



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

CASE NO: AR 111/24

In the matter between:

T[...] Z[...]

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Ladysmith Regional Court (Mr H Visagie sitting as court of first instance):

1. The appellant's appeal against his conviction is dismissed.
2. The appellant's conviction is confirmed.

JUDGMENT

Chithi J (Shoba AJ concurring):

Introduction

[1] On 27 July 2020, the appellant, who was 20 years old, was convicted of contravening s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with s 120 of the Children's Act 38 of 2005, by the Ladysmith Regional Court (the trial court).

[2] On the same day, the appellant was sentenced to seven years' imprisonment, of which two years' imprisonment was suspended for five years on condition that the appellant was not convicted of any offence of which an act of sexual penetration or sexual violence was an element, and which was committed during the period of suspension.

[3] It is alleged that on or about 14 January 2016, and at or near Ekuvukeni in the Regional Division of KwaZulu-Natal, the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant, who was nine years of age, by inserting his penis into her vagina without her consent.

[4] The appellant now appeals to this court, having been granted leave to appeal by the trial court on 17 November 2023. Simultaneously with his application for leave to appeal, the appellant also applied for leave to adduce further evidence in terms of s 316(5)(a) and (b) of the Criminal Procedure Act 51 of 1977 (the CPA), which application was also granted by the trial court. The appellant led the relevant evidence, and the respondent did not lead any evidence in rebuttal. The trial court, as it was required to do, recorded its findings and views with regard to that evidence, including the sufficiency of the evidence and the demeanour and credibility of the witnesses in terms of s 316(5)(c) of the CPA.

[5] Although there is no specific order from the appeal record which shows that leave to adduce further evidence was granted by the trial court, the fact that it was granted may be inferred from the fact that the matter was then adjourned for the appellant to adduce further evidence. I shall return to this aspect later in the judgment.

Grounds of appeal

[6] The trial was heard by the learned regional magistrate Mr H Visagie and the applications for leave to appeal and to adduce further evidence were heard by the learned regional magistrate Ms Eloff. It is not immediately clear from the appeal record why this was the case. However, in terms of s 309B(2)(a) of the CPA, an application for leave to appeal may be heard by any other magistrate of the court concerned if the magistrate whose decision or order is sought to be appealed is not available.

[7] The appellant did not file a notice to appeal in this. The only ground upon which the appellant seeks to appeal his conviction, as it emerges from his application for leave to appeal, is that the complainant recanted her evidence. However, the appellant's grounds of appeal are further buttressed in the appellant's heads of argument, wherein the appellant contends as follows:

(a) While the trial court correctly found the cautionary rule to be applicable to the complainant's evidence, the trial court failed to carefully scrutinise the evidence in view of the contradictions and inconsistencies it contained.

(b) The trial court did not properly consider the contradictions, inconsistencies and the possibility that the complainant might have falsely implicated the appellant.

(c) The trial court merely paid lip service to the cautionary rule by failing to consider the several contradictions contained in the complainant's evidence and by not looking for safeguards to guarantee the reliability of the complainant's evidence.

(d) The complainant did not report the rape out of her own volition but only reported it after a genital inspection was conducted by her mother after she noticed that the complainant was limping.

(e) The complainant's evidence was of such a poor quality that it could not sustain the appellant's conviction.

(f) The trial court erred in failing to consider the following:

(i) The complainant testified that she was penetrated by the appellant vaginally. However, when she was examined by the doctor, she had informed the doctor that she had been penetrated both vaginally and anally.

(ii) During the main trial, the complainant testified that she was raped by the appellant. However, during further evidence, the complainant testified that she had been raped by her uncle Mr K[...] S[...] (K[...]) and had falsely implicated the appellant because K[...] had threatened her.

(g) The trial court erred in rejecting the appellant's version, as corroborated by his alibi witness, that at the time of the rape incident, the appellant had gone to the shop and did not rape the complainant.

