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

CASE NO: AR364/2024

In the matter between: -

MBONGELENI MTSHALI

Appellant

and

THE STATE

Respondent

ORDER

1. The appeal against the appellant's conviction on the rape count (in respect of all 5 alleged incidents) is upheld.
2. The conviction and sentence of the Regional Court on 26 July 2024 are set aside and replaced with the following Order:
"The appellant is found not guilty and discharged"

APPEAL JUDGMENT

PITMAN J [Mathenjwa J concurring]

Introduction

[1] The appellant stood trial in the Regional Court, Esikhawini on 30 January 2023. He was charged with rape in terms of section 3, read with the other relevant sections, of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and with the provisions of section 51(1) of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The allegations were that “from April to May 2022” he committed the unlawful acts of sexual penetration upon one A[...] D[...], a 10-year-old girl, “more than once”. He pleaded not guilty and, when the trial commenced, was represented by a legal representative, Mr S Mthethwa. His legal representative handed up what he described as “a brief statement in terms of section 115”. In that document the appellant denied committing any acts of sexual penetration in respect of the complainant. He claimed that on 12 May 2022 he was at his home when the mother of the complainant arrived and said, “is this the one, is this the one? I am tired of walking” and that the complainant simply showed “disinterest”. He claimed that the mother then accused him of raping the child. He denied raping the child.

[2] Pursuant to the necessary application, which was not objected to by defence counsel, the trial court permitted the complainant to testify through the use of an intermediary via a video link to the court and ruled that the matter would proceed in camera. Once the intermediary had been sworn in, the complainant A[...] D[...] was called as the first witness. The trial court assessed her competence to testify as a witness and concluded that admonishing her to tell the truth would be sufficient in the circumstances. That was done.

[3] Once the complainant started testifying there appeared to have been a number of problems with the recording devices and/or audio streams and the matter was then adjourned more than once until it eventually commenced again on 3 November 2023. At that stage the appellant was represented by Ms Govender. The intermediary was sworn in again. The trial court again assessed the complainant for competency and concluded, again, that it was appropriate, proper and sufficient that the complainant be admonished to tell the truth. She was so admonished. The complainant then testified. During the course of her cross-examination, the court was informed by the intermediary that the complainant “seemed a bit sleepy” and the prosecutor requested that the evidence of the complainant be interposed at that stage with the evidence of her mother.

[4] The State was given leave to interpose the evidence of the complainant’s mother at that stage. Accordingly, the mother, A[...] N[...] M[...], then testified in chief only. Her cross-examination was adjourned.

[5] The complainant was recalled to complete her cross-examination and evidence only on 19 March 2024, as was her mother. Again, the complainant was admonished to tell the truth. After the further cross-examination of the complainant, the mother of the complainant was recalled for her cross-examination.

[6] The State then requested “that the J88 that was compiled by Dr Orisakwe be handed in, your worship”. There was no objection by Ms Govender for the appellant. This document was a written report compiled by that doctor on 12 May 2022 at 3:49 in the afternoon.

[7] In his defence, Ms Govender called the appellant as a witness. Three further witnesses were also called: Zandile Zanele Dube, Sizwe Philani Gazu, and N[...] A[...] M[...].

[8] The appellant was convicted as charged and sentenced to life imprisonment. This appeal arises pursuant to the appellant's automatic right of appeal. Due to my final conclusion, I consider it necessary to set out the evidence in some detail.

The evidence

Complainant

[9] She was 11 years old when she testified and was 10 years old at the time of the alleged incidents. She was in grade 6 at a local primary school. During April 2022, although she couldn't remember the exact date, she was coming back from school and came upon the appellant. He told her to follow him so that she could "fetch my mother's slippers". She knew the appellant as in the past "I used to ask time from him if we had returned from school later". She followed him. When they got nearer the bush "by his homestead" he took out a knife and told her that she must not tell her mother and that he would kill her and also burn her homestead if she did. He then told her to take off her panty. She was initially reluctant. He insisted and eventually removed it himself. He told her to lie down face up. He loosened his belt and then raped her by inserting his penis into her vagina and moved up and down. When he had finished, he told her to stand up and gave her R10. She took it but did not use it and threw it away. She felt pain in her vagina. She put her panty back on and walked quickly home. She stated that she did not know the appellant's name before the incident but asked him his name during one of the incidents and he said he was Mbonga Xulu.

