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

Case No: AR 405/2024

In the matter between:

C[...] R[...] M[...]

APPELLANT

and

THE STATE

FIRST RESPONDENT

ORDER

On appeal from Regional Court, Pinetown (**Mr Hlophe** sitting as a court of first instance)

1. The appeal against conviction is upheld
2. The conviction and sentence is set aside

JUDGMENT

Delivered:

Mngadi J (Pietersen AJ concurring)

[1] The appellant with leave of the trial court appeals against conviction.

[2] The appellant before the regional court was charged with rape, convicted and sentenced to fifteen (15) years imprisonment.

[3] The charge alleged that the appellant is guilty of contravening s3 read with s1,55,57,58,59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with Schedule 2 and Section 51 of the Criminal Law Amendment Act 105 of 1997 and further read with section 256 and 261 of the Criminal Procedure Act 51 of 1977, further read with section 94 and section 92 of the Criminal Procedure Act 51 of 1977 in that on or about on diverse occasions from 2017 to 2019 and at or near Kwandengezi, Pinetown did unlawfully and intentionally commit an act of penetration by inserting his genital organ into the genital organ of [S..... H...] aged 10 years (the complainant) without her consent. The provisions of section 51 of Act 105 of 1997 are applicable in that the victim was under the age of 16 at the time of the commission of the offence.

[4] The appellant who was legally represented throughout the trial pleaded not guilty to the charge. He elected at that stage to remain silent. The learned regional magistrate after hearing evidence convicted the appellant as charged and sentenced him to fifteen (15) years imprisonment.

[5] The state case was based on the evidence of the complainant. She testified *in camera*, assisted by an intermediary. The court after the court finding her to be a competent witness admonished her. She testified as follows. She was 13 years old , she was schooling and in Grade 8. During the period of 2017 and 2018, she left home to visit Kwandengezi. She was with her younger sister S[...]. She went to visit her aunt N[...] who stayed with the appellant. Also staying there was aunt T[...], aunt T[...], B[...] and gran M[...]. Whilst visiting there the following morning her aunt would wake up and go to make porridge. Her younger sister maybe would go and wash her face. Her aunt N[...] would make porridge in the other building where aunt T[...] stayed. Her sister would leave with aunt N[...] and she would remain with the appellant. The appellant would pull her to his bedroom, occupied by him and aunt N[...] whilst they would sleep in the dining room. Apart from the appellant and aunt N[...]s bedroom and the dining room, there was a bathroom. Aunt T[...]s room is not

in the same house. She slept in the dining room. It is on the side in the yard, you walk a short distance to it.

[6] She testified that the appellant called her to his room. He said she must climb on the bed and she did so. He got on top of her. He took off her pants and panties. He then opened her thighs, and he inserted his penis into her vagina. He pushed himself against her also pushing his penis into her vagina. The complainant, on invitation, demonstrated what she said happened by dolls, placing the female doll on her thighs and lifted up her dress and exposed the area around the vagina. She placed the male doll on top of the female on the area of the vagina, as if leaning. Her pants and panties were removed to her ankles. The complainant when asked to demonstrate using the doll, how the penis was inserted into her vagina, she pointed at the penis on the doll and she pointed at the vagina on the doll. Asked whether the appellant when he asked her to climb on the bed was wearing anything, she said she did not remember. Asked how she felt when he put his penis in her vagina, she said it was painful and it also felt like it was slippery. The pain was in her vagina when he put his penis into her vagina, she was quiet. She was asked to show using dolls to show how he put his penis into her vagina, how he was pushing himself against her, and how he was pushing his penis inside her; she put the male doll on top of the female doll with the penis inside the female doll with the penis inside the female vagina and showed some forward and backwards sort of movements. Asked when the appellant moved as she demonstrated where his penis was as he was moving like that on top of her, she said it was in the vagina. Asked after he put his penis into her vagina what happened, she said he kept pushing it in her until he stopped. After he stopped, he then dressed her and when she tried to stand and walk, there was like something watery in her vagina. She then went to the bathroom to go and see what this could be. She took off her pants, and she saw the watery substance, like sticky thing which was on her panties and vagina. She took a towel, wet it and wiped herself. She then changed her panties. Her aunt then came back, saying she was there to check on them together with her younger sibling. On that day she did not tell any person about what happened. It is because she was afraid and he also told her not to tell anyone when he inserted his penis into her vagina. She did not recall anything other things he said.