Factual background

[8] Before summarising the evidence, it is convenient to start off by mentioning that at the time the complainant testified in the main trial, she was 14 years of age. According to her birth certificate, the complainant was born on 5 October 2006. The complainant testified that on 14 January 2016, before midday, she went to the S[...] homestead, which was a neighbouring homestead, to play with her friend, NS. While she was busy playing football, NS suddenly told the complainant that her mother was calling her. The complainant took NS's word for it and started proceeding home. En route home, the complainant was then accosted by the appellant, who was well-known to her because they used to play football together at the S[...] homestead. He grabbed her and pulled her towards the big rock which was behind her home. When they got there, he placed her on her back on the rock. The appellant then undressed her and proceeded to undress himself and thereafter had sexual intercourse with her without her consent. When the complainant tried to resist the appellant's unlawful advances, the appellant threatened to kill her. After the appellant had finished having sexual intercourse with her, she proceeded home. She sustained bruises on her buttocks because during the incident, the appellant forced her to lie on the rock.

[9] The complainant's mother, Ms T[...] L[...] N[...], testified as the first report witness. She testified that upon her arrival from work, she noticed that when the complainant was walking, she was limping. She further testified that she then asked the complainant several times what had happened to her. Upon her failure to respond, she asked her to bend over in order to inspect her buttocks, as she thought she might have a boil. When she did that the complainant started crying. She then lowered the complainant's panty and observed that it was wet with a semen-like substance and that her vagina was also wet and reddish. It was at that stage that the complainant reported to her that she had been raped by the appellant. She also noticed that the complainant had some bruises on her buttocks. She then called the maternal aunt who lived in another locality to come and inspect the complainant. Upon her arrival, the complainant's aunt also conducted her own vaginal inspection

on the complainant, and she thereafter enquired from the complainant what had happened. The complainant then told her what had happened. The complainant's aunt then suggested that the complainant must be taken to the appellant's home to report the incident. As the complainant struggled to walk on her own, they carried the complainant on their back. Upon their arrival at the appellant's home, the appellant was not present. However, the appellant was later found by the river. The complainant was later taken to St Chad's Clinic where she was examined by Dr Ndlela.

[10] The next witness was Dr Ndlela who confirmed that she examined the complainant on 15 January 2016 at 01h00. She testified that the child reportedly told her that the appellant followed her and grabbed her, dragged her into the forest and raped her vaginally and anally. She further testified that the complainant walked with her legs wide open. She further pointed out that the medical examination of the complainant was difficult because the complainant was kicking and screaming and resisted opening her legs. Dr Ndlela explained that the reason why the complainant did not want to open her legs was due to the pain she was experiencing in her vagina. The complainant appeared fearful and avoided making eye contact. The complainant had no external injuries, but her legs were soiled with mud and grass, and she also had grass in her hair.

[I II The genital examination of the complainant revealed the following:

- (a) An inflammation around the labia;
- (b) Semen was coming out of the vagina; (c) A tear to the root of the clitoris towards introitus;
- (d) The urethral folds showed swelling;
- (e) The perineum had no tears but was tender on examination;
- (f) There was no active bleeding of the vagina;
- (g) In relation to the anal examination, Dr Ndlela testified that it was difficult to conduct an anal examination properly because the skin surrounding the orifice was soiled and not clean. The pigmentation there was brown;
- (h) There were no haematomas or tags around;
- (i) The orifice itself had a reflex dilation. There was no obvious swelling around the orifice and there was no discharge;

(j) There were no anal tears; and

(k) In relation to a vaginal discharge, Dr Ndlela testified that there was a fluid which resembled semen.

[12] Dr Ndlela testified that she could not assess the hymen configuration and the posterior fourchette areas because the child was kicking and screaming. Dr Ndlela further testified that the complainant had told her that she had been penetrated both vaginally and anally. But on examination of the anus, she did not find any tears consistent with penetration. She testified further that it was common for girls of the complainant's age not to distinguish whether penetration was vaginally or anally. Additionally, the penetration of the vagina might also affect the perineum. She concluded by testifying that she did not notice any injuries on the complainant's buttocks.