[10] She then testified that similar rapes had occurred a further few times during April and May. In each instance while she walked home from school he called her and she followed him to the spot.

[11] On the second occasion he gave her R5. On her way home she used it to buy a big packet of chips. When she got home her mother asked her where she got the chips and she told her that the chips were bought by her friends.

[12] On the third occasion the procedure was the same. On this occasion she gave him R5. On her way home she bought some sweets. The mother asked where she got them and she said Ms Gumede gave them to her. She did not tell her mother the truth because of the threats by the appellant.

[13] On the fourth occasion the initiation was the same. On this occasion, however, she stated that she had refused to undress. He had then undressed himself and then forced her to the ground. She resisted. The appellant then stood up quickly, she got dressed. The appellant gave her R2 and told her to leave. On the way home she bought two cakes and ate them before arriving home.

[14] On the fifth occasion the initiation was the same. He told her not to do what she had done on the previous day or he would kill her. He took out his knife and threatened her with it by putting it toward her neck. He did not however hit her with it. She was scared and lay down and he raped her again. On this occasion he gave her R5 when she left. On her way home she bought a big packet of barbecue chips. When her mother asked her where she got them, she said she was given them by her friends. That night while her mother was bathing her, her mother asked why her panties were dirty. Initially she said she did not know. She then went to her bed to sleep. Her mother then came to her room and asked her, "what was going on".

Initially she told her mother that nothing was going on. Her mother told her not to tell lies and to tell the truth. She then told her mother that Mbonga rapes her and had warned her not to tell anyone. She was asked by the prosecutor why she had told her mother this. She said she did so because her mother said she must tell the truth or she will “beat me up”.

[15] The following day, in the morning, her mother told her not to go to school and asked her to point out Mbonga’s homestead. She took her mother to the homestead that Mbonga had pointed out to her as being his. She indicated to her mother that the boy who answered the door was not the rapist. The boy pointed out Mbonga’s homestead which was a little higher up. They went to that room in which Mbonga (the appellant) was present, but he only peeked out of the door initially. She saw his face and indicated to her mother that this was the person. He said that the child was causing trouble for herself. He suggested that they all go to someone called Gogo Mkhize to get a “prediction”, Mkhize being a Sangoma. Her mother had then asked whether there had ever been “a test or, a gender test for a gender prediction...”. She did not know what this meant. They left, her mother called the police and that was her last encounter with the appellant.

[16] Cross-examination of the complainant commenced initially on 9 February 2024. Under cross-examination she stated that she could not remember the dates that the incidents had happened. She said that the perpetrator had told her that he is Mbonga from the “Khuzwayo’s homestead”. She stated that he told her his name on the third occasion of rape and said that he told her that he was Mbonga Khuzwayo. When he first asked her to follow him, he showed her his house where she could collect her mother’s slippers. She had studied Life Orientation at school. She knew from those studies, which she had had prior to the incidents, that these types of incidents needed to be reported to the police. She did not do so because of his threats. She had got from the R10 she had first received she had eventually put in her mother’s bag. She stated under cross-examination that she had received R10 on the first occasion and R5 on each of the other four occasions. She stated that she

had always used the money he gave her, including the R10 that he had first given her. Her mother had threatened her into providing the first report by saying that she “will beat me up until I am unable to put a blanket over myself”. She believed that her mother would beat her that badly. She said that her mother was “angry” when she said this to the complainant. She was crying when her mother threatened her. She denied that it was her sister who had directed people to the appellant’s house on the relent day.

[17] She was cross-examined about the written statement she had made to the police. It was pointed out that she stated that the last incident happened on 2 May and she agreed. It was put to her that 2 May was a public holiday. As indicated above, her cross-examination was then interrupted for her mother’s evidence in chief.

[18] When cross-examination was resumed, she was again cross-examined on the date she alleged the last incident had taken place, being 2 May. It was put to her that because that day was a public holiday she could not have been walking home from school because the school would have been closed. She then said that she did not remember the dates well. She stated that he showed her his homestead because she had asked him where he lived. This happened after he had finished raping her on the last occasion.

