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

CASE NO: AR86/24

In the matter between:

B[...] N[...]

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Scottburgh Regional Court (sitting as Court of first instance):

1. The appellants' appeals against their convictions and sentences are upheld.
2. The convictions and sentences are set aside.

JUDGMENT

Nicholson AJ (Seegobin J concurring):

[1] On 15 November 2023, the appellant was convicted in the Scottburgh Regional Court for: rape¹ and sexual assault². As a result, he was sentenced to life and five-years' direct imprisonment, respectively. The sentence of five years imprisonment automatically runs concurrently with the sentence of life imprisonment. By virtue of the sentence of life imprisonment, the appellant enjoys an automatic right of appeal in terms of s 309(1) of the Criminal Procedure Act 51 of 1977 (the 'CPA') against both sentence and conviction.

[2] In her heads of argument, Ms *Fareed* advances various reasons to uphold the appeal and set aside the conviction. She contends that:

- (a) The complainant's testimony, being that of a single witness, is unreliable. In support of this contention, Ms *Fareed* notes that the complainant was unable to recall the specific date and month on which the alleged incident occurred.
- (b) There was a considerable delay of five years between the alleged incident and the eventual reporting of the matter.
- (c) The complainant's evidence lacked clarity and was not satisfactory in all material respects.
- (d) The trial court did not approach the complainant's testimony with the necessary level of caution required when dealing with the evidence of a single witness under these circumstances.

¹ In contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of s 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

² In contravention of s 5(1) Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[3] It is trite that a court of appeal will refrain from interfering with the decisions of a trial court unless there is a clear indication that the trial court has misdirected itself, either in its findings or in its application of the law. The appellate court's role is not to substitute its own view unless such misdirection is evident. For an appeal to succeed, the appellant must satisfy this court on sufficient grounds that the trial court erred in accepting the State's evidence and in rejecting the appellant's version as not being 'reasonably possibly true'. This requires demonstration of a material misdirection or error in the trial court's reasoning or assessment of the evidence. There are long-standing principles that guide appeals against findings of fact. Unless the trial court's decision is shown to be demonstrably and materially incorrect, its findings are presumed to be correct. These findings will only be set aside if the record of evidence reveals them to be clearly wrong.³

[4] In exercising its appellate jurisdiction, a court is tasked with meticulously assessing the evidence presented by the State's witnesses, as well as the evidence led on behalf of the appellant. This evaluation is conducted in the context of the entire body of evidence submitted during trial. The court must then juxtapose its own understanding of the evidence with the factual determinations made by the trial court.

[5] The process requires a careful scrutiny of the record to ascertain whether the trial court considered all relevant evidence and whether it weighed that evidence appropriately. The appellate court must also consider whether the trial court applied the law and the relevant legal principles to the facts in a correct manner when reaching its decision. Ultimately, it is necessary for this court to determine whether the appellant's conviction was proven beyond reasonable doubt.

Evidence for prosecution

³ *S v Hadebe and Others* [1997] ZASCA 86; 1997 (2) SACR 641 (SCA) at 645e-f. See also *S v Monyane and Others* [2006] ZASCA 113; 2008 (1) SACR 543 (SCA) para 15; *S v Francis* 1991 (1) SACR 198 (A) at 204.

[6] The appellant's conviction follows the testimony of four witnesses for the State: the complainant; her grandmother, Ms BK N[...] ('MaBhengu'); the complainant's mother, Ms Z L N[...]; and Dr Kirstan, the medical doctor that examined the complainant and completed the J88 report which documented her findings.

[7] The complainant, who was 13 years old at the time of her testimony;⁴ testified through an intermediary in terms of s 170A of the Criminal Law Amendment Act 105 of 1997 ('Criminal Law Amendment Act').⁵ She testified that when she was six years old and visited her grandmother, MaBhengu, she played outside with her cousin T[...]⁶ near an old vehicle. At one point, she asked T[...] to fetch her some water from the kitchen. When T[...] returned with the water, her uncle B[...] N[...] (the appellant herein), returned from work and approached them. He told T[...] to return the water to the kitchen and when T[...] was away, the appellant picked up the complainant and carried her to his room.

[8] The appellant directed the complainant to lean against the wall with her back, after which he inserted his penis into her vagina. Shortly thereafter, T[...] knocked on the door along with other children, calling for the complainant to join them outside. The appellant instructed the complainant to get dressed while he did the same, handed her a broom, and told her to pretend she was sweeping. He then unlocked the door, at which point the complainant left the room. The complainant stated that she was initially wearing a jumpsuit, which the appellant removed prior to the incident.

[9] The complainant's testimony about the rape is brief and recorded hereunder, as follows:

'10 COMPLAINANT: I was at my grandmother's house, MaBhengu. We were playing with T[...] next to an old vehicle that was no longer being used. As we were playing by

⁴ See complainant's birth certificate at 48 of the record.

⁵ Section 170A(1) of the Criminal Law Amendment Act 135 of 1991 (as amended), provides:

'(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary.'

⁶ T[...] is also referred to as 'T[...]', indexed at 85, line 13, and was four years old at the time of this incident.

the car, I then asked T[...] to get water for me. Then Uncle B[...] N[...] approached. He was coming back from work. When T[...] had come back with the water, Uncle B[...] N[...] said he should take it back to the kitchen. Then he picked me up and took me to his room. When we got to his room, I was wearing a jumpsuit, and he undressed me. Then he made me lean against the wall with my back. Then he inserted his penis into my vagina.

20 Then T[...] knocked on the door with other children and called out for me to come and play with them. Then he said I should dress up and he also dressed himself up. He gave me a broom and said I should act as though I was sweeping. When we were both dressed, he gave me the broom, told me to sweep and he unlocked the door. Then I ran away and that is how I got out.⁷

[10] The complainant's evidence regarding the sexual assault is very brief, and therefore, appropriate to record her verbatim testimony hereunder, as follows:

'10...

PROSECUTOR: K[...] please tell us then about the incident that happened last year on 3 October 2022.

COMPLAINANT: My mother and I were busy washing, and we ran out of water. Then I went to my uncle's house to rinse the clothes.

PROSECUTOR: Did you go to Uncle Neville's house or you went next to Uncle Neville's house?

COMPLAINANT: I went by Uncle Neville's house. When we were finished rinsing clothes, my mum left. She was rushing to a meeting. My mum left; I stayed behind and rinsed my younger sister's takkies. When I was finished, I went back home. Then Uncle B[...] N[...] approached me and he grabbed me by my thighs. Then he said I should go with him to his room to have sexual intercourse, and he will give me R2.00 then A[...] approached and said we should go and play by the tyre. That is how I left and I never went back to Uncle B[...] N[...].

PROSECUTOR: And did you tell anyone about what Uncle B[...] N[...] did and said to you on this particular day?

COMPLAINANT: No.

PROSECUTOR: When you were finished – you said you went to play with A[...], right?

⁷ See indexed bundle at 85.

COMPLAINANT: Yes

PROSECUTOR: When you were finished playing with A[...], what did you do?

COMPLAINANT: I went back home and asked to see my grandmother, MaBhengu.

PROSECUTOR: You said you went to tell your grandmother, MaBhengu. What did you tell her?

COMPLAINANT: I told her that Uncle B[...] N[...] raped me, and he tried to rape me again.⁸

[11] In cross examination, the complainant stated that after informing MaBhengu about the rape and sexual assault, she informed her aunt Zethu, who then told her mother.

[12] Regarding the rape count, during cross-examination, the complainant stated that the incident took place during the day and that she stayed home from school due to illness. At the time, T[...] was also four years old, and the appellant was living with MaBhengu and others, but in an outbuilding near the gate, which was not far from the main house and separated only by a cattle creek.

[13] When the appellant picked her up and took her to his house, T[...] was at MA[...]’s house watching TV. A[...] lives at MaMbutho’s house and when the incident took place, T[...] and A[...] were at MaMbutho’s house. Further, the complainant was at MaBhengu’s house playing with T[...] and A[...] before she was raped by the appellant. She stated that she was playing with the same T[...] who was watching television at MaMbutho’s residence. She also stated that T[...] went to fetch water for her, and that the appellant had likewise requested water from the tap prior to taking her into his room. She cannot remember if she cried or screamed when the appellant picked her up.

[14] In cross examination, regarding the sexual assault, the complainant stated that the appellant brushed her thighs, which she later confirmed.⁹

⁸ See indexed bundle at 88 to 89.

⁹ Ibid at 98, lines 2 to 13.

[15] She indicated that she informed MaBhengu of the incident, but MaBhengu was uncertain about the appropriate course of action. She also confirmed that MaShezi¹⁰ conducted an examination of her vagina.

[16] In placing his version to the complainant, the appellant averred that he was leaving Mbongeni's house when he encountered the complainant. He asked whether she had passed at school and requested to borrow a scrubbing brush. He claims he neither offered her R2 nor requested sexual intercourse, further denying any accusation of raping the complainant.

[17] The State called Bazondani Khanyisile N[...] ('Mrs N[...] / MaShezi') as the next witness. Mrs N[...] testified that she is 73 years old and is the grandmother of the complainant. She stated that the appellant is also a member of their family.

[18] According to Mrs N[...], the events in question occurred in October. On that day, she was at home, noting that she maintains two residences. She recounted that a child came to fetch her, relaying that she should go to her aunt's house because an incident had occurred. Upon her arrival at the house, she found the appellant, the complainant, and the complainant's mother present.

[19] Mrs N[...] explained that it was then she learned appellant had allegedly sexually abused the complainant. The news left her in shock. She further testified that she took a red mat and went outside with the complainant to conduct an examination. During this examination, Mrs N[...] observed that the complainant was no longer a virgin.

[20] After returning indoors, Mrs N[...] stated that the appellant pleaded with her not to open a criminal case against him or have him arrested. He promised that he would provide a cow as compensation for what had transpired.