[13] The appellant testified in his own defence and called an alibi witness. He stated that he knew the complainant. The complainant was a member of his family, being her grandmother's daughter. On 14 January 2016, he saw the complainant at the S[...] homestead playing with other children. He had left her playing with other children when he was sent by the grandmother from the S[...] homestead to buy her snuff from the Mabaleni store, which was across the river. He went along with Mr S[...] N[...] (Mr N[...]) and Mr N[...] S[...] (N[...]). They all went together until they parted ways by the Busi River. He bought snuff and went back to the S[...] homestead and handed it over to the S[...] grandmother. As he was leaving, he was grabbed by his grandfather, Mr Q[...] S[...], who took him home. Along the way, his grandfather enquired why he had raped the complainant, which allegation he denied. When he denied ever raping the complainant, his cousin whipped him.

[14] Upon his arrival at his home, he found the complainant, her mother and her aunt. When he was asked why he had raped the complainant and denied doing so his cousin continued to whip him and when the whip broke, he used a sjambok to assault him.

[15] The appellant further testified that the complainant had pointed out the scene of the rape incident as having been in front of her homestead, instead of having been

behind her homestead near the big rock. The appellant denied that he was found by the river. Lastly, the appellant testified that Mr N[...] would vouch for his alibi.

[16] Under cross-examination, the appellant confirmed that upon his arrival at the S[...] homestead, he and his companions, Mr N[...] and N [...], sat on poles which formed part of the livestock kraal and watched the complainant and her friends playing football. The appellant denied ever having had a fallout with the complainant wherein he allegedly accused the complainant of stealing his aunt's lunchbox. When asked about whether he knew what N[...] or Mr N[...] were wearing on the day in question, the appellant did not recall. He also did not know what Mandisa, one of the children who played with the complainant, was wearing. However, when he was asked if he knew what the complainant was wearing, he testified that she was wearing a pink skirt, although he did not recall the colour of her top. He testified that the reason why he knew what the complainant was wearing was because the skirt had layers and had just come into fashion. The complainant was the first child to have that type of skirt in the area.

[17] Mr N [...], the appellant's alibi witness, testified that he, the appellant and N[...] were at the S[...] homestead, sitting on poles which formed part of the livestock kraal. The complainant and her friends were playing football. They all left them there at 15h00, still playing. The appellant was sent to buy snuff at the Mabeleni store by the grandmother from the S[...] homestead, whereas he and N[...] were sent to buy tobacco by the grandfather from the S[...] homestead at the Mchunu store. They all went together until they parted ways by the Busi river. Under cross-examination, he testified that when they returned from the Mchunu store, he found the appellant already being confronted about the alleged rape of the complainant. Upon his return, he did not tell anyone that he had been with the appellant when he was going to the Mabeleni store. He also did not get to know exactly how, when and at what time the appellant allegedly raped the complainant.

[18] In response to the trial court's questions, Mr N[...] testified that the appellant did not tell him what he had to say in court. He knew what he had to testify about because it was something he knew. When the trial court asked him how he knew what he was required to testify about when he started testifying even before the

appellant's counsel asked him questions, he was unable to account for that. Mr N[...] did not know the date and month the complainant was allegedly raped by the appellant when asked about it. When he was asked whether it was a mere coincidence that he estimated 15h00 as the time when they left to go to the respective stores, which happened to be the same time which the appellant estimated as the time they left for the stores, he agreed.

The complainant's recanting statement

[19] As indicated earlier, after the appellant had been convicted and sentenced by the trial court on 27 January 2020, on 17 November 2023 he applied for leave to appeal and to adduce further evidence. These two interrelated applications were founded on the complainant's recanting statement, which reads:

'I, [the complainant], ID number 0[...].....8[...], state under oath in English: Address: Kwamnangeni I, [the complainant], wish to state that the person who actually raped me is K[...] S[...] my biological father's younger brother and it was not T[...] Z[...].'