[19] When cross-examined about the threats by her mother before she made her first report, she added that her mother had said she would call her father who would give her a hiding. She testified that her mother had also asked her sister to bring “a wet face cloth, and she would use that to “hit” her. She cried during the threats because her mother was going to beat her and tell her father. She was accordingly scared. The next day they went to find Mbonga. It was put to her that the appellant would say that after she and her mother had left, one Sphelele Khuzwayo, the boy from the first building they had gone to, came and told the appellant that he had also

been accused of the rapes. She denied that she had ever accused him. She also denied that she and that boy were in a relationship. She agreed that her sister was called N[...] A[...] M[...]. His sister had been with them when they approached the appellant on the day after the last rape.

A[...] N[...] M[...]

[20] This witness was the complainant's mother. She testified that on 11 May 2022 the complainant came back from school late. She was eating chips. She asked her where she had got the money. The complainant said she had been given the chips by her friend at school. That evening whilst bathing the complainant she again asked what type of friend had given her the chips because she was suspicious. She noticed that the complainant's panty was dirty on the bottom part. After bathing the complainant, she applied some "lotions" on her body and told her to climb into bed. She opened the complainant's legs and testified that "I noticed that her vagina looked like it had been interfered with". She said it was "reddish and there was also a certain hole". She asked the complainant "who had touched her". The complainant did not want to tell her who had touched her. She did not say anything until the mother told her sister to give the mother "a wet towel, I wanted her to be frightened and also be in a position to tell me the truth." According to the mother it was then that the complainant said Mbonga had touched her. The complainant said she knew Mbonga's homestead. The complainant said also that she had been told not to report what happened and that if she did the homestead would be burnt and her and her mother killed.

[21] The next day they were directed to Mbonga's homestead by the complainant. They had directed them to a second homestead where the complainant identified the appellant. Initially, she testified, the appellant took a while to open the door. She had to bang on the door and he eventually opened slightly. The complainant identified him as the perpetrator. He gave his name as Mbonga and claimed that the homestead was the Ngema homestead. He said that the child was causing trouble for herself. The appellant suggested that they go to "a spiritual or traditional healer"

who would tell them whether this was true. It seemed to her that the appellant was searching for money for that purpose. She refused because she believed he was guilty and he was “trembling”. They left, she initially reported to the local induna and eventually the police. Both the complainant’s brother and her sister were present during the visit to the appellant that morning. She claimed that the complainant had told her that the perpetrator was “Mbonga Xulu”, a surname different from Ngema. As regards the surnames she testified that Xulu had been a surname given to her by the complainant. The initial homestead they approached used the surname Khumalo. The homestead where the appellant was found used the surname Ngema. She only learned of the surname Mtshali when she came to court.

[22] In cross-examination on 19 March, she confirmed that on the occasion when she had asked the complainant where she got the chips from, the complainant said that she had got them from “her friend”. She was asked what persuaded the complainant to change her mind, when her mother had asked her what was going on, about saying nothing. She stated that “I told her sister to give me a towel, and I threatened her that I was going to assault her, and then she did say”. She added “I was thinking that I was going to hit her with it” (the towel). She agreed that she had also threatened to tell the complainant’s father and agreed that the complainant appeared scared of these threats and therefore “ended up telling me”. She confirmed that the complainant had used the surname Xulu in respect of the perpetrator. She agreed that her daughter N[...] had been present during this questioning of the complainant and also the next day when they went to look for the perpetrator. It was put to her that when she got to the appellant’s door the complainant had showed “disinterest”. She denied this. She was asked whether she knew someone called Sizwe Gazu. She claimed she knew him and denied that he was ever alleged to have been the perpetrator. She denied being aware that the complainant had been in a relationship with one Sphelele Khuzwayo. She denied accusing that person of having raped the complainant. She confirmed that the complainant told her she had been raped on 11 May.