[21] With respect to her evidence in chief concerning rape and sexual assault, Mrs N[...]s evidence was very brief:

'10 ...

¹⁰ The complainant's grandfather's second wife

MRS N[...]: K[...] said that her uncle called and took

20 her to his room and brought her close to the bed. He then inserted his penis. When she felt pain, he instructed her not to tell anyone. And that he would pay R2.00 if she did not tell anyone. Then he tried to grab her a second time, and that was it.

PROSECUTOR: Did K[...] say exactly what happened the second time now when he tried but he was not successful?

MRS N[...]: K[...] said that the accused said they should go back and do again what they did the last time, and if she told on him, he will kill her.'

[22] In her evidence in chief, Mrs N[...] also stated that she is also referred to as MaShezi, and noted that the appellant continued to deny both the allegations of rape and sexual assault when they all confronted him.

[23] During cross-examination, Mrs N[...] testified that the appellant brought her closer to his bed. She did not provide specific details, stating only that the appellant moved her closer, and that when she felt his penis near her vagina, she experienced pain.

[24] The next witness to testify for the prosecution was, Ms Z[...] L[...] N[...] ('Ms ZL N[...]'). She testified that she is the complainant's mother. She explained that she knows the appellant as her brother, although they do not share the same mother or father. Despite this, she stated that she grew up with the appellant and regards him as her brother.

[25] She testified further that on 3 October 2022, at approximately 15h00, she received a telephone call from her sister, Zethu. During this conversation, Zethu informed her that the complainant was on her way home and advised her to listen to the complainant's statement.

[26] When the complainant arrived, she explained that after she (Ms ZL N[...]) left the complainant to wash clothes, the complainant remained to wash her sister's takkies. The appellant returned home and held her thighs, and asked the complainant to go to his room, and offered her R2 to have sexual intercourse with her. At that point, G[...], also known as A[...] and MA[...], approached her and

invited her to play. The complainant indicated that she responded that she would first hang the takkies before joining A[...].

[27] The complainant and her mother then proceeded to MaShezi's home. Upon arrival, Ms ZL N[...] that the appellant had allegedly grabbed the complainant's thighs and attempted to take her to his room and thereafter proceeded to the residence of MaShezi.

[28] At the home of MaShezi, they met Ms ZL N[...]’s aunt, K[...], and her older brother, Ms ZL N[...] summoned the appellant to address the allegation. In this gathering, they confronted the appellant with what the complainant had reported. The appellant, however, denied the accusation.

[29] Ms ZL N[...] stated that although the appellant denied the rape, the complainant stood by her account, recalling that he returned from work while she and other children played near a discarded fridge.¹¹ She claimed the appellant suggested discussing the matter rather than opening a case against him. Ms ZL N[...] testified that both her mother and aunt examined the complainant and determined she was no longer a virgin. Under cross-examination, the appellant denied offering to buy a cow and denied both rape and the sexual assault.

[30] With regard to the rape, Ms ZL N[...] testified that the complainant told her that:

‘He picked her up and took her to his room. It was a rondavel. She said that the accused was wearing navy pants coming from work. He lowered his pants and instructed her to unzip her jumpsuit, pressed her against the wall, and inserted his penis into her vagina. She said that they were disturbed by a knock. It was a child, T[...] who was knocking, and the accused said K[...] should dress up and act as though she was sweeping. She said that is how she ran out of the room and got away.’

Dr Kirstan

[31] The next witness for the State was Dr Kirstan who provided expert testimony regarding the gynaecological examination of the complainant. During

¹¹ See indexed bundle at 112, lines 10-14.

her examination, Dr Kirstan observed that all findings were within normal limits, with the exception that the hymen could not be seen. Based on her clinical assessment, she concluded that the findings were suggestive of a possible sexual assault. The results of this examination were formally documented in the J88 medical report, which Dr Kirstan completed, and which was subsequently handed in as exhibit B. The J88¹² was completed on 3 October 2022 at 21h15.

[32] The findings documented in the J88 are as follows:

(a) At part II, paragraph 5 under the heading 'History Of The Alleged Assault and/or Rape', Dr Kirsten recorded the following:

'Patient reports that she was sexually assaulted by her uncle $\pm$ 6 years ago when he told her to go to his house. He threatened her so she never told anyone. Yesterday, when her mother was gone for a meeting, the uncle came to her house and was touching her thighs and told her to go to his house, but some other children came and the patient ran away.'

(b) At part II, section F, under the heading 'clinical findings', the following was recorded: 'Nil other finding'.

(c) At part II, section G.4, under the heading 'Gynaecological Examination', at paragraph 11, it was noted: 'hymen is not seen'.

(d) Under 'Conclusions'¹³ the following is stated: 'History suggestive of sexual assault possibly. However delayed presentation for examination'.

Defence case

[33] With respect to the charge of rape, allegedly committed in 2017, the appellant denied the incident in its entirety. He further denied the allegations that he touched or brushed the complainant's thighs in October 2023.

[34] At the time of his testimony, the appellant stated that he was 52 years old. He stated further that he could not recall what transpired in 2017. He described the layout of the property, noting that there was an old fridge by the tap. According to him, if a person stands by the fridge, they are visible to anyone in the kitchen. He added that the door to his room faces the area where the

¹² See indexed bundle at 50-55.

¹³ See para K of the J88.

children typically play, and if he had picked up the complainant, anyone present in the yard would have seen him. He described his room as a rondavel situated next to the road, making it visible to passersby. He further stated that, in 2017, he did not own a broom or a bed, as he was sleeping on the floor at that time.

[35] The appellant testified that, in 2022, he saw the complainant while he was on his way to see a friend named Mbongeni to discuss soccer. On his return, he encountered the complainant walking down the road, noting that schools were closed and other children were discussing their results. He enquired whether she had passed, to which she responded that she had not yet received her report. She was holding a brown basin, he asked her to lend him the scrubbing brush, which she said belonged to her mother. He told her that if she returns with it, she could leave it by the door since he would not be home. He then proceeded to Mbongeni's home.

[36] He was later called to MaShezi's home. Upon his arrival the appellant encountered Z[...] L[...] N[...] and MaBhengu, who informed him that the complainant had alleged that he previously had sexual intercourse with her and intended to do so again. The appellant maintained that he was unaware of these allegations and consistently denied them. He further recounted that the complainant's mother expressed a desire for him to be imprisoned and began shouting insults at him. The appellant admitted that he could not recall whether he admitted to the allegations but remembered feeling extremely pressured by everyone present in the room.

[37] During cross-examination, the appellant stated that he was surprised by the accusations, emphasising his previously good relationship with the complainant's family. He reiterated that, although he could not recall the events of 2017, children used to play near the fridge by his house. He denied that T[...] ever swept near his house or that the complainant ever entered his house. He confirmed that he did not possess a broom in 2017, only acquiring one in 2018 after gaining employment. The appellant also stated that he typically did not close

his room door, which was adjacent to the road and therefore visible to anyone passing by.

[38] The appellant explained that he was alone at the time and that many people were questioning him. He felt shocked by the situation and noted that this would have been his first arrest. He was uncertain whether he offered to pay with a cow or not. He acknowledged that it is a common practice in the community to compensate with a cow if a female is found not to be a virgin.

The heads of argument

[39] Before addressing the evidence, it is necessary to remark on the quality of the heads of argument before this court. Appearing in this court, the appellant was represented by Ms *Fareed* of Legal Aid, while the respondent was represented by Mr *Kathi* from the office of the Director of Public Prosecutions, KwaZulu-Natal. Although both Ms *Fareed* and Mr *Kathi* submitted heads of argument, these were unfortunately of limited assistance.

[40] In an article entitled, 'Heads of argument in courts of appeal' authored by Deputy President of the Supreme Court of Appeal ('SCA'), LTC Harms,¹⁴ Justice Harms opined:

'The purpose of heads of argument is to convince the court of appeal that the court below has either erred or was correct. This means that the judgment below has to be addressed. Too often counsel simply ignore that judgment and reargue the case, quite regularly by recycling the heads used in the trial court. This approach is not only disrespectful towards the court of first instance – it is also unhelpful and misses the point that appeals are not re-hearings.'

[41] In *S v Ntuli*,¹⁵ the court opined that:

'[16] Unless counsel properly represents his or her client, the right to a fair trial and the right to a fair appeal may be negated. At issue is simply the basic proposition that the minimum required of counsel is to prepare and present a proper argument on behalf of his or her client. Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage fairly with the evidence

¹⁴ Advocate Magazine, December 2009 ed.

¹⁵ *S v Ntuli* 2003 (4) SA 258 (W).

and to advance submissions in relation thereto. They ought to deal with the case law. Where this is not done and the work is left to the Judges, justice cannot be seen to be done. Accordingly, it is essential that those who have the privilege of appearing in the Superior Courts do their duty scrupulously in this regard. In *S v Steyn* 2001 (1) SA 1146 (CC) para [24] at 1160C - 1161A (2001 (1) SACR 25 at 38e - 39c; 2001 (1) BCLR 52) at para [24], the Constitutional Court stressed the importance of oral argument in the context of criminal appeals. The same holds true for written argument.

[17] This judgement is intended to provide guidance for the conduct of criminal appeals in the future. Where inadequate heads of argument are filed, a Court may adopt a variety of remedial measures, either on their own or in combination with each other. Thus, a Court may direct that proper heads of argument be filed. The Court may postpone the hearing of the appeal until proper heads of argument are filed. Legal practitioners who do not fulfil their duty in this regard may be deprived of the right to charge any fee. Finally, the matter may be referred to an appropriate authority for the institution of disciplinary proceedings.’