Further evidence

[20] Pursuant to both applications having been granted, the appellant testified and thereafter led the recanting evidence of the complainant. The respondent did not lead any evidence in rebuttal. The appellant confirmed that he was convicted and sentenced by the trial court on 27 January 2020. However, before he was due to be considered for parole, he had to undergo a victim offender dialogue (VOD). This process entailed a dialogue which would be arranged at the instance of the Department of Correctional Services (the department) between the appellant, as the offender, and the complainant, as the victim. In this dialogue, the offender would apologise to the victim, and the victim would express his/her views on whether he/she was receptive to the offender receiving parole and whether he/she was prepared to accept the offender's apology. The appellant testified that when this process was explained to him, he outrightly refused to participate because he had never offended the complainant.

[211] However, during January 2022, he received information from a prison warder that the complainant wanted to speak to see him in Ladysmith. A date was then agreed on when he would be taken to Ladysmith to see the complainant. On the

agreed date, he was transported to the Ladysmith Correctional Centre. Upon his arrival, he met the complainant and her family members. The complainant then stood up and apologised for causing him to be imprisoned for something he had nothing to do with. He testified that during that interaction, the complainant told him that she was not raped by him but that she had been raped by K[...]. He went on to state that the complainant said that after K[...] raped her, he told the complainant that she must say that it was the appellant who raped her. K[...] further threatened the complainant that if she ever gave out his name, he would kill her and her mother. During August 2022, the appellant was released on parole.

[22] The appellant then called the evidence of the complainant. At the outset, this court records that the complainant's evidence was incoherent and the complainant did not give any specific details about the incident and this court, in summarising the complainant's evidence, will not deviate from how the complainant presented her evidence. The complainant testified that she knew the appellant as they were from the same area. She confirmed that she remembered that something bad had happened to her in January 2016. She testified that K[...], who is a relative from the S[...] homestead, did 'that thing' to her. When the appellant's counsel asked the complainant what K[...] did to her, she stated that he inserted his penis into her vagina. He thereafter instructed her to say that it was the appellant who raped her and if she did not say that, he would kill her and her mother. When her mother came home, she told her it was the appellant, because K[...] had instructed her to say it was him.

[23] Under cross-examination, the complainant testified that when K[...] raped her, he told her not to tell anyone. However, if someone asked her or if someone sawⁱ, she must say that it was the appellant and not him. Apart from the appellant being a boy that she knew from the area, he was her sister's son. The complainant further testified that her sister had other sons who were older than the appellant. She did not know how K[...] chose the appellant as the person to be implicated. The complainant stated that the details of her version in the main trial were not spoon-fed to her by K[...] but were a product of her own making. All that K[...] told her was to say that it was the appellant who raped her.

[24] When the complainant was asked when had she decided to tell the truth, she stated that she had wanted to do so since 2023. The reason why she decided to tell the truth is because that is what she always wanted to do. The complainant testified that what triggered her to tell the truth is that during one particular day in December 2022, while she was sitting alone feeling sick as she was suffering from a headache, she was approached by her aunt. She was not entirely sure how it came about that she and her aunt engaged in a conversation concerning the rape incident involving the appellant. However, her aunt enquired from her if she was sure that it was the appellant who had done 'that' to her. When she answered in the affirmative, her aunt repeated the enquiry if she was really sure that it was the appellant. At that moment she started crying because she wanted to tell the truth.

¹ By saying 'if someone saw' it was not clear whether the appellant meant if someone saw any signs that she might have been raped or if she meant that if someone saw when the appellant raped her.

[25] She testified that the reason why she did not tell the truth immediately and only did so after she was asked for the second time if she was really sure is because she was afraid. However, she realised that being afraid did not help the situation. She felt bad that the appellant was imprisoned for something he did not do. The complainant testified that K[...] was deceased. However, when she told her aunt that it was him who raped her, K[...] was still alive but was sick. K[...] was then called by the family and confronted. However, he denied in front of everyone that he raped the complainant. Lastly, the complainant confirmed that she was 17 years old.