The Appellant

[23] The appellant denied that he had perpetrated any of the alleged rapes on the complainant as testified to by her. He said that on 11 May 2022 he and his girlfriend Zandile had gone to Empangeni. They had travelled at about 1 o'clock on a bus. After alighting they went to the Boxer Supermarket first and bought bread. They left Empangeni late in the afternoon at "around 4 o'clock". He gave evidence about the visit to his home by the complainant, her mother and other relatives on 12 May. He denied raping the child. He requested that they go to a spiritual healer to predict whether this had happened or not. The mother refused and told him that he would spend the night in police custody. After they had left, he said that Sphelele Khuzwayo had come to his room and said that he had chased the mother and the others away from his place because they came to him first. He told him that the mother had been to 3 homesteads. He could think of no reason why he had been implicated by the complainant. He stated that he knew the complainant's mother "was in a relationship with" someone called Qiniso Dube and that the complainant was in a relationship with Sphelele. He stated that his surname was Ngema and that he also used the surname Mtshali which was his maternal surname. He denied ever telling the complainant his name and stated that she knew him from the area.

[24] Under cross-examination he claimed that upon returning from Empangeni he had gone to his girlfriend's homestead and then had come back to his homestead at about 10 that night. He was asked how he remembered that this happened on 11 May 2022. He said that he remembered because on that day he had first gone and dug up herb called "umhlabele" which he then cooked just before going to his girlfriend's homestead. He stated that when the mother and the complainant had been at his room the complainant seemed "disinterested" in him and did not identify him. He reiterated that he did not know why he had been accused.

[25] To questions by the court he stated that Sizwe Gazu was a witness who wanted to testify that the complainant's mother had made fabricated stories against him in the past also.

Zandile Zanele Dube

[26] This witness testified that she was the appellant's girlfriend and had been with him on 11 May 2022. She stated that they had left their homestead about 11 or 12 o'clock but eventually took the 1 o'clock bus to Empangeni. Upon reaching Empangeni they went to the Boxer store first. The appellant was with her. They bought bread, cold drink and then requested "cash-back of R300". They spent some hours in town and got back to the bus stop at approximately 5:20. The appellant was with her the whole time. As proof she said that she still had till slips from the day. Copies from her cell phone were handed in as exhibits.

[27] Under cross-examination she admitted that the till slips alone did not prove that the appellant was with her. Upon being pressed by the prosecutor she stated that she had returned to the shop on 25 May 2022 to see if she could get video footage in relation to the day in question. She stated that the appellant had left her at the gate of the homestead at about 10 to 6. She became emotional during cross-examination and the matter stood down for her to compose herself. The court then asked her whether she had a "photographic memory". She claimed that she had a good memory and remembered this day.

[28] She denied that she had been coached and claimed that she remembered this day because "I cannot forget what happened on the 11th" referring to the allegations against her boyfriend.

[29] Under re-examination she stated that she had gone to the shops on her own to attempt to get copies of the video footage. They had told her that she was bringing an empty DVD and should come with the police in order for her to obtain such. She then approached the investigating officer to ask him to accompany her to the stores to request video evidence. She stated that he alleged that he was not allowed to go with her to do that because "we will bribe him".

Sizwe Philani Gazu

[30] This witness, 30 years old, testified that he had previously been arrested and charged for rape. When he was arrested, he was asked “what is the conflict between me and Ms M[...]”. That is the mother of the complainant. He was taken to Ms M[...]’s homestead. Ms M[...]’s daughters were called to look at him, and he was accused of pointing a firearm at N[...] (N[...] was one of Ms M[...]’s daughters) and trying to rape her. He was taken to the police station and charged. And after three months his matter was referred to the Regional Court. Eventually the matter was withdrawn. Sometime after his release he met the complainant in this matter who had told him that a case had been opened and that her mother was “pushing” her into saying that the appellant had raped her. The complainant also told him he was “not the right person that is supposed to be arrested”.

[31] Under cross-examination he stated that the charges were withdrawn against him because there was “no evidence”. It was put to him that none of this had been put to State witnesses. He denied fabricating the evidence. He stated that he had been telephoned to come and testify. He stated further that he had, earlier in the year, called a lady by the name of “Ma Dube” to say that he could testify in the matter. He denied again that he was fabricating his evidence. He alleged that his relationship with the complainant was good.

[32] The court asked him how he could testify that he “got along” with the 10-year-old girl. He answered that he spoke to her when they came across each other in the area as people in that area do. He had told the appellant’s girlfriend that he could give evidence. He said that what he told her was that he would like to come to court to give evidence to show the court that it is possible that the allegations against the appellant were not true because of the case that had been fabricated against him by the same mother.