[42] While the heads of argument of both the appellant and the respondent were found to be lacking in certain respects, it is apposite to reflect on the importance of quality legal aid. In a keynote¹⁶ address entitled, ‘Free Legal Aid Cannot Be Poor Legal Aid’, Justice Vikram Nath, of the India Supreme Court, highlighted significant deficiencies in the current legal aid system in India, particularly regarding its support for pre-trials. He observed that the existing legal framework often leads to the continued detention of individuals who are not legally required to remain in custody, reflecting a systemic failure to uphold the rights of those awaiting trial.

[43] In his address, Justice Nath called for immediate and comprehensive reforms to the legal aid system, with a particular focus on improving the processes and protections associated with pre-trial detention. He further contended that effective legal aid cannot be achieved through isolated efforts. Instead, he argued that all aspects of the legal aid mechanism must operate in a coordinated and integrated manner to ensure the highest level of effectiveness.

¹⁶ Justice Vikram Nath keynote address at a NALSAR University event organised by the Square Circle Clinic / <https://www.livelaw.in/amp/top-stories/free-legal-aid-cannot-be-poor-legal-aid-justice-vikram-nath-309216>.

According to Justice Nath, competent legal representation is essential for safeguarding the right to a fair trial, and every component of the system must contribute meaningfully to this objective.

[44] Justice Nath asserts that the legal aid system in India is failing to meet constitutional promises of liberty and dignity, primarily due to a lack of awareness and trust. He asserts that providing a lawyer is not enough; rather, the representation must be effective. He emphasised that legal aid must be provided in spirit, not just in form, and that legal professionals should address the specific vulnerabilities of groups like women.

[45] The shortcomings in the appellant's heads of argument serve to underscore the critical importance of providing not only accessible, but also effective, legal aid services. Legal aid must go beyond mere availability to ensure robust representation, especially in matters concerning pretrial detention, an issue of equal significance when it comes to appeal proceedings. Meaningful legal assistance is especially vital for vulnerable groups, including women, who may face additional barriers within the justice system.

[46] In the context of appellate proceedings, heads of argument play a pivotal role in persuading the court. This is achieved not by simply restating arguments made at trial or recycling documents from previous stages, but by engaging directly and substantively with the judgment of the lower court. Effective heads of argument should critically analyse the decision under appeal, demonstrating where the lower court may have erred or, conversely, where it acted correctly according to the law and facts.

[47] Adequate legal representation is the cornerstone of both a fair trial and a fair appeal. Counsel are obliged to prepare clear, detailed, and comprehensive arguments, addressing all relevant evidence and applicable case law and legal principles. The principle that justice must not only be done, but must also be seen to be done, is upheld through diligent preparation and advocacy.

[48] When counsel submit inadequate heads of argument, the courts are empowered to take remedial action. These measures may include directing counsel to revise and resubmit their arguments, postponing the hearing, withholding fees from practitioners who fail in their duties, or referring such matters for disciplinary review. These mechanisms exist to ensure that the integrity of the legal process is maintained and that all parties receive the fair hearing to which they are entitled.

[49] It is appropriate at this stage to note that, on the date this matter was before the court, three appeals were set down for hearing. In each of these appeals, the heads of argument were so deficient that they provided no assistance to the court, resulting in their adjournment sine die. While the heads of argument in the present case were also substandard, the court determined that, in the interest of justice, it was appropriate to proceed with hearing and considering this appeal, nonetheless.

[50] In her heads of argument, Ms *Fareed* made minimal reference to the record and cited various decisions on the cautionary rule regarding single witnesses. However, these citations were not effectively connecting these principles to the judgment or pertinent facts of the case. Her heads of argument failed to address the quality and weight of the evidence presented by the State, nor does she give due consideration to the appellant's version, which received only limited attention from the court a quo.

[51] Ms *Fareed* sets out brief reasons for seeking to overturn the conviction in her heads of argument, with limited engagement with the evidence and the judgment. She argues that the complainant's testimony is unreliable due to her being a single witness, citing the complainant's inability to recall the specific date and month of the alleged incident and the considerable five-year delay in reporting the matter. Ms *Fareed* asserts that the testimony was not 'clear and satisfactory on all material aspects' and contends that it was not approached with sufficient caution.

[52] It is instructive to mention that her submissions as they stand, conflict with the provisions of the Sexual Offences Act 32 of 2007 ('the Sexual Offences Act')¹⁷ and the CPA. Specifically, in criminal proceedings concerning alleged sexual offences, courts are prohibited from drawing adverse inferences solely based on any delay between the alleged commission of the offence and its subsequent reporting. Additionally, irrespective of other laws, courts must not approach a complainant's evidence in such matters with caution merely because of the nature of the offence. Furthermore, the CPA¹⁸ allows for a conviction on the sole evidence of a competent witness.

[53] This point was buttressed in *Phogole v S*,¹⁹ where the SCA held:

'[21] As regards the delay in reporting the rape, counsel for the appellant did not, correctly so in my view, pursue this argument. This is because the offence of rape has no prescription period. Furthermore, s 59 of the Act is specific that no inference can be drawn from the delay between the commission and the reporting of the rape. Therefore, the delay in reporting the rape could not be decisive in the adjudication of the veracity of the allegation of the complainant.'

[54] In the absence of substantive engagement with both the evidence and the judgment, the appellant's heads of argument offer limited assistance to the court. In this instance the contentions present are legally unsound. It is incumbent upon counsel to address the evidence and judgment comprehensively; merely restating legal principles without illustrating their relevance to the facts falls short of what is required and does not assist the court.

¹⁷ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Section 58 reads as follows: 'Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements.'

Section 59 reads as follows: 'In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.'

Section 60 reads as follows: 'Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.'

¹⁸ Section 208 of the CPA reads as follows: 'An accused may be convicted of any offence on the single evidence of any competent witness.'

¹⁹ *Phogole v S* [2025] ZASCA 54 ('*Phogole*').

[55] Representing the respondent, Mr *Kathi*'s heads of argument are confined to addressing the points raised by the appellant. His submissions lack citations of pertinent case law and engage minimally with both the record and the impugned judgment.

[56] The appellant's conviction was based solely on the complainant's testimony, who was a minor at both the time of the incident and when giving evidence. The respondent insists her account was credible and met the legal requirements. Although the complainant could not recall the exact date due to the long delay between the alleged event in 2017 and its report in 2022, her reporting of the rape that occurred in 2017, were prompted by the sexual assault in October 2022.

[57] Regarding the examination by the two grandmothers, the respondent argues there was no risk of injury, noting Mrs BK N[...] conducted only a visual inspection, and subsequent medical checks found no recent injuries. Dr Kirstan's findings, such as the absence of a visible hymen, supported the claim that virginity had been lost prior to examination.

[58] Testimony from the complainant's mother and Mrs N[...] indicated the appellant offered a cow as compensation to avoid arrest; his vague responses failed to explain why this would be fabricated, supporting the decision to reject his version. The offer of compensation is cited as corroboration, leading to the conclusion that the Magistrate correctly found guilt beyond reasonable doubt.

[59] As previously stated, Mr *Kathi*'s submissions, apart from being brief, did not provide references to relevant case law and demonstrated limited engagement with both the record and the impugned judgment. The manner in which the matter was approached suggests that Mr *Kathi* did not fully support the conviction and treated the process as a formality.

[60] If this observation holds true, it would be prudent for Mr *Kathi* and other prosecutors to consider that despite the legal process being inherently adversarial, public prosecutors must consistently maintain impartiality. A public

prosecutor's sole duty is to present facts that help the court determine the truth, not to seek convictions at any cost. They represent both the interests of the State and the rights of the accused, ensuring innocent people are not wrongfully convicted. Prosecutors must disclose facts, even those unfavourable to their case, when required, uphold honesty and integrity, and ensure fair treatment for all, as any failure erodes public trust in the legal system. When commencing criminal proceedings, prosecutors should do so only when there is a reasonable likelihood of success. It is imperative that all pertinent facts supporting the prosecution are presented to the court. Prosecutors are obligated to assist the court in achieving a fair outcome. When appropriate, they are required to highlight significant deficiencies or irregularities, even if these have not been identified in the grounds of appeal, the appellants' written arguments, or by the court itself.²⁰

Legal principles

[61] Appellate courts defer to trial courts' findings of fact, in the absence of a demonstrable and material misdirection, presuming such findings are correct unless the evidence plainly contradicts them. The main issue is whether all trial evidence proves guilt beyond reasonable doubt. While analysing evidence in detail is necessary, it is equally important to consider the entire body of evidence collectively. A critical review of each piece is essential, but one must step back to view the complete picture to avoid losing overall context²¹.

Single child witness and sexual offences

[62] The conviction of the appellant followed the evidence of a single child witness. In addition to this, two other witnesses testified pursuant to the provisions of the Sexual Offences Act. This Act establishes an exception to the general rule that prohibits self-corroboration, also known as the inadmissibility of previous consistent statements.

[63] Section 208 of the CPA reads as follows:

²⁰ *R v De Kock* 1914 EDL 348 at 354; *R v Riekert* 1954 (4) SA 254 (S.W.A.) at 261F; *S v Takaendesa* 1972 (4) SA 72 (R., A.D.) at 74F-G; *S v Chogugudza* 1996 (1) SACR 477 (ZS) at 487h.

²¹ *S v Hadebe and Others* [1997] ZASCA 86; 1998 (1) SACR 422 (SCA) at 426 A-J.

‘An accused may be convicted of any offence on the single evidence of any competent witness.’

[64] Although the word ‘credible’ is not included in s 208 of the CPA, it remains essential that the testimony of a single witness is reliable. Credibility is subject to variation and cannot be assessed through a fixed standard; instead, judges evaluate all evidence, considering any imperfections, to ascertain the truth. The cautionary rule serves as an aid in judicial decision-making but should not supplant common sense, nor does it assure success on appeal based solely on minor criticisms. The State is not required to address every conceivable inference, nor are courts obliged to speculate regarding incriminating conduct²².

