to take care to avoid "the intrusion of any idea that a party should lose his case as a penalty for perjury." (See *Goodrich v Goodrich* 1946 AD 390 at 396.)

[31] The second witness called by the defence was the teacher Ms S Mtshali. It will be recalled that she was the complainant's class teacher in 2018 when the child was in grade 3. She taught all the subjects in grade 3. Her evidence is that Ms Ntshangase was the complainant's class teacher in 2019, although in grade 4 more than one teacher taught the various subjects to the class. Ms Mtshali did not teach grade 4 as, certainly at that time, her work was confined to the foundation stage.

[32] The complainant's evidence as to the participation of Ms Mtshali in the events of 2019, that is to say the setting of the task of drawing the family, the complainant's drawing involving "granny's hotdogs", the allegation of disrespect shown by the complainant to the appellant, the complainant's alleged disclosure of the appellant's

misconduct to Ms Mtshali, and her alleged undertaking to provide assistance the next day by calling a social worker, were all put to Ms Mtshali by counsel for the appellant. Her response was that she was not a party to any of these events. She learnt of the accusations that had been made against the appellant after she had noted that he was absent from school and was informed of them at a meeting with the principal which would normally have been attended by the appellant.

[33] Under cross examination Ms Mtshali was challenged on the issue of a request from the police that she should make a statement. She said that a female police officer had asked her to "write something", and that she had refused to do so for two reasons.

- (a) One was that the police officer had not spoken to the principal.
- (b) The second reason was that, whilst the police officer had told her what was written on the piece of paper (which she recognised as a child's handwriting), she, Ms Mtshali, knew nothing about those things and informed the officer of that fact.

The prosecutor then informed the court that she proposed to make an application to have the investigating officer (who was apparently the officer just mentioned) called, and on that footing should be permitted to cross-examine Ms Mtshali on the contents of the investigating officer's statement concerning her attempt to secure a statement from Ms Mtshali. After argument the magistrate acceded to the request. Notwithstanding that, and the cross examination which ensued, the investigating officer was not called to give evidence in the case. It was put to Ms Mtshali that she had refused to make a statement because she was thereby "helping the child" (something never explained); because she was afraid to get involved in the matter;

and because she was afraid to testify in court. In particular, it was suggested that she was afraid to testify against a colleague. Ms Mtshali was pressed at some length on these matters. The question of the need to defer to the principal aside, Ms Mtshali's evidence was that she could not claim to recall every detail of her conversation with the officer two years earlier. However Ms Mtshali did not deviate from the central features of her recollection and certainly persisted in her denial of the features of the conversation upon which the prosecution relied to discredit her.

[34] The record reveals that Ms Mtshali's evidence summarised above was consistent throughout. She had no difficulty answering the questions put to her and was not evasive in any respect. There was no inherent fault-line in her evidence to support a finding that she should be disbelieved.

[35] The third witness called during the presentation of the appellant's case was Ms Ntshangase. She confirmed the teaching arrangements which Ms Mtshali had spoken to during the course of her evidence. She presented herself as a person who preferred not to interact with co-workers, but simply to involve herself in her work with the children. She claimed never to attend the staff room. She somewhat improbably claimed not to have realised that accusations had been made against the appellant by his granddaughter. She had no difficulty remembering the complainant and described her as a brilliant child. She said that the complainant simply disappeared from her class at some stage earlier than the June examinations of 2019 and did not turn up for those examinations.

[36] Ms Ntshangase claimed to have a vague recollection of the children being called to a hall in 2019, but no other recollection of what had happened. In the class

register she simply registered the complainant as absent day after day, until the child eventually did not sit for the June examinations. Most of the cross examination of Ms Ntshangase, indeed almost all of it, reflected the prosecutor's disbelief at the proposition that the witness's memory could be so appalling. I have sympathy for that view, but the truth of the matter is that Ms Ntshangase's evidence takes neither the State nor the defence case any further.

[37] The magistrate decided to call a witness himself in the midst of the appellant's case, before the appellant's two sons gave evidence. I have already dealt with what I perceive to be the material elements of their evidence. The witness in question was Mr Mkhize, the social worker who collected Mrs M[...] from her place of work and brought her back to the Princess Phumzile Primary School on the day on which her granddaughter made the accusations against the appellant. It is clear from at least some of the questions put by the magistrate to Mr Mkhize that the magistrate hoped thereby to clarify, or gain more insight into, the dispute between the complainant and Ms Mtshali over the latter's alleged involvement in the disclosures made on that day.