[33] Under re-examination he stated that he only spoke to the defence counsel Ms Govender on the day he testified. That is the first time he told her his version.

N[...] A[...] M[...]

[34] This witness testified that she was an older sister of the complainant. On a particular day she said that the complainant had arrived home late from school. Their mother asked why she was late. The complainant said that she had been “cleaning after school”. The mother did not believe her and asked, “which school is cleaned up until four”. The mother then took the complainant into the house and started assaulting her. Her mother was upset because she was late from school and was also asking “where did she get the money to buy chips”. The complainant had answered that she got them “from her friends”. Her mother then assaulted her using an electric cord. The complainant refused to change her version and her mother continued assaulting her until the early hours of the morning using an open hand and clenched fists. Eventually the complainant told “the truth”. The complainant then said that she had been raped by a male person who held a knife, had told her not to report it and had given her R100. The mother insisted that they go to the perpetrator’s homestead. During the night the complainant identified the alleged perpetrator as Mbongeni and said that she knew where the homestead was. The next day they went there. She was present as was her brother Menzi. When they got to the house their mother asked if this was the person and the complainant was silent for “like three minutes”. When asked again she said that the complainant responded, “like somebody who was scared and said yes” in “a very soft voice”. The appellant denied that he had raped the child. The police were eventually called by the complainant’s mother. This witness at some stage relocated to KwaNongoma where the complainant made a report to her. For some reason the court and prosecutor took the view that that would constitute hearsay and accordingly the question was not answered.

[35] She then gave evidence that their mother had previously “just accused a person and says that that person has raped her child. She did it with me and said that I was raped to the extent that I was then referred to the social workers after she had said that I was raped by my stepfather”. She said that she had been interviewed by the social workers, and she had denied that her stepfather had raped her. Notwithstanding, her evidence appears to have been that the stepfather was convicted and sentenced “because a log or a stick was found in my vagina because my mother had inserted that stick or a log to try and prove that I had been raped”.

[36] She testified further that there were other occasions that their mother had tried to fabricate allegations “like this”. She said that her mother had once accused her baby’s father (Sizwe Gazu) of raping her younger sister.

[37] She confirmed that she had only consulted with the defence legal representative the day she testified. She had come to testify because she felt it was necessary in view of the fact that the father of her baby (Sizwe Gazu) had come to testify. She stated that the relationship between herself and Sizwe Gazu and her mother was “not good”. However, when it was put to her that the bad relationship was the motive for her to come to court to be dishonest about her mother, she was adamant that “I am not out to portray my mother as a bad person, but I came to court to tell the truth”.

The Appeal Grounds and Arguments

[38] The appellant argues the following:

- a) The magistrate erred in concluding that as a whole the evidence established guilt beyond a reasonable doubt.
- b) The magistrate erred in not accepting the evidence of the appellant’s alibi for 11 May 2022.

- c) The magistrate did not exercise the necessary and required degree of caution in evaluating the evidence of the complainant who was a single witness and a child.
- d) The magistrate erred in concluding that the child was a reliable witness.
- e) The medical evidence was not consistent in establishing the crime or the perpetrator.
- f) The magistrate erred in failing to find that on the probabilities, given the complainant's education, and particularly her Life Skills education, she would not have failed to report the four alleged rapes before the final one. On the probabilities she did not do so because she was using the money allegedly given to her.
- g) The magistrate erred in not finding that the first report only came about because of the threats of violence perpetrated on the complainant, that it was common cause that the complainant was scared by them and that in the circumstances the report was neither voluntary nor could it be considered reliable. In this regard the magistrate erred in reasoning that the complainant had no reason to falsely implicate anyone.
- h) The magistrate erred in rejecting the appellant's version, and those of his witnesses, without "cogent reasons given as to why it is not reasonably possibly true".

[39] The respondent argues the following:

- a) The complainant's evidence was clear, chronological and consistent on how the offences were perpetrated on her. In the circumstances it was clear and satisfactory in all material respects.
- b) The medical report "to an extent provides corroboration for the complainant's evidence".
- c) If the complainant intended falsely implicating anyone, she would have implicated the first male who emerged from the first house. The complainant's initial reluctance to speak and the fact that her version was then solicited pursuant to threats of violence was correctly not to be held against her.