[65] In *S v Mahlangu and Another*,²³ the SCA held:

‘[21]The court can base its finding on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration. The said corroboration need not necessarily link the accused to the crime.’

[66] The phrase that the testimony of a single witness must be ‘substantially satisfactory in every material respect’ or its variants, is frequently cited in both judgements and heads of arguments. Due to its inherent ambiguity, both the defence and prosecution often invoke this phrase to support their respective positions, as it can be interpreted to either facilitate or hinder securing a conviction, depending on the perspective adopted.

[67] The defence typically focuses on the latter portion of the statement, namely, ‘in every material respect’. By emphasising this aspect, the defence argues that the evidence must withstand scrutiny in all critical areas. This approach allows the defence to challenge the reliability of the witness’s testimony by identifying any deficiencies or inconsistencies, thereby casting doubt on whether the standard has truly been met. Conversely, the State places emphasis on the first part of the statement, ‘substantially satisfactory’. From this standpoint,

²² *S v Sauls and Others* 1981 (3) SA 172 (A) at 180.

²³ *S v Mahlangu and Another* [2011] ZASCA 64; 2011 (2) SACR 164 (SCA) para 21.

the State contends that the witness's evidence needs only demonstrate substantial compliance with the requirements of reliability and adequacy. Rather than insisting on perfection in every detail, the State usually argues that the evidence should be sufficiently satisfactory overall to support a conviction.

[68] Owing to its inherent ambiguity, the legal principle is subject to individual interpretation and may lead to differing conclusions when applied to the same set of facts.

[69] A case in point is the recent decision of *Phogole v S*,²⁴ writing for the majority, Justice Mokgohloa observed, 'I find, undoubtedly so, that the trial court was correct to accept the evidence of the complainant as satisfactory in all material respects to justify a conviction.'²⁵ However, in his minority judgement, Justice T Makgoka observed,²⁶ '...Instead, the trial court slavishly accepted the evidence of the State witnesses as satisfactory without any critical analysis. As I have demonstrated, the complainant's evidence was riddled with inconsistencies, improbabilities and material contradictions.'²⁷

[70] It is appropriate at this point to note that in the present matter, the appellant relies on s 208 of the CPA to assert that 'the evidence of a single witness must be clear and satisfactory on all material aspects for the evidence to be reliable.' Conversely, the respondent submits that 'the complainant's evidence was clear and satisfactory in all material respects as required by s 208 of the CPA.' These superficial submissions of the legal principle, without any engagement with the record and the impugned judgment, does not provide substantive guidance to the court.

[71] In *S v Jantjies*,²⁸ it was stated:

'[15] At issue in the appeal before us is whether the State has proved the appellant's guilt beyond reasonable doubt on the evidence presented before the trial

²⁴ *Phogole*.

²⁵ *Ibid* para 26.

²⁶ *Ibid* para 77.

²⁷ *Ibid*.

²⁸ *S v Jantjies* [2024] ZASCA 3.

court. There is conflicting evidence as to whether the appellant was with the complainant at the hotel when the incident occurred. The State's case is wholly dependent upon the testimony of the complainant. Section 208 of the CPA provides that an accused may be convicted of any offence on the evidence of a single competent witness. When assessing the credibility of a single witness, it is crucial to understand that there is no one-size-fits-all approach. The evidence presented by such a witness must undergo the same rigorous scrutiny as any other evidence. The trial court is tasked with meticulously evaluating the evidence, taking into account both its strong points and shortcomings. After this thorough examination, the court must then determine whether, despite potential flaws or inconsistencies in the testimony, it is convinced of the truthfulness of the witness's account. This careful and balanced evaluation is fundamental to ensuring a fair and just legal process.

[16] The court must assess the credibility and reliability of the complainant's evidence in light of all other evidence presented. It must weigh the potential risks associated with relying exclusively on the complainant's account as a single witness and seek corroborative evidence from other sources when available...' (Footnotes omitted)

[72] Section 208 of the CPA allows conviction on the testimony of a single credible witness if guilt is proven beyond reasonable doubt. The cautionary rule for single-witness cases is discretionary, depending on circumstances. If credibility is in doubt or risks exist, the court should look for corroboration and weigh it with the testimony to decide on conviction. A lack of credible testimony requires extra supporting evidence to meet the standard of proof.

[73] Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 states as follows:

'Court may not treat evidence of complainant with caution on account of nature of offence

Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.'

[74] Considering s 60, it is apparent that although the application of the cautionary rule remains subject to judicial discretion, a court may not invoke this

rule solely because the complainant's complaint pertains to a sexual offence. Notably though, s 60 neither expressly endorses nor prohibits the application of the cautionary rule in cases involving a single child witness.

[75] In *S v Jackson*,²⁹ the SCA opined that:

'In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.'

[76] In *Dyira*,³⁰ the court held that:

'[6] This leads to the argument of the insufficiency of the evidence to prove guilt beyond reasonable doubt. The onus was squarely on the State. It relied on the evidence of an 8-year-old little girl to prove (a) the commission of the offence of rape (b) by the appellant. In our law it is possible for an accused person to be convicted on the single evidence of a competent witness (s 208 of the Criminal Procedure Act 51 of 1977). The requirement in such a case is, as always, proof of guilt beyond reasonable doubt, and, to assist the courts in determining whether the onus is discharged, they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution (*R v Mokoena* 1956 (3) SA 81 (A) at 85, 86). This means that the courts must be alive to the danger of relying on the evidence of only one witness, because it cannot be checked against other evidence. Similarly, the courts have developed a cautionary rule which is to be applied to the evidence of small children (*R v Manda* 1951 (3) SA 158 (A) at 162E - 163E). The courts 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 (*S v Viveiros* [2000] 2 All SA 86 (SCA) para 2). Here, more

²⁹ *S v Jackson* 1998 (1) SACR 470 (SCA) at 476.

³⁰ *Dyira v S* [2009] ZAECGHC 34; 2010 (1) SACR 78 (ECG).

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 (Schmidt *Law of Evidence* 4-7).’

[77] Courts have been cautioned when hearing the evidence of a child in court may not fully grasp the significance of an oath or affirmation, though they can show intelligence, observation, and honesty. Sometimes, their evidence is clear and limited to what they understand, reducing risks of suggestibility. Courts should avoid rigidly requiring corroboration for such testimony but must remain cautious, as children’s accounts can be influenced by imagination and suggestibility. A child’s evidence should be assessed like that of accomplices or sexual assault complainants, so the court acknowledges the related risks. This awareness should be evident in the judgment’s reasoning, as a lack thereof may lead to overturning a conviction on appeal.³¹

[78] In *Maila v S*,³² the SCA held that:

‘[17] The evidence in this case was based on the evidence of a single witness, the complainant. Apart from being a single witness to the act of rape, the complainant was a girl child, aged 9 years at the time of the incident. For many years, the evidence of a child witness, particularly as a single witness, was treated with caution. This was because cases prior to the advent of the Constitution (which provides in s 9 for equality of all before the law) stated inter alia that a child witness could be manipulated to falsely implicate a particular person as the perpetrator (thereby substituting the accused person for the real perpetrator). To ensure that the evidence of a child witness can be relied upon as provided in s 208 of the CPA, this Court stated in *Woji v Santam Insurance Co Ltd*, that a court must be satisfied that their evidence is trustworthy. It noted factors which courts must take into account to come to the conclusion that the evidence is trustworthy, without creating a closed list. In this regard, the court held:

‘Trustworthiness... depends on factors such as the child’s power of observation, his power of recollection, and his power of narration on the specific matter to be testified. His capacity of observation will depend on whether he appears “intelligent enough to

³¹ *R v Manda* 1951 (3) SA 158 (A) at 163.

³² *Maila v S* [2023] ZASCA 3.

observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has the "capacity to understand the questions put, and to frame and express intelligent answers."

[18] This Court has, since *Woji*, cautioned against what is now commonly known as the double cautionary rule. It has stated that the double cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single child witness's evidence, tested through (in most cases, rigorous) cross-examination, should be 'trustworthy'. This is dependent on whether the child witness could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers. Furthermore, the child witness's evidence must not have changed dramatically, the essence of their allegations should still stand. Once this is the case, a court is bound to accept the evidence as satisfactory in all respects; having considered it against that of an accused person. 'Satisfactory in all respects' should not mean the evidence line-by-line. But, in the overall scheme of things, accepting the discrepancies that may have crept in, the evidence can be relied upon to decide upon the guilt of an accused person.'

[79] There is no statutory requirement for corroborating the evidence of a child, nor have the Courts adhered to an inflexible rule mandating corroboration in all cases. However, where the action is criminal but not civil, in which the burden of proof is onerous, there is cause to assess if the child's evidence should be corroborated. The question which the trial Court must ask itself is, whether the child's evidence is trustworthy. Trustworthiness depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated.³³

Issues for determination

[80] It is trite that, on appeal, this court is constrained by the contents of the appeal record.³⁴ The appellant's conviction was based on the testimony of a

³³ *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1029.

³⁴ *Dhlamini v Mayne* (1916) 37 NLR 173. See also *Minister of Police and Others v Gcelushe* [2014] ZAECHC 7 para 7.

single child witness. Accordingly, the task before this court is to assess the correctness of the conviction in light of that evidence. The issues for determination are:

- (a) Is the complainant testimony credible and reliable?
- (b) If not, is there sufficient corroboration to convict the appellant?
- (c) The probative value of the medical evidence presented.
- (d) Is the version of the appellant 'reasonably possibly true'?

Complainant's evidence

[81] The complainant stated that the appellant restrained her against the wall when he raped her.