[38] Mr Mkhize's evidence was that on the day in question his supervisor advised him that an awareness campaign was to be conducted at the Princess Phumzile Primary School and that Mr Mkhize should attend it. When he arrived at the school he went to the principal's office where some people were already congregated. The people involved in the awareness campaign on the day in question were employees of the Department of Education as well as Childline, and of course Mr Mkhize. The principal disclosed to Mr Mkhize that there was a complication with regard to the conduct of the awareness programme because a report of abuse had already been

made, and it involved a member of the school's staff. It was decided to conduct the programme, which involved, *inter alia*, an address to the assembled pupils, and then what from the children's perspective would have been the game involving robots. Childline made their presentation after which that game was commenced, and Mr Mkhize confirmed that the complainant was part of the group behind the red robot. He then dealt with her personally. The child reported that she had been sexually abused by her grandfather in her grandmother's absence. She said that it was more than once. When Mr Mkhize asked her why she did not report this to her grandmother her answer was that her grandfather had told her not to report to anyone. This was of course not the complainant's evidence before the court.

[39] Mr Mkhize gathered from those whom he met at the school that the disclosure in question had been made to a teacher. He did not know whether it was the child's class teacher or any other teacher. He knew nothing of a Ms Mtshali. The complainant did not mention a Ms Mtshali to him, and he did not meet such a person on the day in question.

[40] In the result, the magistrate had inconsistent evidence as to the circumstances in which the first report had emerged. A first report is not merely relevant to the question of consistency. It is also important because such evidence should reveal the circumstances giving rise to the disclosure. If it is generated by a suggestion, let alone by any threat, it is important that the court should know that; *inter alia* in a case like the present, because it is well known that once a small child makes a declaration concerning something which happened to the child, it is seldom voluntarily retracted, even if false.

[41] Before examining how the magistrate dealt with the evidence in this case it is as well to remind oneself of two principles which may justifiably be labelled "trite", and which bear a peculiar relationship in cases like the present. The first is the distinction which must be drawn between the assessment of the credibility of testimony, and the reliance which can be placed on it. The principle was stated as follows in *S v Saban en 'n Ander* 1992 (1) SACR 199 (A) at 204c.

"What must be proved is the truth of the account of the party bearing the onus and not merely the honesty of the witnesses who present it." (My translation.)

The second principle involves the caution to be exercised in certain instances, which is engaged for two reasons in a case such as the present; namely the fact that the complainant is a single witness and, perhaps more importantly, the fact that she is a child. The dictum most quoted on the subject of single witnesses is found in *S v Sauls and others* 1981 (3) SA 172 (A) at 180. Whilst Diemont JA pointed out in that judgment that the testimony of a single witness may be acceptable despite some shortcomings or defects, and that in that regard, the "exercise of caution must not be allowed to displace the exercise of common sense", in following that injunction one should take care not to allow "common sense" to displace the exercise of caution.

[42] Perhaps for the purpose of this case the most convenient exposition of the reasons for caution in considering the evidence of child witnesses in cases involving alleged sexual misconduct is to be found in *S v Dyira* 2010 (1) SACR 78 (ECG) at paragraph 6.

"Similarly, the courts have developed a cautionary rule which is to be applied to the evidence of small children.... The court should be aware of the danger of accepting

the evidence of a little child because of potential unreliability or untrustworthiness, as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity. Here, more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness. "

(Authorities omitted.)

[43] In his judgment, the magistrate made reference to the need for caution in the case of a single witness who is a young child, with reference to cases such as *Dyira*. However, in my view, his judgment does not display the exercise of such caution. The magistrate's approach to this case was governed by his assessments of credibility. He found the complainant a credible witness, citing in support of that those factors so often mentioned when assessing adult witnesses, such as that the complainant was not "shaken in cross examination". He contrasted that credibility finding, with the ones he made against the appellant and Ms Mtshali, discounted the significance of the inconsistencies in the complainant's various accounts of events to which reference has been made earlier in this judgment, and misdirected himself in finding that the complainant's evidence was corroborated by that of Mrs M[...] and Mr Mkhize; concluding that the complainant's evidence was not only credible but reliable: i.e. it reflected truth.