- d) The appellant's "alibi" defence was correctly rejected. There was no corroboration for the evidence of his girlfriend that he was with her on the relevant day.
- e) In the circumstances the magistrate made no misdirections and did not err materially in any way.

[40] During argument I tackled the State representative on what I considered a very important issue, being the fact that the doctor had not been called to give his expert evidence as to the meaning of his findings and report. The respondent's counsel conceded that the medical doctor, who's completed J88 form was handed in by consent, should have been called as a witness to explain his findings. It was conceded further that prima facie, and without the doctor's explanation, the recordal on the J88, being that the posterior rim of the hymen was "partially eroded – 7-6 o'clock" and that the configuration of the hymen was "annular" with no further explanation, was insufficient to materially and adequately permit an analysis of whether the findings as they were corroborated. or reasonably possibly negated, the version of the complainant. The same criticism can be levelled at the material value of the doctor's "conclusion" being "Finding in keeping with penetrative sexual activities." The complainant's version had been that there had been full penetrative rape by an adult man, she being only 10 years old at the time, over five occasions in the couple of months before the examination. The last rape was alleged to have occurred the day before the medical examination. Like the Court, the State representative could not explain what the findings actually meant in the context of the facts of this matter and what, if any, conclusions could be drawn from them given the complainant's version. The critical questions are in my view, were these findings in fact injuries, and if so, when are they likely to have occurred, and what type of "sexual activity" (as recorded by the doctor), is likely to have caused them?

Some relevant legal principles as were, and are, applicable in the adjudication of this trial and appeal

Single witnesses/child witnesses and the cautionary rule

[41] Section 208 of the Criminal Procedure Act 51 of 1977 (“the Act”) permits the court to convict an accused on the evidence of a single, competent witness. There is no obligation for corroboration. However, the evidence of that witness must be clear and satisfactory in all material respects and in analysing whether it is, and whether it can be safely relied upon, a court must apply what has been called “the cautionary rule”. That rule is, simply put, that the evidence of the single witness must be analysed and approached with sufficient caution before accepting it. Corroboration is a potential safeguard but is not a requirement. It is also accepted that caution must be applied when analysing and approaching the evidence of a child. Our courts have resisted the temptation to refer to a double cautionary approach. The position is that at a practical level what is required is that the evidence of a single child witness must be considered and evaluated with appropriate caution.¹ It does not need to be free of all conceivable criticism, but it should be substantially satisfactory in relation to material aspects or be corroborated. This approach sometimes holds that it be clear and satisfactory in all material respects.²

[42] Child witnesses should not be disadvantaged merely because of their age. Their evidence must be considered holistically to determine whether it is trustworthy.³

Expert medical evidence

[43] On the issue of expert medical evidence in matters such as this, there is what has been referred to as a growing dissatisfaction of the courts with the increasing tendency of the prosecution, particularly in cases of sexual assault, not to call the medical expert who examined the complainant and compiled the medical report. Authors Du Toit et al⁴ remark as follows: “the State does not seem to be heeding his appeals in this regard... and the time has come, as some judges already have, to

¹ R v Mokoena 1932 OPD 79; S v M 1992 (2) SACR 188 (W).

² R v Mokoena 1932 (supra) at 80; S v Rugnanan [2020] ZASCA 166, Case no 259/18, 10 December 2020 at [23].

³ Maila v The State (429/2022) [2023] ZASCA 3 (23 January 2023)

⁴ Commentary on the Criminal Procedure Act. Juta. Volume 2, Service 68 2022 at 24-36U

consider whether a judicial officer has, in addition to a discretion to subpoena a doctor in these circumstances to give oral evidence in terms of section 212(12), an actual duty to do so in terms of section 186” (with reference to the Act).

[44] Section 186 of the Act permits the court to call a witness “if the evidence of such witness appears to the court essential to a just decision of the case”. The power is discretionary but may, “become a duty if it appears that the evidence of the witness is essential to the just decision of the case. If it appears that the evidence is, in fact, essential to the just decision of the case, the failure to call the witness could be an irregularity”.⁵

[45] On this issue, Wallis JA warned, in *S v MM*,⁶ that in that matter it was “most unsatisfactory to have to reach a conclusion on the basis of uncertainty concerning the meaning of the medical report... Certainly, wherever the implications of the doctor’s observations are unclear, the doctor should be called to explain those observations and to guide the court in the correct inference to be drawn from them”.