[82] The complainant testified that, during the incident, the appellant, an adult male aged 46, inserted his penis into her vagina while restraining her against the wall. Upon evaluation of the biological and physical differences between a child of six years and an adult, this version of events appears highly improbable. The physical dynamics of such an act, given the respective ages and statures of the complainant and the appellant, would have rendered it extremely difficult, if not impossible, for the appellant to perform such an act in the position described.

[83] Furthermore, had this act occurred as alleged, the complainant would have experienced significant injury and pain. Such a degree of discomfort would reasonably be expected to prevent her from resuming normal activities, specifically, as she testified, continuing to play after the incident. The absence of any immediate physical distress or interruption to her play is inconsistent with the severe pain likely to have been caused by the alleged conduct. This raises serious questions about the plausibility and reliability of this aspect of the complainant's testimony.

[84] Further still, neither the complainant nor her mother provided testimony indicating that the complainant experienced and infection, bleeding or pain immediately following the incident.

[85] The absence of such testimony is significant, as it implies there were no reported observable physical symptoms directly after the alleged event. The lack of evidence from both the complainant and her mother is significant when assessing the credibility and reliability of the complainant's account. Considering the nature of the allegations, it would be reasonable to expect the mother to have noticed signs such as blood on the complainant's underwear, or complaints of pain while the complainant was walking, or noted some discomfort when the complainant walked.

[86] In the circumstances, I align myself with the comments of the SCA in *Maemu v S*,³⁵ where the SCA commented that:

'[12] First, regard must be had to the tender age of the complainant – she was 6 years old, while the appellant was an adult. One would have expected the child to have sustained noticeable injuries after having been raped. She instead went to buy Simba chips and apparently at her ease walked home without crying. Her sister did not notice any bleeding from her. They went about playing and M even let the 'secret' out to her. Even when the aunt returned home, after having been told by the sister what happened to M, she did not notice any irregularity, nor did she examine the child. The child complained that she suffered pain when the rape took place. The evidence, however, was that she did not sustain injury to her private parts, except perhaps the small cleft.

[13] Second, in regard to the cleft, the medical report does not corroborate the child's version. If anything the medical report shows inadequate proof of penetration at best the evidence of penetration is neutral. The doctor who testified was unable, to say whether the cleft was old or fresh, natural or inflicted. The child was taken to a doctor for examination about two months after the event. Her mother did not examine her private parts after she arrived home.'

[87] During the evidence in chief, the prosecutor posed a series of leading questions, which I record hereunder and will return to hereinbelow:

'10 ...

PROSECUTOR: *And how exactly were you on the wall? You said he made you lean against the wall, were you leaning on your back, on the side or on the front?*

20 COMPLAINANT: On my back.

³⁵ *Maemu v S* [2011] ZASCA 175.

PROSECUTOR: *And you were standing?*

COMPLAINANT: Yes

PROSECUTOR: And what position was he whilst you were leaning on your back on the wall

COMPLAINANT: he was also standing.

PROSECUTOR: *When he inserted his penis into your vagina, did you feel any pains?*

COMPLAINANT: Yes

PROSECUTOR: *Did you cry, or did you cry out for help?*

COMPLAINANT: Yes

PROSECUTOR: What exactly did you say when you were crying?

COMPLAINANT: I called out for my grandmother, MaBhengu.

PROSECUTOR: And did your uncle say anything to you when you were crying out for your grandmother, MaBhengu?

COMPLAINANT: Yes

PROSECUTOR: What did he say?

COMPLAINANT: He said he will kill me.

...

PROSECUTOR: Why did you not tell anyone?

COMPLAINANT: I still needed time.

PROSECUTOR: Time for what?

20 COMPLAINANT: To think clearly.'

[88] Accordingly, during her examination-in-chief, evidence material to these crimes were introduced into the record; that the complainant indicated that she experienced pain, cried out for help, and reported that the appellant threatened to kill her, only after the prosecutor posed leading questions, these are: 'When he inserted his penis into your Virgina did you feel any pains?' 'Did you cry, or did you cry out for help?', 'And did your uncle say anything to you when you were crying out for your grandmother, MaBhengu?' Additionally, in response to a leading question, she reiterated that the appellant threatened to kill her. However, at the conclusion of her evidence-in-chief, she explained that she did not report the incident immediately because she required time to consider her actions.

[89] In *S v Matiya*,³⁶ the court held:

'[16] Evidence-in-chief concerning contested issues that is put on record by means of leading questions will not in all cases be absolutely disregarded, and certainly not if there has been no objection to it. The effect of any such evidence has to be weighted contextually. It may, for example, be corroborated by evidence adduced by non-leading questions from other witnesses, or confirmed by objective or real evidence, or concessions made under cross-examination by witnesses from the opposing side in the litigation. It may even carry weight because of the way the answers adduced thereby fit in with the witness's other answers to appropriately framed questioning. It all depends.'

[90] It is trite that evidence presented during evidence-in-chief should primarily be elicited through open-ended questions, allowing the witness to provide unprompted and spontaneous responses. In contrast, cross-examination typically involves closed questions designed to test the reliability and consistency of the witness's testimony.

[91] In the present matter, the answers provided by the complainant to the prosecutor's leading questions during examination-in-chief significantly diminish the probative value of that evidence. Leading questions, by their nature, suggest the desired answer to the witness and may influence their responses, especially in cases involving young or vulnerable witnesses. As such, the responses given under these circumstances carry limited weight and cannot be regarded as reliable evidence upon which to base a conviction. The court must therefore approach such evidence with caution and refrain from considering it as sufficient proof to establish the appellant's guilt beyond reasonable doubt.

[92] During cross-examination, the complainant's account of the circumstances of the rape appeared to change from the evidence in chief. She testified that the incident occurred during the day while she remained at home from school due to illness. At that time, T[...] was four years old, and the appellant resided with MaBhengu and others. However, the appellant lived in an outbuilding situated near the gate, which was close to the main house and separated only by a cattle creek.

³⁶ *S v Matiya* [2021] ZAWCHC 254.

[93] The complainant further explained that, when the appellant picked her up and took her to his house, T[...] was at MA[...]’s house watching television. She noted that MA[...] lived at MaMbutho’s house, and at the time of the incident, both T[...] and MA[...] were present at MaMbutho’s residence. Additionally, she stated that prior to the alleged rape, she had been at MaBhengu’s house playing with T[...] and MA[...].

[94] Notably, in the complainant’s evidence in chief, she indicated that she was playing with the same T[...] who, in cross examination stated that she was watching television at MaMbutho’s residence at the time of the rape. This aspect of her testimony highlighted inconsistencies regarding the precise location and activities of the individuals involved during the events in question.

[95] She also stated that T[...] went to fetch water for her, and that the appellant had likewise requested water from the tap prior to taking her into his room. She cannot remember if she cried or screamed when the appellant picked her up.

[96] The complainant’s evidence regarding the sexual assault is very short and lacks detail. In her examination-in-chief, her account was inconsistent; she first claimed that the appellant grabbed her thighs but later said, he brushed her thighs. This inconsistency was reaffirmed during cross-examination. The limited and ambiguous nature of her statements, along with the discrepancies between her testimony in chief and under cross-examination, call into question the clarity and reliability of her account of the incident. Consequently, whether the appellant possessed the requisite intent to commit sexual assault is questionable on the evidence.

[97] Upon a careful consideration of the complainant's evidence relating to both the rape and the sexual assault, it is apparent that her testimony displays substantial inconsistencies and lacks sufficient detail. These contradictions become evident when comparing her responses during examination-in-chief with those during cross-examination, particularly regarding the chronology of events,

the locations of the parties involved, and the description of the alleged incidents. The complainant's inability to provide coherent and detailed narratives materially affects the reliability of her testimony.

[98] Consequently, the complainant's evidence cannot be deemed credible or reliable in its current form. The presence of these inconsistencies, coupled with the lack of clear corroborative details, renders her testimony alone inadequate to support a conviction. Within the context of criminal proceedings, it is incumbent upon the prosecution to establish the accused's guilt beyond reasonable doubt. In this instance, corroboration is necessary to substantiate the complainant's account and to meet the requisite standard of proof for the offences alleged.

Corroboration

[99] In *Mahlangu*,³⁷ the SCA held that corroboration is needed by the prosecution to prove its case, if the first part of the test is 'substantially satisfactory in every material respect' is not met and the corroboration need not necessarily link the accused to the crime.

[100] In *S v Gentle*,³⁸ the SCA remarked that:

'[18] It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, on the issues in dispute (cf *R v W* 1949 (3) SA 772 (A) at 778-9). If the evidence of the complainant differs in significant detail from the evidence of other State witnesses, the Court must critically examine the differences with a view to establishing whether the complainant's evidence is reliable. But the fact that the complainant's evidence accords with the evidence of other State witnesses on issues not in dispute does not provide corroboration.'

[101] In *Rex v Rose*,³⁹ in explaining the purpose of 'previous consistent statement', the court held as follows:

'In certain exceptional cases a previous similar statement made by the witness is admitted not to prove the truth of the facts asserted but merely to show that the witness

³⁷ *Mahlangu and Another v S* [2011] ZASCA 64; 2011 (2) SACR 164 (SCA) para 21.

³⁸ *S v Gentle* [2005] ZASCA 26; 2005 (1) SACR 420 (SCA).

³⁹ *Rex v Rose* 1937 AD 467 at 473.

is consistent with himself, but the general rule is that a witness cannot be corroborated by proof of prior similar statements, see *Rex v Manyana*, (1931 AD 386 at p. 389); Phipson on Evidence (7th ed., p. 471). Wigmore on Evidence (vol. 2, sec. 1122 et seq.), has an interesting review of the whole subject. He quotes a judgment of an American Judge as follows: "It can scarcely be satisfactory to my mind to say that, if a witness testifies to a statement to-day under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath. The idea that the mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth. Indeed, it has never been supposed by any writer or judge that the repetition had any force as substantive evidence to prove the facts, but only to remove an imputation upon the witness."