[7] The complainant was asked whether anything happened other than the incident she told the court about, she said yes. She was asked whether she was able to say how many times these incidents took place, she said no. She was asked when it normally happened, she said this would generally happen when they were visiting during holidays but when they were in Ambo, he would just touch her vagina or her thighs. It would happen when it was holidays when visiting at Kwandengezi

[8] The complainant testified that what she told the court happened, it was the first incident. It upset her. When she visited at Kwandengezi, the incident which she described is what happened, she did not know how long she stayed at Kwandengezi.

[9] The prosecutor told the complainant to tell the court about more incidents, she recalled during the period. She said there was this one time when aunty N[...] went to work and her younger sibling S[...] went to play. She slept. Then woke up and the appellant saw that she was awake. He came to her and he jumped onto the bed and to get on top of her. He took off her panties. He took a towel and told her to lift herself up. He then placed the towel behind her. He said she must open her thighs and then put his penis into her vagina. She did not notice what was he wearing. When he put his penis into her vagina she was not dressed. She did not see his penis. She is saying he put his penis into her vagina because whenever he has it he generally pulls up his pants or his boxer shorts when he is done, finished putting his penis into her vagina and keep pushing himself on her. She demonstrated when asked to do so, by having the pants of the male doll on the ankles and the underwear of the male doll on the knees. She did not notice how he was dressed when he climbed on the bed. She was facing up when he took off her panty. He was facing down. It was painful just like the first time and a watery substance was also present again. He put his penis into her vagina, and he kept pushing himself against or on her. He continued pushing himself with his penis in her vagina until he stopped. She then went to the bathroom. She took some tissue, and she wiped her vagina, and again the liquid substance was in there. She then went outside and she cried. She did not report what happened to any person. He said she must not tell anyone and she was afraid. She was afraid of not respecting them as an elder to her, and that if she told anyone, it would cause problems in the family.

[10] The prosecutor again told the complainant to tell the court about more incidents that took place during this period 2017 to 2019, if she can remember. She testified that on this one they woke up in the morning. Aunt N[...] was not there, and she did not know where she was, she went with her younger sibling. It would be in the morning when they all woke up, they would go and sit with them in their room. Aunt N[...] and S[...] had left and she was lying down on her stomach on the bed. She was left with the appellant. He then got on top of her. He pulled down her pants. She was wearing pyjamas. He took off her pyjamas. He then inserted his penis into her buttocks. It felt slippery and it felt like a mucus. He kept pushing himself on her with his penis. Asked where his penis was, she said it was in the middle of her vagina. She was to demonstrate using dolls; she showed a female doll facing down and the male doll on top of the female, and she pulled the panty to the ankles or around the knee. She was asked to show where he put the penis, she pointed at the vagina, showing it put from the back between the thighs. She said he kept pushing until he stopped and got off her which then lined with the return of aunt N[...] and S[...].

[11] The complainant was asked whether she could recall any more incidents, and she said no, there are not. During the period 2017 to 2019 she visited her aunt at Kwandengezi during holidays. She was always with her younger sister when she visited. No one witnessed the appellant penetrating her vagina. It happened every time she visited. It happened that she told someone what happened. They were at Ambro, and aunt N[...] generally came to see them. Her sister S[...] in the morning went to sit with grandmothers. S[...] went to watch the TV and she remained with grannies. It was granny, aunt N[...], her mother and S[...]. Aunt N[...] asked her mother that the complainant and Sane should visit them (her and appellant). She was sitting on the bed. She then asked her mother to borrow her the cell phone. She then wrote a message for her mother, stating the reasons why she no longer wanted to go to Kwandengezi. She wrote the message and she gave it to her mother to read. Her sister S[...] called her into her room asked her saying they witnessed this crime, she asked her if the appellant inserted his penis into her vagina, and she answered yes. The message she wrote stated that she no longer wanted to go to Kwandengezi because the appellant did things that she did not like.