[46] The medical report handed up in this matter is described, on its first page, as being a report and certificate “in terms of sections 212(4), 212(8) and 213(3) of Act 51 of 1977” (the Act). Section 212(12) of that Act provides that the court before which such a certificate is produced “may in its discretion call the person who made the affidavit or issued the certificate to be subpoenaed to give oral evidence in the proceedings in question...”. This may be done *mero motu*. It has been held that a court should avail itself of this power where it appears that the certificate requires elucidation.⁷

⁵ *S v B & Another* 1980 (2) SA 946 (A)

⁶ 2012 (2) SACR 18 (SCA)

⁷ *S v Veldthuizen* 1982 (3) SA 413 A

[47] Swain JA has severely criticised the practice of not calling the medical doctor in a number of judgments but of particular relevance are his words in a rape matter, *S v NS*.⁸ The court expressed its dissatisfaction with the trend on the part of the prosecution, particularly in cases of sexual assault, not to call the medical expert who examined the complainant and compiled the medical report. This approach by prosecutors “to obtain an admission from the accused as to the findings in the report ostensibly to satisfy this vital part of the prosecution’s case” was condemned as “a lackadaisical” one. In that matter the magistrate had relied on the “bald and cryptic conclusion in the J88 form, to corroborate the unsatisfactory evidence of the complainant”. This was held unjustifiable. The issue was not whether the conclusion in the form that the physical evidence was consistent with the averment of rape was logical, but whether it was reliable. In the circumstances it was considered vital to have called the medical practitioner to explain her conclusion and exclude any reasonable possibility that the physical evidence was equally consistent with consensual sexual intercourse.

The Court’s role in a criminal trial

[48] As early as 1928, in *R. v. Hepworth*⁹, Curlewis JA recorded that: “A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side. A judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done. Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirements or in the context of resources. . .”

⁸ [2015] ZASCA 139

⁹ 1928 A.D. 265 at 277

[49] In *S v Gerbers*¹⁰, Marais JA reiterated the Hepworth principles. He also pointed out that Sections 167 and 186 of the Act confer the same powers and duties upon a judicial officer as section 169 had when Hepworth was decided.

[50] The result is that when a witness's evidence is necessary to arrive at a just decision in a case, a presiding officer is obliged to use the powers set out in s186 of the Act to call that witness.¹¹

The trial Court's judgment and an analysis thereof

[51] Judgment was delivered on 26 July 2024, after argument on 17 May 2024. After the brief summary of the evidence the magistrate commenced her conclusions with the following: "the evidence of the doctor contains conclusive proof of sexual violation". She clearly meant by the words "sexual violation" that she viewed it as conclusive proof of the alleged rape. After drawing that conclusion, she records "the critical issue concerned here is the identity of the person who committed the alleged crimes."

[52] In my judgement that conclusion is the trial court's first, but significant, misdirection. In the absence of the oral testimony of the doctor, the entries on the J88 do not, in my judgment, evidence "conclusive proof" of the alleged penile penetration rape. As set out above, counsel for the State conceded as much. In the result, the court misdirected itself in then concluding that the only issue was who the perpetrator of "the alleged crimes" was. There was, in fact, an additional obligation to determine whether, beyond a reasonable doubt, the alleged rapes had been proved to have taken place at all.

¹⁰ 1997 (2) SACR 601 (SCA)

¹¹ Director of Public Prosecutions, *Transvaal v Mtshweni* 2007 (2) SACR 217 (SCA).

[53] Once incorrectly concluding that the only issue was the identity of the perpetrator the magistrate then considered the credibility of the various witnesses.