[44] It was clearly apparent to the magistrate, and correctly so, that Ms Mtshali's contradiction of everything the complainant had to say about Ms Mtshali's alleged role in the events of the day when the child first accused her grandfather, posed a significant obstacle to a finding that the complainant's evidence was credible.

[45] As I have already mentioned, during the cross-examination of Ms Mtshali the prosecutor advised the court that she wished to cross-examine Ms Mtshali on the contents of a statement made by the investigating officer concerning Ms Mtshali's alleged refusal to make a statement to the police. The prosecutor could have asked Ms Mtshali questions, as indeed she did, about why it was that the police did not have a statement from her. The prosecutor, not satisfied with accepting the answers, sought permission to cross examine Ms Mtshali in order to suggest to her that the contents of the police officer's statement were correct. The magistrate ruled that the prosecutor could proceed along those lines against the undertaking given by the prosecutor to call the investigating officer concerned. The line of cross-examination achieved no result favourable to the State. The investigating officer concerned was not called as a witness. Despite that, in his judgment the magistrate referred to the statement of the investigating officer as "evidence" in support of his finding that Ms Mtshali was not a credible witness.

[46] After Ms Mtshali's cross examination the magistrate delivered a lecture to Ms Mtshali about the obligation she had to report directly to the police if she received any information concerning sexual misconduct in relation to a child. Ms Mtshali's response was that she had not been told of that duty, and that she understood her duty to be to report such an event to the principal, leaving it to the school and the principal to take

it from there. That did not satisfy the magistrate who continued to press Ms Mtshali about her legal duty, with the obvious implication that if what the complainant had said about a report to Ms Mtshali was correct, she, Ms Mtshali, had not conducted herself lawfully. An objection was made to what had been put to Ms Mtshali, but the magistrate dismissed it, claiming it to be his entitlement to educate Ms Mtshali on the law. I am afraid that reading the relevant passages in the evidence suggests most strongly that, whatever the magistrate's motive for doing what he did, Ms Mtshali would have experienced it as intimidation designed to undermine her evidence.

[47] Matters did not stop there. After Ms Mtshali had been re-examined the magistrate decided to put the entirety of the complainant's evidence to Ms Mtshali, passage by passage, so to speak. He even went so far as to put Dr Mathenjwa's evidence to Ms Mtshali, and ended with this statement to Ms Mtshali:

"This is the evidence by this child. I am not proposing anything to you. I am just telling you what the evidence says on record."

[48] Counsel who appeared on appeal for the prosecution submitted in her heads of argument, and repeated it in oral argument, that Ms Mtshali had been unfairly treated by the magistrate. That submission was undoubtedly correct. At best for the prosecution the magistrate's interventions I have described constituted an invitation to Ms Mtshali to reconsider her evidence. There is little room to doubt that Ms Mtshali would have left the court after her ordeal with a sense, if not a conviction, that the magistrate had already decided that what the complainant had said about Ms Mtshali's involvement in the disclosure of the alleged sexual misconduct of the appellant was true, notwithstanding Ms Mtshali's denial of it.

[49] The magistrate criticised Ms Mtshali's evidence that she did not know anything about the visit of social welfare officers to the school on that day. The magistrate overlooked that Ms Mtshali taught the foundation grades. There is no reason to suppose, and certainly no evidence to the effect that, even the children in the grades below grade 4 would have been called to a lecture to be given by social welfare officers and Childline on the subject of inappropriate sexual conduct.

[50] The magistrate ignored the fact that Mr Mkhize had not met Ms Mtshali on the day in question and did not know or had not been told that the teacher to whom the disclosure had been made by the complainant was Ms Mtshali. The name was not mentioned to him by the complainant herself. The magistrate ignored the fact that Ms Mtshali was not teaching the complainant during 2019.

[51] Unless one approaches the entire enquiry upon the basis that one believes everything the complainant said without question, there is little if anything on the record to justify a finding that Ms Mtshali's evidence should be rejected as false. Notwithstanding that, the magistrate's finding on the evidence of the teachers went as follows.