[12] The complainant was asked by the prosecutor to tell the court about other times when the appellant touched her vagina as she said earlier. She said he would visit and he would sleep with aunt N[...] and S[...]. He said he would also like to sleep with her. She could not sleep with them because although she wanted to or she would like to do so in the morning, she would wake up and go to them. She slept in another room with granny. Aunt N[...] would offer that she sleeps with them, and the appellant would then call her to enter his side of the bed. She then slept in front of him, then he would touch her thighs and brush her vagina. She did not remember whether she was dressed or not when he touched her thighs. She was asked to demonstrate and asked as the doll had the panty lowered when he touched her vagina was her panty lowered; would it be over her clothes when he touched her vagina; she said it was under what she was wearing. She was asked how many times he touched her vagina, is it more than once, she said yes. The prosecutor asked the complainant to tell the court how it would happen on the other occasions. She said this one time there was a place, so there was somewhere where he was going and he went passed their home. She and S[...] saw him, where they left him and he sat on the sofa, She sat on the armrest of the sofa facing him. S[...] then went to the room to talk to granny. He inserts his hand, and he touched her vagina. Asked inserted his hands where, she said he placed it on top of the pants that she was wearing. Asked where he placed his hands, she said on the vagina. She said she removed his hand because she did not like it. She said she could not recall any other incidents.

[13] The complainant was asked whether she recalled the other incidents when the appellant put his penis into her vagina. She said it was then when she explained that she was lying on her stomach. It happened at Kwandengezi. Asked how many days or weeks after it happened when she wrote the message to her mother; she said she thought it was the following year when it was about to be the holidays, just before the holidays. Asked how old she was when the incidents started, she said she had forgotten. Asked in what grade was she, she said that there is an incident that occurred when she was in grade 4 and another when she was in grade 5. She had never repeated a grade.

[14] The complainant under cross-examination stated as follows. The appellant was married to her aunt N[...]. The appellant is S[...]'s father. The incidents that brought her to court started to happen between 2018 and 2019. The appellant's two children are S[...] H[...] and S[...]. S[...] is 11 years old and S[...] is 22years old. When she visited the appellant's home, the two would be present. But before Sane did not frequently visit. S[...] would sometimes stay behind, and she would go with Sane to visit. Although, S[...] and S[...] were the appellant's children they stayed with her at her home at Ambo.

[15] She testified that no incident happened in the presence of S[...] or when S[...] was around. Aunt T[...]s house is separated by two houses and a tree. The last time she visited the appellant's home was 2015 or 2019. Aunt T[...]s house is in another premise or yard. It is a separate house, but they are close to each other. She did not know the surnames of the two houses that separated Aunt T[...]s house from the appellant's house. But they are not the appellant's nor Aunt T[...]s homes. She denied that there were houses separating aunt T[...]s home from the appellant's house. She stated that the appellant's house was an RDP house at aunt T[...]s yard. On the day aunt N[...] went to make porridge, S[...] stayed behind for a while and then followed her. She was in the dining room and the appellant was in the bedroom. S[...] followed aunt N[...] after 20 minutes. Her aunt usually went to make porridge between 08:00 and 09:00, she would be left behind and watch TV.

[16] She testified that when the appellant told her to climb into the bed, she said she did not ask him why she had to climb in the bed. He was under the blanket. They slept separately. He then came close to her and he climbed on top of her. She on her own got under the blanket. She did not know how long she was in bed with appellant. She did not ask him what he was doing when climbed on top of her, took off her panty and panty, spread her thighs and inserted penis into her vagina. It is because she was scared and shocked. At that time, she was either 9 or 10 years old. She did not see the appellant's penis, she cried and he continued. In her evidence in chief she did not say she cried, it was a mistake. She did not cry. She did not cry because she did not know what was happening. She did not know how long it took the appellant penetrating her. She in the bathroom used a tissue, she could not

recall whether she used a tissue or a towel. It was the first time for her to be vaginally penetrated; she did not as she wiped her private part see any blood.

[17] She wiped herself and she changed her panties. She said she was saying she changed her panties something she did not say in her evidence in chief because she decided to say one thing. Her aunt and siblings returned, she did not report to them as she was in shock and also thinking what happened was just for that day only. Her aunt returned and found her sitting in the dining room, the appellant in the bedroom. She did not report as she thought that perhaps this was an incident which took place only once, it will not ever happen again so there will be no need for her to report it. She did not explain why earlier in her evidence in chief she said she did not report because the appellant told her not to tell any person. The appellant after the first incident did not tell her not to tell anyone, he said it on the other incidents.