The issues

[26] The following are the issues which this court must determine:

- (a) Whether the complainant substituted her actual assailant, K[...], for the appellant as the perpetrator.
- (b) Whether the contradictions in the complainant's evidence rendered it unreliable, warranting its rejection.

The parties' submissions

[27] Ms Anastasiou-Krause, on behalf of the appellant, argued that there was no dispute that the complainant was raped. However, the complainant replaced the actual perpetrator with the appellant. She argued further that what complicated the respondent's case was that the complainant never volunteered the report about the rape incident when she was probed by her mother. She therefore urged this court to uphold the appeal. Conversely, Mr Sokhela, for the respondent, argued that the appellant's conviction was in order. He contended that the trial court did not misdirect itself in any way. He pointed out that the complainant gave a detailed account of what had happened to her. Mr Sokhela therefore urged this court to dismiss the appeal.

The powers of a court of appeal

[281] It is trite that the powers of a court of appeal to interfere with the findings of fact of a trial court are limited: ¹

'In the absence of any misdirection the trial Court's conclusion, including its acceptance of D'S evidence, is presumed to be correct.'

[29] It is through this lens which this court will consider each of the issues which must be determined.

Whether the complainant substituted her actual assailant with the appellant

[30] It is common cause that the appellant was sexually violated on 14 January 2016 but what is in dispute is the identity of the perpetrator. The issues of the identity of the complainant's actual assailant, the appellant's alibi, and the further evidence which the appellant adduced can all be conveniently dealt with under this topic. Even before the appellant applied and was granted leave to adduce further evidence, the trial court pertinently dealt with this issue.

[311] The trial court remarked as follows:

'During cross-examination of the complainant the possibility that she identified the wrong person as a perpetrator was raised. The evidence does not allow for that possibility. The

¹ *S v Francis* 1991 (1) SACR 198 (A) at 204d, where the court referred to *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705. See also *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e - f, and *Masango v S* [2024] ZAGPPHC 64 para 3.

complainant knows the accused very well. They used to play football together. The alleged incident took place during broad daylight, and she was not in his company only for a fleeting moment. The accused walked with her and even talked with her about going to the shop and after that he spent a few more minutes with her while having sexual intercourse with her. It leaves only one other possibility which has to be excluded beyond a reasonable doubt and that is that someone else had raped her and that she chose to implicate the accused. It was not suggested that she had any motive to implicate the accused falsely. However, she was frank and made it clear that she does not like the accused. Her dislike for the accused stems from the fact that he had falsely accused her of eating food at the church which was not meant for her on the previous day. This the accused denied. The complainant implicated the accused by name shortly after the incident.'

[32] The trial court further remarked:

'I am mindful of the fact that the complainant did not immediately volunteer the information to anyone and that she only did so after someone had examined her genitalia.'

[33] The trial court's remarks must be considered along with the complainant's recanting statement and evidence. The complainant tersely states in her statement in a single sentence that it was not the appellant who actually raped her but K[...]. Conventionally, the purpose of a police statement is to provide details to enable the prosecution to decide whether to institute a prosecution and the statement of a witness is not intended to be a precursor to that witness' evidence in court.² While a recanting statement serves a different purpose than an ordinary police statement, in my view, there is no reason why a recanting statement should fall short of the general benchmark and be unnecessarily sketchy. A recanting statement may well hold the key to the accused's personal freedom.

[34] The trial court granted the appellant's application to adduce further evidence, sketchy as the complainant's recanting statement was. The findings which the trial court made after hearing further evidence are noteworthy. The trial court remarked:

'I am well aware of the fact that in a case where family is involved in a rape scenario there are so many different layers and nuances involved. And it is often difficult for a Court to hear the matter, to actually be completely aware and to understand how all these things fit together. I am sure that there is going to be a lot of arguments raised on appeal in this case by the State and I can clearly see why. I have to agree with the prosecutor's submission that obviously the court of appeal will not be able to see what I saw today but I can say that it is

² S v Bruiners en 'n Ander 1998 (2) SACR 432 (SE) at 437h.

clear that the victim is extremely shy. She crawled into a little corner in the intermediary room. Her head is hanging. She finds it very difficult for her to look at the camera. The set up is such that she must look at the camera. And then Ms Z[...] had to go to the extent of asking this Court to allow her to testify in the intermediary room because although she is 17 years old, she did not want to testify in open court.'