"It would seem to me that they were hell-bent on protecting their colleague, the accused herein, at all costs even if it meant misleading this court under false pretences that they were not aware of the report by complainant and a subsequent visit by the social workers based on the report. They were both not credible and can be deemed to be unreliable witnesses and this court will reject their version as false insofar as it is in conflict with the state case."

Insofar as Ms Ntshangase is concerned, I make no comment simply because it is not the State case that the first report was made to her. The material witness is Ms Mtshali. The magistrate overlooked the fact that it would be inherently improbable, unless a particular motive had been identified by the State in the presentation of its evidence, for Ms Mtshali to risk her career by lying to protect a colleague, even to the point of at the same time undermining the credibility of the colleague's granddaughter whom she had taught the previous year. There is no evidence of any special relationship between the appellant and Ms Mtshali. Furthermore,

- (a) whilst the complainant's evidence implied that the social welfare officers came as a result of her disclosures to Ms Mtshali, Mr Mkhize's evidence establishes that the visit the next day by them was pre-arranged; and
- (b) it is difficult to see why Ms Mtshali would have thought that denying that the first report had been made to her would have assisted the appellant in any way.

[52] The complainant's evidence reads well as far as it goes. All the witnesses who interacted with her and who were asked the question said that she was a very bright child. She testified at the age of 11 and I regard it as fair to say that this assessment of her intellect comes through on the record. But the record of her evidence, from the State's perspective the most important evidence in the case, is truncated. For instance, the treatment of the sexual acts attributed to the appellant is perfunctory.

[53] The complainant's explanation for her failure to report the incidents, that she thought no one would believe her, is in my view reasonable coming from a bright

nine year old (her age when she first said it) or from an 11 year old child. It is far from clear, however, that a six year old child, even a bright six year old child, would have thought along those lines. The prosecution made no attempt properly to explore the question of what knowledge of sexual matters the complainant may have had at the age of six, nor indeed to contrast with that the state of mind of the complainant on that subject at the ages of nine or eleven. Assuming that the complainant's evidence is broadly true (I say "broadly true", because her description of what would amount to full sexual intercourse is not borne out by what medical evidence is available), it would perhaps have been more understandable if the complainant explained her silence on the matter at the age of six by asserting that she did not then understand the implications of what had occurred. But that is not her evidence.

[54] The delay of three years before the complainant first reported the alleged incidents required an explanation, but it has to be acknowledged that the assessment of the quality of such an explanation is difficult for want of a clear perception in the adult mind of how the mind of a child of six, seven, or eight years of age would process incidents of the type described by the complainant. However, perhaps of more significance in a case like this is the question as to why the disclosure was made after the passage of three years. The complainant's grandmother understood the significance of that question and put it to her grandchild. Regretfully, the prosecution appeared not to have appreciated the significance of it. The story of the drawing said to depict the appellant eating his wife's hotdogs was never elucidated. (I put aside the fact that there are two different accounts of what was depicted in the picture.) The complainant said that her fellow pupils reported that her drawing showed disrespect to her grandfather. (Why the drawing would elicit that reaction was not explored in evidence.) The prosecution made no attempt to secure from the complainant an

explanation for her decision, in the light of that report, to disclose what had happened when she was six years of age. The connections between the drawing, the allegation of disrespect, and the disclosure were not established in evidence. The connections are, on the evidence, so remote that it is difficult through speculation to reach a sensible impression of what might have gone on. Putting aside what I hold to be the irreconcilable conflict between the evidence of the complainant and that of Ms Mtshali, the court was deprived of any evidence from the complainant concerning what Ms Mtshali might have thought of the picture, and what she said to the complainant about how she, Ms Mtshali, perceived the picture. Did Ms Mtshali also regard the picture as disrespectful of the child's grandfather? Did she perhaps press the child with the proposition that she had no reason to disrespect her grandfather? Did some exchange along those lines perhaps generate an unexpected disclosure of sexual misconduct? The court should not have been left to speculate along such lines. If some truth resides in the complainant's account of events in 2016, the prosecution failed properly to discharge its duty to place her case before the court.