[18] The complainant testified that she realised what the appellant did to her was wrong, when some people came to her school and taught them. The incidents took place many times. She did not know how many times, she could not estimate. She visited the appellant during the holidays. She continued to visit him even after the first incident. She continued visiting him because she thought it had been the last time that it had happened, She also did not like staying behind alone at her home. She did not report when the second incident happened, because he had started to caution her not tell anyone. She visited the third time and at every occasion when her siblings were visiting. The third time the incident happened, and she did not report it. Despite that she continued to visit because S[...] would leave home, she would be bored when left alone at home. It happened several times. She is not able to say where was the appellant's wife on the other occasions. She did not recall that in her evidence in chief she said on the second incident the wife of the appellant had gone to work. She did not recall that in chief she stated where her younger sister was. She did not recall which is the second incident because it happened on several occasions. She could not tell the court about the incident she said it happened when her aunt had gone to work. She did not recall that she said second incident her aunt had gone to work and she was alone with the appellant in the house.

[19] She testified that the incident he lifted up and placed a towel underneath her took place in his bed. Asked whether she already slept on his bed, she said she usually slept on the couch but when it did happen there was no one, she would then sleep on the bed. She said when he lifted, he approached wearing boxer shorts. She said earlier she said she did not recall, but now when she says he was wearing boxer shorts; it is not that it is what he was wearing, but it is what he was usually wearing. When he inserted his penis into her vagina and started pushing, she first kept quiet and let him do what he was doing because she did not know what to do.

[20] She stated that besides the incidents she narrated there are no other incidents that she recalled. Asked whether there was an incident where she said she was lying facing down and the appellant came from behind on top of her, she said she did not recall where her aunt was during that incident. After the appellant finished, she climbed off the bed, got off the bed and went to the toilet because she felt there was something slimy and slippery and she wiped it off. She changed her panty. That slimy thing was disgusting, and it made her feel uncomfortable when walking. She did not recall whether her aunt and sister returned. The incident happened in the morning. All the incidents took place in the appellants' bedroom. She continued to voluntarily go to the appellant's bedroom because when her little sister went to the appellant's bedroom she would also follow because she sometimes got bored sitting alone. She did not report to her mother because she was afraid and she was told not to tell anyone. She lived with the appellant's daughter, she reported to them what their father did then, it was her oldest sister, her granny, aunt and morn. She told her morn first. She did not remember when this was, when she typed a message. She reported to her mother because she no longer liked it, it was hurting her every time, or it bothered her.

[21] J[...] S[...] H[...] testified as follows: She is the mother of the complainant. On 30 June, they were sitting in the bedroom. It was she, M[...], complainant, S[...], S[...] and granny. Her sister M[...] asked the complainant when they are visiting her. The complainant changed her facial expression. She asked her to give her the cell phone. She took it and she started typing and when she read what she had typed, it was that she no longer wanted to visit at Kwandengezi because when she is left with S[...]s father, he touches her private part, then he told her to undress and then they

sleep together. After she had said the whole story, then S[...] went to the bedroom with her so that she could tell her the rest of it or tell her more because she was crying. She would pack for the complainant when she went to visit, and granny would pack for S[...]. She would be present when they return. The complainant and S[...] were always together. She had never noticed anything untoward in complainant, they were always their usual selves. She was shocked when she read the message. The complainant had never had a problem at school. She agreed that in her police statement she said in the message the complainant said the appellant touched her private part, she did not say she slept with her.

[22] Aboobacker Suluman testified as follows: He was a medical doctor in private practice. He previously worked as a District Surgeon. On 30 June 2019 he was requested to examine a young child, 10 years had allegedly been raped. He examined the child at the surgery. He referred the child to the hospital after examination. He found features that were consistent with trauma or sexual abuse. His findings were consistent because on vaginal examination, he found that there were bruising or tears. What he found at 9 O'clock position on the hymen and at 11 O'clock positions on the hymen. It means that the opening to the vaginal track he found tears. It was easy to infiltrate a finger into the track. He was happy to send the child to hospital for his findings to be confirmed. On 8 July 2019 he was informed that he had not completed the J88 and that he should do so. This was done also from his records cards. He did not notice whether the tears at the time were fresh or not, he thought that would be left to the Child Protection Unit and the hospital. It was not fresh tears, it was scarring/ tears at 11 O'clock and to 9 O'clock, it were old tears consistent with trauma.