[102] The next two witnesses to testify was the complainant's grandmother and Mother: Mrs N[...] (also known as MaShezi), and Ms ZL N[...]. These witnesses testified in terms of ss 58 and 59 of the Sexual Offences Act. These ss read as follows:

'58 Evidence of previous consistent statements

Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements.

59 Evidence of delay in reporting

In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.'

[103] Under the common law, previous consistent statements made by a witness has no probative value, except where fairness demands it. This exclusion is known as the rule against self-corroboration. The purpose of this rule is to prevent witnesses from bolstering their own credibility merely by showing that they have repeated the same account on multiple occasions. Reiteration of a statement does not inherently increase its truthfulness or reliability. The law recognises that simply restating an account does not constitute independent support for its accuracy, and therefore, such statements are not admissible to corroborate a witness's evidence.

[104] As a result, it is impermissible during examination-in-chief or re-examination to question a witness about prior consistent statements made outside of court that align with their present testimony. This restriction aims to avoid the potentially prejudicial effect that may arise if a witness strengthens their evidence through repetition alone.

[105] However, under common law, an exception to this rule exists within the context of sexual offences.⁴⁰ Specifically, evidence of a voluntary complaint made by the victim within a reasonable time after the alleged commission of the offence, that is, at the first reasonable opportunity, is admissible as a previous consistent statement.⁴¹

[106] The approach to previous consistent statements in sexual offence cases has evolved from the common law position. Sections 58 and 59 of the Sexual Offences Act have fundamentally changed this rule in the context of sexual offences.

[107] Section 58 allows previous consistent statements by a complainant to be admitted in criminal cases involving alleged sexual offences. However, courts cannot infer anything from the absence of such statements, ensuring that complainants' credibility isn't undermined solely due to a lack of prior consistent accounts. This framework permits these statements as evidence while protecting complainants from negative assumptions if they are missing.

[108] Section 59 stipulates that during criminal proceedings related to such offences; courts are prohibited from drawing any inference solely because of the time elapsed between the alleged offence and its subsequent reporting. The legislative intent is to safeguard complainants against negative assumptions arising from delays. This is a departure from the common law because now delays in reporting an offence shall not be held against the complainant; and acknowledging that such delays may occur for various legitimate reasons and

⁴⁰ *Manyana* at 389-390.

⁴¹ *Ibid.*

should not automatically be construed as suggestive of fabrication or lack of credibility.

[109] The amendments introduced in ss 58 and 59 have expanded the scope for admitting previous consistent statements in sexual offence cases. Simultaneously, these provisions establish protections for complainants by stipulating that neither the lack nor the timing of such statements can serve as the sole grounds for drawing negative inferences against them.

[110] It is apposite to mention that the Sexual Offences Act have not altered the manner in which courts assess evidence. Judges are required to evaluate all presented evidence holistically, carefully weighing both incriminating and exculpatory factors rather than considering individual facts in isolation. A balanced approach to evidence evaluation is essential for both the prosecution and the defence. The principal objective is to determine whether the State's case, when considered in its entirety, dispels reasonable doubt. Each item of evidence must be assessed within the context of the full evidentiary record, as its significance arises from this broader perspective. Courts and legal practitioners should avoid piecemeal analysis and consider all relevant factors before deciding if reasonable doubt exists⁴².

Mrs N[...]’s testimony

[111] In my view, regrettably, Mrs N[...]’s testimony offered little support to the prosecution’s case, because it lacked detail and differed from the complainant’s account in material details. Significant inconsistencies were apparent concerning both the location and specific details of the alleged rape. This is demonstrated from the following:

- (a) The complainant testified the rape occurred *against the wall*, whereas Mrs N[...] stated it was *near the bed*.
- (b) Mrs N[...] claimed the appellant offered her two rand not to tell anyone; a detail entirely absent from the complainant's account.

⁴² *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

(c) Mrs N[...] initially testified that the complainant stated she felt pain when the appellant inserted his penis into the complainant's vagina, but under cross-examination, revised this to say it was merely when the appellant brought his penis close to her vagina.

(d) The evidence for the sexual assault charge was limited, with Mrs N[...]s account lacking detail and mainly describing the appellant as touching or brushing the complainant's thigh. Additionally, Mrs N[...] claimed the complainant was threatened by the appellant, but this was not supported in the complainant's own statement, creating even further inconsistency regarding the account.

[112] While Ms ZL N[...]s testimony provided some corroboration for the complainant, it nonetheless differed from the complainant's account. She testified that after leaving the complainant to continue washing clothes and her sister's takkies at MaBhengu's home, the appellant then came home, grabbed her by the thighs, asked her to go into his room, and offered her R2 to have sexual intercourse with him. At that moment, G[...], also known as A[...] or MA[...], approached them and invited her to play with them. The complainant said she replied that she would hang up the takkies first before joining A[...].

[113] The complainant's account was that after she finished, she returned home, when the appellant came up to her and grabbed her by her thighs (but in cross examination described it as brushed her thighs). He invited her to his room to have sexual intercourse and promised to give her R2. While speaking to the appellant, A[...] approached her and asked her to go play with him by the tyre, she then left to play with him, and after playing with him reported both the rape and the sexual assault to MaBhengu.

[114] With regard to the rape. Ms ZL N[...] testified that the complainant told her that when she was six years old and playing near a discarded fridge at MaBhengu's house, at a certain point; the appellant returned from work, lifted her up and carried her to his outside room, which she described as a rondavel. At the time, the appellant was said to be wearing navy trousers, having just returned from work. He lowered his pants and instructed her to unzip her jumpsuit,

pressed her against the wall, and inserted his penis into her vagina. Ms N[...] further testified that the complainant told her that the appellant's actions were interrupted when T[...] knocked on the door. The appellant then told her to pretend to dress up and pretend to be sweeping, and when the door opened, she ran away.

[115] There are minor discrepancies between the complainant's version and that provided by Ms ZL N[...]. The complainant did not mention during her testimony that the appellant was wearing navy pants at the relevant time. In contrast, Ms ZL N[...] stated that the appellant was wearing navy trousers, having just returned from work. Furthermore, the descriptions of the location where the complainant was playing prior to the alleged incident differ. The complainant stated that she was playing near a discarded car, whereas Ms ZL N[...] described the location as being near a discarded fridge.

[116] There is also a discrepancy regarding the involvement of T[...]. Ms ZL N[...] did not mention that, prior to the incident, the complainant was playing with T[...], or that the appellant took the complainant to his room while Talent was fetching water for her. This contrasts with the complainant's evidence in chief, where she described T[...]’s actions as fetching water for her and either returning it to the kitchen or fetching more water, during which time the appellant allegedly carried her to his room.

Medical evidence

[117] The medical evidence presented by Dr Kirsten, both her testimony and the J88 medical examination, were inconclusive regarding the alleged rape and sexual assault. Before the trial court, Dr Kirsten testified that all findings were within normal limits, with the exception that the hymen could not be seen.

[118] In a medical journal article ⁴³ entitled, 'Hymen and virginity: What every paediatrician should know', the authors aver that the hymen is an elastic and

⁴³ Moussaoui D., Abdulcadir J., Yaron M. Hymen and virginity: What every paediatrician should know (2022). National Library of Medicine (NLM) accessed at:

changing tissue, with intra- and inter-individual variations. Despite scientific evidence showing that the hymen is not a reliable marker for previous sexual activity, misconceptions persist and lead to unjustified procedures, such as virginity testing, certificate of virginity and hymenoplasty. According to the World Health Organization, virginity tests are a form of sexual violence. It is not a marker of purity or sexual experience and there is no scientifically reliable way to determine virginity on examination. The hypoestrogenised hymen of the pre-pubertal girl is atrophied, thus very thin and highly sensitive, so physicians should be careful not to touch it and cause pain inadvertently.

[119] On the J88 form, Dr Kirsten included remarks such as 'hymen is not seen' and 'history suggestive of sexual assault possibly'. She also noted the delayed presentation for examination. The comments made in the medical evidence, specifically the phrase "hymen is not seen," were not clarified during the proceedings. This lack of clarification leaves several important questions unanswered. It remains uncertain whether this phrase is intended to indicate that the hymen was absent, not intact, or simply not visible at the time of examination. Furthermore, it is not explained if the non-visibility of a hymen, on its own, is conclusive evidence of sexual intercourse, or is due to reasons unrelated to trauma or sexual activity.

[120] In a medical journal article⁴⁴ entitled: 'Forensic medical evidence in rape and child sexual abuse: controversies and a possible solution'. Authored by Raine E Roberts, the learned author opined:

'Doctors who have examined a complainant, whether adult or child, are often perceived as biased towards the complainant and, by implication, the prosecution. It is natural for a doctor to want to help the patient, but in a medico-legal context a degree of objectivity is essential. When examining a complainant, it is important to remember that one is being made aware of only a small part of the evidence that will be presented in the court room. The medical examiner has a single account of events, which may or may not be entirely

<https://pmc.ncbi.nlm.nih.gov/articles/PMC9306936/#:~:text=Paediatricians%20may%20face%20the%20notion,of%20females%20of%20all%20ages>

⁴⁴ Raine E Roberts MBE FRCGP, 'Forensic medical evidence in rape and child sexual abuse: controversies and a possible solution', Journal of the Royal Society of Medicine, Vol 92, August 1999, accessed at: <https://journals.sagepub.com/doi/pdf/10.1177/014107689909200802>

true, and usually little background information unless the complainant has already been interviewed by specially trained police officers and the resultant information together with statements from other witnesses made available before his/her clinical examination.'