[55] The complainant explained her return to her grandfather's bedroom when the second incident occurred by furnishing an account of the state of her imagination when she was six years of age. In essence, she described a blurring in her mind of the distinction between imagined things and reality. The magistrate's judgment shows no appreciation of that fact, and consequently no acknowledgment of its potential significance in a case like the present. It is simply not good enough to accept the complainant's protestation that what she was describing was real and not dreamt on the basis of credibility findings. Although the magistrate cited *Dyira* he never considered "the beguiling capacity of a child to convince itself of the truth of a

statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children...".

[56] From the questions put by the prosecution to Ms Mtshali it is plain that the investigating officer and the prosecutor understood that Ms Mtshali did not support the complainant's evidence as to the making of her first report to Ms Mtshali. It would appear that no further investigation was done in order to clear up that important fact. The prosecution knew that Mr Mkhize had dealt with the complainant on the day that the social welfare officers performed their tasks at the school. It appears that he was not interviewed. If a statement had been taken from him it would have revealed that the principal knew of a first report before the social welfare officers commenced the performance of their duties for the day. We do not know whether a statement was taken from the principal. One assumes not, as he was not called in order to support the State's case as to the circumstances of the first report. (I discount the possibility that he was not called because the investigating officer and/or the prosecution believed that his evidence would undermine the State case on this issue.) The only conclusion reasonably to be drawn is that on this account, and on others mentioned earlier, both the investigative and prosecutorial arms of the State failed to perform their duty carefully to investigate and prosecute a case of the alleged rape of a child.

[57] Taking all these considerations into account, this is not a case in which the failings of the appellant as a witness on the issues already discussed can legitimately lead to the conclusion that his denial of sexual interference at any level with the complainant is demonstrably false. The State failed to prove its case beyond a reasonable doubt.

[58] Finally, I am compelled to say something about the conduct of the advocate who took over from Mr Moala after the close of the State case. His arrival on the record was accompanied by a statement that he would be applying for the recall of the State witnesses as there were matters which had not been dealt with properly. There are frequent exchanges during the course of the defence case between the lawyer and the magistrate in which the lawyer displayed a confrontational approach to the court. Unfortunately at times the magistrate rose to the bait. (What the witnesses who were giving evidence during the course of some of these exchanges thought of the matter one does not know, but it must have caused them some discomfort.) However, I would not have mentioned these matters if it were not for the crescendo reached when the defence advocate addressed the court on sentence. He listed the defendant's personal circumstances in the ordinary way. The appellant was a 57 year old man with no previous convictions who had been teaching children since 1992, and so on. (I do not propose to dwell on the subject but make the observation that the submission we received from counsel who appeared for the State in this appeal was that, if the conviction should be upheld, the sentence should be closer to 15 years than to 20 years imprisonment. That submission had merit.) Having listed those personal circumstances, counsel for the appellant then submitted that there were, in fact, no substantial and compelling circumstances justifying a deviation from the sentence of life imprisonment. He then added that this case was going on appeal.

[59] The rationale for this extraordinary conduct is not explicitly stated on the record. One can only assume that the advocate adopted that stance in order to gain what he perceived to be the advantage of an automatic right of appeal. In the process he

displayed complete disrespect for the magistrate's ability rationally to determine a sentence, and to consider an application for leave to appeal, and for this court's ability to discern grounds for appeal on petition if the magistrate concluded that an appeal should not be allowed. More importantly, he disregarded the right of his client to a decision on sentence from the judicial officer who had the benefit of being steeped in the trial. He disregarded his duty to make all submissions which could reasonably be made in support of a lesser sentence than life imprisonment.

[60] The advocate concerned delivered heads of argument in this appeal which we found to be quite unhelpful. Two days before the appeal was due to be heard another advocate was briefed, apparently because of the unavailability of counsel responsible for the presentation of the defence case in the magistrates' court. He was not sufficiently prepared as a result of which the appeal had to be adjourned to a later date in order to allow him to deliver heads of argument and be properly prepared for the hearing.

[61] We say no more on this subject. Because he did not appear on appeal, counsel who conducted the defence in the court *a quo* has not been heard on the subject of his conduct. What happened nevertheless warrants mention in this judgment, as does our disapproval of the course followed by defence counsel.

[62] The following order is made.

(a) The appeal is upheld.

(b) The appellants conviction and sentence in the court a quo are set aside and replaced with the verdict "Not Guilty".

Olsen J

Mossop J

Case Information:

Judgment reserved:
Judgment delivered:

15 August 2025
5 December 2025

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