[35] The complainant's further evidence was entirely incoherent. It did not augment and give content to what was, as previously stated, a sketchy recanting statement. What the complainant's further evidence did was to obfuscate the position. The complainant spoke in riddles instead of speaking directly. The complainant's evidence is lacking in details and specifics. The complainant, when she spoke about the rape incident, preferred to refer to it as 'that thing' or 'it'. The complainant's evidence did not demonstrate any originality. The complainant testified as if she was schooled about what to say. Crucially, the complainant failed to state specifically where K[...] raped her or whether it was on the same spot where she had alleged, she had been raped by the appellant, and whether, before raping her, K[...] took off his clothes or whether K[...] only lowered his pants and underwear. What was striking in the complainant's further evidence was her assertion that K[...] suggested to her that if someone either asked her or if someone saw, she must say it was the appellant. If by saying 'if someone saw' the complainant meant if someone saw when the appellant raped her, the person concerned would not need to be told by the complainant what she or he would have witnessed her/himself. Additionally, the complainant sought to conceal the fact that the appellant was her sister's son by referring to him as 'a boy from the area'.

[36] Moreover, the appellant testified that what constituted her version in the main trial was manufactured by her on her own and that it was not spoon-fed to her by K[...]. It is highly improbable that K[...], having successfully persuaded the complainant that she should falsely implicate the appellant, would have left it to the complainant to invent the facts surrounding the incident, especially at the young age of nine years. What further makes this version highly improbable is that the complainant, when she was only nine years old, was able to give a coherent account of what was supposedly her own manufactured version but at 17 years of age, she could not give a coherent account of what was supposedly a true account of what happened to her.

[37] Importantly, the circumstances under which the complainant came to make her recanting statement are relevant. The complainant, while she was in peace and quiet in her room suffering from a headache, was approached by her aunt. The complainant's aunt enquired from her if it was indeed the appellant who raped her. When the complainant confirmed that it was the appellant who raped her, her aunt persisted with the enquiry. This is how the recanting statement came about. In my view, had the complainant been haunted by her guilty conscience and always wanted to tell the truth, it is improbable that she would not have confirmed to her aunt upon her first enquiry that she was indeed not raped by the appellant. The persistence on the part of the complainant's aunt with the enquiry, in my view, amounted to her bringing pressure to bear on the complainant.

[38] It should be remembered that the approach by the complainant's aunt was preceded by a meeting between the appellant and the department, wherein the appellant was told to apologise to the complainant through the VOD before he could be considered for parole, which process the appellant outrightly rejected to participate in. Further, when the complainant was taken to apologise to the appellant, she was taken by a group of family members, although the number of family members was not specified nor were the names of the persons who accompanied the complainant. The question which has to be asked is why did the complainant have to be accompanied by a group of family members? If this was not meant to bring pressure to bear on the complainant and to ensure that she had carried the wishes of her family, was it not sufficient if she was accompanied by her mother? Put differently, if the complainant wanted to genuinely apologise to the appellant, was it not enough if she was accompanied only by her mother?

[39] The remarks by the trial court in its ruling answer these questions. The family dynamics and the nuances to which the trial court referred in its ruling clearly played a role in this case. The circumstances under which the complainant came to recant her evidence are not consistent with those of a person who wanted to offload their guilty conscience. Instead, they are demonstrative of a person who has been subtly pressured to recant her evidence. Even the very conduct of the complainant when she led her further evidence is not consistent with that of a person who wanted to take the trial court into her confidence by telling the truth. The poor quality of the

further evidence which the complainant led is a testament to this fact. The trial court, being steeped in the atmosphere of the trial, pertinently remarked about the complainant's demeanour and this court need to say no more.