[121] Medical practitioners providing testimony have a duty to document their clinical findings clearly and, where appropriate, draw conclusions based strictly on those findings. When a doctor states that sexual assault is 'possible', particularly after being informed by the complainant of an alleged rape, such a conclusion is not founded on objective clinical evidence but instead appears to reinforce the narrative provided to them by the complainant. This approach risks undermining the objectivity required in medical assessments and may mislead the court. Courts rely on the objectivity, integrity and clarity of medical evidence, including the J88 report, to reach informed decisions.

[122] Raine E Roberts,⁴⁵ in her study, explored how case narratives affect the medical opinions of doctors regarding the detection of sexual abuse. At a medical conference attended by one hundred doctors, Roberts presented them with photographs and symptoms for assessment. The doctors were first asked to provide their opinions based solely on the physical findings, without any accompanying narrative or background information. In this context, the majority concluded that there was no evidence of abuse.

[123] However, when the same photographs and symptoms were presented alongside a narrative that included a history suggestive of abuse, the number of doctors concluding that abuse had occurred increased significantly. Conversely, when the narrative specifically indicated that there was no history suggestive of abuse, the number of doctors concluding abuse dropped.

[124] These findings highlight the significant impact that case histories and narratives can have on the objectivity of medical assessments in cases of alleged sexual abuse. The presence or absence of a suggestive history appears to

⁴⁵ Raine E Roberts MBE FRCGP, 'Forensic medical evidence in rape and child sexual abuse: controversies and a possible solution', *Journal of the Royal Society of Medicine*, Vol 92, August 1999, accessed at: <https://journals.sagepub.com/doi/pdf/10.1177/014107689909200802>

influence the doctors' interpretation of otherwise identical physical findings. A summary of Roberts's findings is set out as follows:

'At a medical conference, I put questions to a hundred doctors who had been involved in the medical examination of sexually abused persons. The results were recorded by computer, with experienced and inexperienced doctors identified and their opinions recorded separately. There was a distinct divergence of opinion on questions such as, 'are labial adhesions in a child out of nappies a sign of abuse?'. Doctors, however, agreed that anal dilatation in the presence of stool was unlikely to be a sign of abuse (97% took that view). Slides of physical findings were shown and the doctors were asked to grade them as (a) normal, (b) variant of normal, (c) questionable, (d) abnormal but not necessarily abused, and (e) grossly abnormal and indicative of abuse. They were asked to give an opinion purely on the slide itself and vote again after being given details of the case history. In every case where the case history suggested that abuse was present the percentage of doctors diagnosing abuse rose quite dramatically. Where they were told that there was no abuse in the history, they moved in the opposite direction. For example, in a child with lichen sclerosus et atrophicus 13% of the experienced doctors judged that there was gross abnormality indicative of abuse, but none of them did so after hearing the history. Thus, had there been any suspicion of abuse in the child's background, findings which were agreed to be caused naturally would have been put forward as strongly indicative of abuse.'

[125] Furthermore, the use of non-scientific or non-medical terminology within medical reports, such as the phrase 'history suggestive of sexual assault possibly', poses significant challenges for judicial proceedings. Phrases like these are inherently ambiguous and fail to provide the objective, probative evidential value required in a court of law. They do not offer conclusive or scientifically validated findings, thereby undermining the reliability of the evidence presented.

[126] To illustrate this concern, one may consider the approach taken in other medical or forensic contexts. For example, a surgeon would not proceed with the amputation of a limb based only on a statement such as 'history suggestive of gangrene possibly'. The gravity of such a decision necessitates further diagnostic tests and clear, objective confirmation before any action is taken. Similarly, in

forensic investigations, a ballistic expert would not provide testimony that a firearm found in the possession of an accused person is 'possibly' the murder weapon. Such equivocal evidence would lack the necessary probative value and would not meet the standard of proof required for criminal proceedings.

[127] The challenges with speculative comments in medical evidence was highlighted in a matter that came before the Kenyan High Court full bench of the Court in, *Mwanzia v DPP*,⁴⁶ where the court observed:

'40. That, despite the medical officer conclusion, that there was penetration, it was on the basis of absence of the hymen only. She admitted in cross-examination that, a hymen can be broken by any other means.

41. Reference is made to the case of PKW Vs. Republic [2012] eKIR, where the Court of Appeal while resolving the issue of the absence of a hymen observed; "Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences, we have dealt with, Courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding and gymnastics, there can also be a natural tearing of the hymen".'

[128] In the circumstances, the absence of a hymen is neither a definitive indicator of sexual intercourse nor of sexual assault. The reference to 'sexual assault' in both Dr Kirsten's testimony and the J88 medical report was not grounded, at least on the evidence before this court, in an objective or purely clinical assessment; but rather appears to have been influenced by the narrative with which Dr Kirsten was presented by the complainant during her examination.

⁴⁶ *Mwanzia v DPP* (Criminal Appeal E033 of 2021) [2024] KEHC 5480 (KLR) (8 May 2024) (Judgment) - Criminal Appeal E033 of 2021.

[129] Put differently, while Dr Kirsten concluded that the findings were suggestive of a possible sexual assault; this observation could equally have been expressed as, 'All findings were within normal limits except for the inability to visualize the hymen during clinical assessment. These results may be suggestive of "possible" sexual assault; however, this is but one of several but equal potential explanations.'

[130] Given this uncertainty, it is not clear whether the medical findings in this matter are exculpatory or non-exculpatory in nature. As such, they are best regarded as neutral evidence. Furthermore, it is acknowledged that legal authorities have clarified that the presence of an intact hymen does not exclude the possibility of penetration, given the natural elasticity of the hymen. Nevertheless, the main concern with the medical evidence recorded in this matter, is that the court is seeking corroboration for the complainant's version from the medical report. Due to the failure to obtain clarification by either the defence or the magistrate on the vagueness of the report; the medical evidence, presents itself as neutral and does not serve as corroborative proof of the complainant's version.

Trial court's reasons

[131] In convicting the appellant, the court determined that the complainant provided testimony in a clear and confident manner, notwithstanding her young age. Her account was consistent with her own previous statements as well as those of other State witnesses, and the court found no discrepancies in her version of events. The court was satisfied that the complainant was a credible and reliable witness.

[132] Additionally, the court found that the doctor's clinical findings were consistent both with her account of having been raped and with her grandmother's observation when examining her. Furthermore, it was noted that the appellant denied all allegations and could not recall whether he had offered a cow as compensation; if he did, he reported feeling shocked and pressured.

[133] The learned Magistrate recognised that, beyond credibility and reliability, the court must consider the probabilities associated with each version of events. The appellant's version was rejected on the basis that it was unlikely the complainant would fabricate such allegations given her previously good relationship with the appellant, and due to the grandmother's surprise at the appellant's statement regarding payment with a cow. Consequently, the appellant's version was rejected as false; and found guilty of rape and sexual assault.

Analysis of trial court's findings

[134] In the matter of *S v Ergie*,⁴⁷ the SCA addressed the need for thorough judicial analysis when evaluating all the evidence. The Court observed that the trial court's judgment contained only a superficial reference to the applicable legal principles pertaining to the assessment of the complainant's testimony. This lack of depth in the analysis was noted as a significant concern.

[135] The SCA emphasised that although the trial court had summarised the evidence in considerable detail, there was an evident absence of critical evaluation consistent with the standard of 'great caution' required in such matters. This point was underscored by referencing the remarks of Mbatha JA in *Oosthuizen*,⁴⁸ who stated that: 'It was incumbent upon the trial court to show that it took into account the necessary caution. The trial court set out the evidence in great [detail], but nothing suggests that it was properly evaluated. Regard must be had at all times to the fact that the onus to prove the case beyond a reasonable doubt rests on the State.'

[136] Applying these observations to the present matter, it is evident that a careful examination of all the complainant's evidence reveals material changes in the complainant's version during cross-examination. The discrepancies identified were significant, relating to the events prior to the alleged rape, the period immediately following the incident, as well as the complainant's conduct after the alleged offence.

⁴⁷ *S v Ergie* 2021 (1) SACR 127 (WCC).

⁴⁸ *Oosthuizen and Another v S* [2019] ZASCA 182; 2020 (1) SACR 561 (SCA).

[137] Despite recording the evidence and referencing the relevant legal principles, the learned magistrate ultimately reached the incorrect conclusion that the complainant was a reliable witness corroborated by other State witnesses. This approach did not reflect the level of caution and critical scrutiny mandated by judicial precedent in cases of this nature.

[138] Mrs N[...]’s testimony was marked by a lack of clarity and differed from the complainant’s evidence. Although the complainant’s version corresponded more closely with that of her mother, Ms ZL N[...], this similarity did not resolve the discrepancies that emerged in the complainant’s version during cross-examination.

[139] The learned magistrate took into account both the medical evidence presented during the trial and the testimony of Mrs N[...], who reported that she had conducted an examination of the complainant and determined that the complainant was not a virgin. I have already indicated herein above that the medical evidence itself did not provide conclusive support for either the prosecution or the defence; and therefore, neither exculpatory nor non-exculpatory.

[140] Mrs N[...]’s testimony regarding the complainant’s virginity is inadmissible because she is not a trained medical professional. While the practice of virginity testing may hold significance within a traditional or cultural setting, the findings therefrom is inadmissible for the purposes of legal proceedings. Accordingly, the evidence relating to virginity testing, as conducted and presented by Mrs N[...], must be excluded from consideration in the court’s deliberations⁴⁹.

[141] Considering the evidence as a whole, the learned magistrate’s finding that the complainant’s version was consistent with her own previous statements as well as those of other State witnesses, is a material misdirection.

⁴⁹ Section 210 of the CPA provides as follows: ‘No evidence as to any fact, matter or thing shall be admissible which is irrelevant, and which cannot conduce or prove or disprove any points or fact at issue in criminal proceedings.’