[23] Dr Suluman testified he would not state how old were the tears. He had written that on examination of the hymen, of the opening it was consistent with tears which seemed to be old tears. Scarring means any wear, tear, cracks or repeated trauma. He thought at the hospital they would determine the time frame of when it occurred, how often it occurred as that is done by specialised unit of the hospital. He preferred that the child needed a second opinion, a specialised opinion. On the first sexual intercourse there will be occasions when there is a tear or cut between the vaginal opening and as far as the anal opening. The child will continue to bleed, will

not be able to walk, will have extreme difficulty in urinating including going to the toilet and passing faeces, will be very emotional personally.

[24] The appellant testified as follows. He was 60 years old. He knew the complainant. She is her wife's sister's daughter. His property is an RDP house, two rooms and one bedroom. It is correct that the complainant visited his home. She visited on December and June holidays. She would visit with his last born who is 11 years old. They resided at Embo at their grandmother's house. He got married in 2015. He had a good relationship with the children. He has never been left alone with the complainant in the room. He was shocked when he heard the accusations made against him. He has never even once did what the child testified he did to her. His wife would go to make porridge in the main family house.

[25] The regional magistrate stated that the complainant was a child and a single witness whose evidence had to be approached with caution. The complainant although at times would be emotional, she gave her evidence in a calm and sequential manner. The court formed an impression that she was truthful, honest and reliable as a witness. She did not contradict herself and she remained unshaken under cross-examination. Although she could not recall all rape incidents it is evident from her recollection of the incident that she recalled. She was able to narrate the events very well. She was intelligent enough to answer the questions that were put to her even though she was a child witness.

[26] The regional magistrate held it against the appellant that his legal representative suggested to the complainant that she had been influenced to implicate the appellant whereas it could not be said who influenced the complainant and for what reason, and also his evidence had an inconsistency of whether there were times where he was left with the complainant.

[27] The record shows that it was not the evidence of the appellant that the complainant was influenced to implicate him. His evidence was that he had a good relationship with the complainant and her family. The appellant cannot be discredited based on what his legal representative put to the complainant as his theory of the case not as an instruction from the appellant. The fact of the matter is that the

appellant testified, and he denied the allegations against him. His evidence had no inconsistencies. The nature of the allegations against him lacked in specifics with no date, month or year specified of when it took place. He could not be faulted in denying them without giving any details or supporting evidence.

[28] The charge covered a period from 2017 to 2019. It was the evidence of the complainant that whenever visiting Kwandengezi, she never visited alone. The complainant herself stated that whenever she was at the appellant's house, she was either with both or one of her siblings. She herself said she did not recall where the siblings would be when the appellant sexually assaulted her. It was, therefore, never an issue that the sexual assault took place because the appellant had been left alone with the complainant.

[29] The question is approached with the required caution was the evidence of the state of such a quality and quantity sufficient to prove the guilt of the appellant beyond reasonable doubt, and whether the appellant's version was not reasonably possible true.

[30] The evidence of a child poses some unique challenges. It is irrelevant whether one subjectively believes the child or not. To heap praise on a child as a witness failing to factor in the effort put on preparing the child and how the child was led as a witness is not the exercise of caution which is required. The cautionary rule entails that the court should fully appreciate the dangers of relying on uncorroborated evidence of a child. In *S v Mandla* 1951(3) SA 158(A) at 163 the court emphasised that the dangers inherent in reliance upon the uncorroborated evidence of a child should not be underrated. The danger inherent in the evidence of children can be attributed (amongst a number of factors) to their 'imaginativeness' and suggestibility'; that require their evidence to be scrutinised with care, amounting perhaps to suspicion. In *S v Hadebe* 1998 (1) SACR 422 (SCA) at 426-426h the court stated: 'But one in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubt about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation: Those doubts may be set at rest, it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when

evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees': In *S v Chabalala* 2003(1) SACR 134 (SCA) at 139;- 140 (a) the court stressed that the correct approach is 'to weigh up all the elements which point towards the guilt of the accused against 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 guilt.'

[31] The regional magistrate stated that to his mind the version of the complainant was simply not the type of story that will credibly emerge from the fantasy of a 13-year-old girl; the details were too graphically realistic and precise. The difficulty is that the regional magistrate relied on his own opinion not on any expert evidence. The regional magistrate sought to explain complainant continued visit to the appellant knowing of the sexual abuse, failure to report as attributable to her youthfulness but this was not based on any evidence.