[40] In my view, the detailed nature of the complainant's evidence which she led in the main trial showed that she had personal knowledge about the events, as opposed to the sketchy evidence which she adduced during further evidence, which left this court with a distinct impression that the complainant was schooled in relation to what to say.

[411 Additionally, K[...] was never mentioned as having been present at the S[...] homestead or in the near vicinity on 14 January 2016.

[42] Pertaining to Ms Anastasiou-Krause's contention that the complainant never volunteered the report about the rape incident but that she was probed by her mother, it is trite that a first report is not a mandatory requirement for the State's case to succeed.³The trial court was alive to this fact. This court is satisfied that even if there was no voluntary report of the rape by the complainant, on the holistic consideration of the evidence presented by the respondent, the appellant's guilt was proved beyond reasonable doubt.

[431 In any event, it was never the appellant's case that the complainant's mother schooled her to falsely implicate the appellant. Any reasonable parent who saw her child limping would have been expected not only to enquire but also to probe and investigate the circumstances which led to her child limping.

Whether the contradictions in the complainant's evidence rendered it unreliable [44] It was contended on behalf of the appellant that the contradictions in the complainant's evidence rendered her evidence unreliable and could not possibly have sustained the appellant's conviction. The contradictions concerned related to:

³ S v Vilakazi [2016] ZASCA 103; 2016 (2) SACR 365 (SCA) paras 14 - 16; S v McKenzie 2025 (1) SACR 568 (WCC) para 11 .

- (a) Whether the complainant was raped behind her homestead or whether she was dragged into the forest, as Dr Ndlela testified.
- (b) Whether the complainant sustained any bruises on her buttocks or if she sustained no injuries, as Dr Ndlela testified.
- (c) Whether the appellant was raped both vaginally and anally, as testified by Dr Ndlela or only vaginally, as testified by the complainant.

[45] It is trite that contradictions per se do not lead to the rejection of a witness' evidence. The contradictions may simply be indicative of an error.⁴ The trial court was alive to these contradictions. In acknowledging them, it stated that the complainant's evidence was not without a blemish. It specifically dealt with these contradictions in its judgment⁶ and it is unnecessary for this court to repeat what the trial court stated. Suffice it to say that the trial court was satisfied that the truth had been told and accepted the evidence presented by the respondent.

[46] When all of this evidence is considered, along with the appellant's alibi, I am unable to fault the trial court's findings. Apart from the fact that the complainant disputed N[...] and Mr N[...] 's presence at the S[...] homestead on 14 January 2016, even if they were present and went along with the appellant, they parted ways with the appellant by the Busi river. By the time they came back from the Mchunu store, the appellant was already being confronted about the rape of the complainant. To complicate matters for the appellant, his alibi witness did not even know the date of the rape incident. I agree with the trial court that Mr N[...] was coached in relation to what to say. This was demonstrated by the fact that he started testifying without being led and gave the same details with regard to the time of their departure to the stores.

[47] Considering the totality of the evidence, as adduced in the main trial and during further evidence, the appellant's appeal must fail.

Order

[48] In the result, I make the following order:

⁴ S v Mkohle 1990 (1) SACR 95 (A) at 98f - g. ⁶ The record at pages 168 -169.

- 1 . The appellant's appeal against his conviction is dismissed.
2. The appellant's conviction is confirmed.

CHITHI J

SHOBA AJ

APPEARANCES

For the Appellant: Ms Anastasiou-Krause

Instructed by: Legal Aid South Africa

Pietermaritzburg Local Office
187 Hoosen Haffeejee Street
Pietermaritzburg

For the Respondent: Mr S I Sokhela

Instructed by :

Deputy Director of Public Prosecutions
286 Pietermaritz Street
Pietermaritzburg
Tel: 033 392 8700

Date of hearing: 7 November 2025

Date of judgment: 23 January 2026