Adverse inference

[142] During the course of the trial, it emerged that the complainant initially made her report to an individual named MaBhengu. Notably, MaBhengu was also present when the appellant was confronted regarding the allegations. However, following MaBhengu's failure to take any action in response to the report, the complainant proceeded to disclose the incidents to her aunt, Zethu. Significantly, when the alleged incident of sexual assault occurred, the complainant managed to get away from the appellant when A[...], who is also referred to as G[...] or MA[...], called her to play with him. A[...] could have provided corroborative evidence if he had observed the appellant with the complainant at the relevant time. Similarly, both Zethu and MaBhengu could have offered supporting accounts to substantiate the complainant's version of events.

[143] On the other hand, the appellant asserted that his intention was to discuss soccer with an individual named Mbongeni. According to the appellant's version, he spoke with the complainant while en route to Mbongeni's home. The involvement of Mbongeni was thus pivotal, as he could have confirmed or refuted whether the alleged sexual assault took place. Nonetheless, none of these individuals, A[...], Zethu, MaBhengu, or Mbongeni, were called as witnesses by the State during the trial.

[144] It is further noted that no explanation was provided for the State's decision not to call these potential witnesses. Their absence leaves a gap in the record, as their testimonies could have served either to corroborate the complainant's account or to clarify the circumstances surrounding the incident.

[145] In *Phogole v S*,⁵⁰ in his minority judgement, Justice T Makgoka observed: '[67] There were four potential witnesses whom the State could have called, namely the three friends she was playing with when she was allegedly dragged to the tavern toilet, and the complainant's grandmother. Her friends could have been called to testify, not

⁵⁰ *Phogole*.

necessarily that they had seen her being dragged, but that she suddenly disappeared while they were playing with her on the day of the alleged rape. This would have corroborated her evidence about being dragged away, and in a crucial manner, added weight to her evidence that she was taken into a tavern toilet where she was raped.'

[146] In *S v Teixeira*,⁵¹ the appellate division held:

'In the judgment of the Court a quo there is no reference whatsoever to the State's failure to call either Sithole or Tshabalala to testify on behalf of the State, nor to the question whether an inference adverse to the State was justified. The burden of proof rested on the State to prove its case. Counsel for the State must have realised how unsafe it is to rely on the evidence of a single witness. I will disregard the fact that he failed to call Sithole. In the case of Tshabalala, however, counsel for the State must surely have realised that, if Sarah's version is to be accepted as truthful, Tshabalala's evidence could have corroborated her evidence in regard to a matter very much in issue...

...In my opinion, the failure by the State to call Tshabalala to testify as a witness justifies the inference that in counsel's opinion his evidence might possibly give rise to contradictions which could reflect adversely on Sarah's credibility and reliability as a witness.

In my opinion, therefore, the Court a quo erred in concluding that the evidence of the single witness, Sarah, was satisfactory in every material respect, and that it was safe to convict appellant of murder on the strength of her uncorroborated evidence, notwithstanding the improbability inherent in her version.'

[147] The learned magistrate did not make an adverse inference from the State's failure to call witnesses who could have provided independent corroboration of the complainant's account. This omission is significant, as several individuals, namely A[...], Zethu, MaBhengu, and Mbongeni; were mentioned during the proceedings as individuals who were present during or after the incident in question. Their testimonies could have either corroborated or challenged the evidence presented by the State.

⁵¹ *S v Teixeira* 1980 (3) SA 755 (A) at 764F-765D.

[148] In the absence of these witnesses, the record lacks independent corroboration that might have clarified the circumstances surrounding the alleged incident. The complainant's narrative remained uncorroborated, and no explanation was provided for the State's decision not to call these potentially critical witnesses. The magistrate's failure to address this gap constitutes a material misdirection, as their evidence could have had a bearing on the reliability and credibility of the complainant's version of events.

Analysis of the defence

[149] In *S v Shackell*,⁵² the SCA held that:

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step.'

[150] In *Tofie v S*,⁵³ the SCA commented that:

'[19] It is trite that there is no obligation upon an accused to prove his innocence. The State bears the onus of proving the commission of an offence. If his version is reasonably possibly true, he is entitled to his acquittal even though his explanation is not plausible. As pointed out in many judgments it is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true, but whether one believes him is not the test. It is and remains the State's duty and not the appellant's, to discharge the onus and it should not be reversed.'

[151] The learned magistrate rejected the appellant's version without giving it due consideration. The appellant contended that he was not employed in 2017,

⁵² *S v Shackell* 2001 (4) SA 1 (SCA) para 30.

⁵³ *Tofie v S* [2014] ZASCA 159.

an assertion which could have been verified. The appellant's employment status in 2017 is relevant to his version because he maintains that being unemployed during that year, he did not possess a bed and instead slept on a mattress placed directly on the floor. He further asserts that he did not own a broom, only acquiring both a broom and a bed upon subsequent employment. Consequently, the appellant contends that it would not have been possible for him to commit the alleged rape near a bed, as stated by Mrs N[...], nor provide the complainant with a broom to simulate sweeping. The absence of such verification or rebuttal evidence leaves this aspect of his defence untested.

[152] Furthermore, the appellant argued that it would have been impossible for him to pick up the complainant and take her to his room without being noticed by anyone present in the kitchen. This claim could have been confirmed or refuted by the investigating officer or any other witness, yet no attempt was made to do so.

[153] The complainant referred to an 'old car', whereas the appellant and other State witnesses referred to an 'old fridge' during their testimony, with the appellant asserting that the old fridge is located near a tap. No additional evidence was presented to clarify this discrepancy, and as a result, the matter remains unresolved. According to the appellant, a tap was positioned near the fridge, implying that while they were playing in proximity to the tap, she instructed T[...] to retrieve water from the kitchen. Should it be accurate that a tap exists near the old fridge, the complainant's account appears unlikely.

[154] Notably, the appellant demonstrated candour during his testimony by making certain concessions that were not strictly necessary for his defence, such as admitting that children did, in fact, play in the yard. This openness suggested a willingness to be truthful about the circumstances, even when the facts did not directly support his case. The court, however, did not engage further with these concessions to explore their significance or what they revealed about the appellant's credibility.

[155] Furthermore, the appellant averred that the complainant never entered his room. This assertion was central to his defence and could have been tested more thoroughly during the proceedings. For example, the court could have asked the complainant to describe the contents or layout of the appellant's room. If the complainant had provided such a description, another witness could have been called to confirm or refute its accuracy. The absence of such investigative steps by the court or the parties involved meant that this material aspect of the case remained unresolved. This lack of thorough examination represented a missed opportunity to clarify a critical point in the evidence.

[156] The learned Magistrate rejected the appellant's version, reasoning further that it was improbable for the complainant to fabricate such allegations given her previously positive relationship with the appellant and citing the grandmother's evident surprise at the appellant's comment about payment involving a cow.

[157] In *Mtetandaba v S*,⁵⁴ the court stated:

'[69] In Lotter, Erasmus J, evaluated several cases where the accused's credibility was impugned after failing to give an explanation as to the possible motive behind him being falsely incriminated. In those cases, the accused had denied the commission of those offences and there was not sufficient evidence from which their guilt could have been inferred. Mr Lotter, as the accused, had been charged of rape and denied having had sexual intercourse with the complainant. There was no other corroborative evidence of sexual intercourse which was placed before court. The complainant further did not report the alleged rape timeously. The prosecutor in that case repeatedly asked the accused to state the motive behind the complainant falsely incriminating him. The magistrate rejected his speculative reasons as 'making no sense'. In criticizing the magistrate's approach, the court said:

"In the circumstances of this case, the magistrate was not entitled to draw any inference adverse to the appellant's credibility from the fact that he had offered explanations as to the complainant's possible motives which she found unacceptable."

⁵⁴ *Mtetandaba v S* [2025] ZAECHMHC 7.

[70] It follows from the above quoted passage that the circumstances of each case and the conspectus of all the evidence ought to determine the appropriateness of drawing an adverse inference on the credibility of an accused where the explanation he or she gives as to the motive behind his/her incrimination in a criminal case is found not to be convincing to the court. I hold the view that any explanation that the accused furnishes is to be measured against what, in the exercise of logic, is probable and that which is not, upon a holistic evaluation of all the evidence.'

[158] It is submitted that the learned Magistrate materially misdirected herself by inferring that the existence of a good relationship between the appellant and the complainant negated any possibility that the complainant might fabricate allegations of rape. This inference is unwarranted given the limited evidence placed before the trial court on this specific issue. The appellant acknowledged the presence of a good relationship between himself and the complainant, but he was unable to provide any further explanation or insight regarding the potential for a false allegation. Importantly, the appellant was not required to prove, nor was there an onus on him to establish, a motive for the complainant to make a false accusation, as he did not advance such a version in his defence. The absence of a suggested motive from the appellant does not justify an adverse inference against him, nor does it strengthen the reliability of the complainant's testimony in the absence of corroborating evidence or critical evaluation of her version.

Conclusion

[159] I believe that the trial court erred in finding that the evidence provided by the single witness, the complainant, was satisfactory in every material aspect. The court found it safe to convict the appellant for rape and sexual assault based solely on her uncorroborated testimony, despite the improbabilities present within her version of events.

[160] Although there is no appeal lodged against the conviction for sexual assault, the trial record clearly indicates that the evidence presented was inadequate to support such a conviction. Furthermore, during the proceedings,

the respondent acknowledged before the court that the available evidence was insufficient to justify a finding of guilt on this count. Given these circumstances, permitting the conviction to remain, solely due to the absence of an application for leave to appeal, would constitute a miscarriage of justice. The lack of supporting evidence renders the conviction unsustainable, and it would be unjust to uphold it on procedural grounds alone.

Order

[161] In the result, I propose the following order:

1. The appellants' appeals against their convictions and sentences are upheld.
2. The convictions and sentences are set aside.

NICHOLSON AJ

I agree

SEEGOBIN J

Case information

Date heard : 31 October 2025

Handed down : 

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