[32] The danger of suggestibility goes hand in hand with imaginativeness. Once something is suggested to the child, the child might use her imagination to believe that it happened. As a result of her immaturity, she might go along with what she thinks it happened. The complainant made a report by writing a message on her mother's cellular phone. This message was not produced before the trial. The complainant testified that she was sitting on a bed when she heard aunt N[...] telling her mother that she and S[...] should visit her, but her mother and aunt N[...] asked the complainant when they would visit her. The complainant testified that in the message she wrote that she no longer wanted to visit go to Kwandengezi because the appellant does things that she did not like. But her mother testified that in the message the complainant wrote that she no longer wanted to visit at Kwandengezi because when she is left with the appellant, he touched her private parts and then and then asks her to undress, and they then sleep together.

[33] The complainant testified that after she wrote the message she gave the cell phone to her mother to read, she then did not remember what happened, but her sister S[...] called her into her room and she asked her and told her that they witnessed this crime and asked her if the appellant inserted his penis into her vagina and she answered yes. This indicates that it is S[...] who first told the complainant that they witnessed the crime and asked her if the appellant inserted his penis into her vagina. It is not something that she wrote in her message it was suggested to her. The message was not produced in court as evidence and the State did not call S[...] to tell the court what she said to the complainant and also to testify about what would happen when they visited her parents with the complainant at Kwandengezi and whether at any stage she saw complainant distressed.

[34] The complainant without any prompting or hesitation wrote a message to her mother reporting to her what was happening to her when she visits Kwandengezi. This is inconsistent with her failure to report what happened to her at an earlier stage. She did not report to her mother. To her aunt, to her granny or to her siblings. She did not report it although it happened on many occasions over a period of three years. The excuses that she gave for the failure to report; namely, she thought it would happen once, she was told by the appellant not to tell anyone, she was scarred of causing a conflict in the family are not reasons that would cause a child of such a young age not to report something that is hurting the child.

[35] Dr Suliman testified that a child of complainant's age on sexual penetration will sustain a lot of trauma, there will be grievous injury, there are occasions when there is tear or cut between the vaginal opening and anal opening. The child will continue to bleed, will not be able to walk, will have extreme difficulties in urinating including passing faeces. The complainant testified that from the first sexual penetration and during all the sexual assault she did not bleed. Those with her when she visited on each and every occasion, those with her at home, and those with her over a period of three years did not observe anything untoward with the complainant.

[36] Dr Suliman as he was examining the complainant did not complete the medical examination report (J88) contemporaneously with the examination. The J88 report handed in as exhibit was completed eight (8) days after the examination. He

also did not produce any record where he the recorded the findings during the examination. The J88 the exhibit had the page with sections D, E and F missing. Dr Sulum testified the he conducted a preliminary examination which was subject to confirmation which confirmation was not done. The regional magistrate overlooked these material issues relating to the medical evidence. The finding that the medical evidence corroborated the evidence of the complainant is not supported. The essence of the medical evidence is inconsistent with the evidence of the complainant that the sexual assault had no physical observable effect on her and that at not stage did she bleed.

[37] The charge alleged that the sexual assault took place during the period 2017 to 2019 when the complainant was ten (10) years old. The complainant was born 19 March 2009 which means in 2017 she was seven or eight years old. It is inexplicable that the complainant would continue to visit Kwandengezi without any protestation when she had no reason to visit Kwandengezi where she was experiencing continuous sexual abuse.

[38] The regional magistrate failed to scrutinise closely the evidence, failed to note and to put proper weight to the unsatisfactory features of the evidence of the state. As a result, the court failed to exercise proper caution. The court had it done so would have found that the state failed to prove the guilt of the appellant beyond reasonable and that the appellant is entitled to the benefit of doubt.

[39] It is ordered as follows:

3. The appeal against conviction is upheld
4. The conviction and sentence is set aside

Mngadi J

I agree

APPEARANCES

Case Number:

For the Appellant: Patrick Mkumbuzi
Instructed Durban Justice Centre
DURBAN

For the Respondent: AM Makhanya
Instructed by: Deputy Director of Public Pros.
DURBAN

Heard on: 28 November 2025
Judgment delivered on: 05 December 2025