[54] She correctly accepted that the only direct evidence implicating the appellant was the evidence of the complainant. She set out the cautionary rule she was obliged to apply and accepted that there were contradictions in the child's evidence. She referred, for example, to the contradiction regarding the alleged coming from school on 2 May 2022, that day in fact being a public holiday when school would not have sat. She also was alive to the contradiction where the complainant had first said she received R10 which she threw away on the first occasion, as against later saying that she had used that money. The magistrate regarded these "contradictions" as being of inconsequential effect, however. This the magistrate based on a conclusion that the child was young and initially had no intention of reporting the incidents and was probably making an error. But that justification by the magistrate is inconsistent with what the magistrate later says about the complainant as a witness as follows: "she was an intelligent, honest and a reliable child seeking no desire to implicate any person in the commission of these crimes". In my view, those were not, however, the only material contradictions in the evidence of the complainant. Others, seemingly missed by the magistrate, included the following:

- a) In her evidence she had alleged that the appellant had given her money each time an incident took place. That is inconsistent with what she allegedly told the doctor. The J88 document records the history given to the doctor by the complainant and it records "... Used to give her money sometimes".
- b) Her evidence was that the last rape took place the day before her examination by the doctor. The doctor's J88 record that the history she gave was that the last incident occurred "in the May 2022". Whilst it is so that he saw her on 12 May 2022 there can be little doubt that had she told him that she had been raped the day before he saw her, he would have recorded that.

- c) In her evidence in chief the complainant said she received R10 the first time, then R5, R5, and R2 on the last occasion. Under cross-examination, she changed that to say that she also received R5 on the last occasion.
- d) In her evidence, in relating the first rape, she said he told her his name was “Mbonga Zulu”. Under cross examination she stated that he told her, his name on the third occasion and that the name he stated was “Mbongi Khuzwayo”.

[55] In my judgement all these inconsistencies in her evidence were material and should have been considered as such by the trial magistrate.

[56] The judgment also does not reveal that the magistrate gave any material consideration to the probabilities of the complainant’s version. In my view there are certain aspects of the complainant’s version which appear, on the face of it, to be inherently improbable. For example:

- a) Given that it was the complainant’s version that the incidents took place without her consent, and that the appellant was on her version bent on concealing what he was doing to her (and had on numerous occasions threatened her and her family with death and destruction should she tell anybody what was happening to her), it seems inherently improbable that when she asked for his name by her he simply gave it to her. Also that he would then point out to her the area (at least) where he allegedly lived.
- b) Having been exposed to the first rape, it is, on the probabilities, concerning that she would have again followed him when he called her on the next occasions. In reaching this conclusion I do not lose sight of the fact that this was a child who had allegedly been threatened previously. Her version was that she went each time because she was scared by his threats. But that, in my view, is improbable with her behaviour of spending the money, and as she said, on one occasion returning the change to her mother’s purse.

[57] In my judgment the magistrate's failure to consider these probabilities also constituted a misdirection. She ought to have considered these also when applying the "holistic" approach she says she did. In my judgment, considering the complainant's evidence holistically required a finding, against the application of the cautionary rule, that her evidence was not satisfactory in all material respects.

[58] The evidence about the first report is also problematic. It is common cause that the complainant was threatened with violence by her mother, which induced her into making a "first report". The magistrate accepted, correctly in my view, that the threats of physical assault on the complainant by her mother contributed to the making of the first report and the identification of an alleged perpetrator. What needed to be weighed up, certainly as far as the complainant and her mother's credibility is concerned, was the following evidence:

- a) The complainant's sister had testified that she was present when this first report was made, and that their mother had assaulted the complainant "with an electric cord". The magistrate found this evidence "improbable" and found support for that conclusion because there was, so the magistrate recorded, "no support from the medical report of the doctor who examined the complainant on the following day". However, whilst the J88 simply records "NAD", (which presumably stands for "no abnormality detected"), in relation to the body of the complainant, in my view such a conclusion based only on a reading of the J88 document is not justified.
- b) That is because the J88 does not indicate whether such an assault was investigated, whether it could have taken place, or whether the words "NAD" proved beyond reasonable doubt that it did not take place. Had the doctor been called, as he ought to have been, he would have been able to provide evidence of whether if, for example, the child had been wearing clothes during such an assault one would have of necessity seen any marks or wounds. Once again, in my view, the magistrate's

failure to call the doctor, as she should have, resulted in an insufficiency in the evidence necessary to ensure justice was done. The result, in my view, was that the inferences the magistrate drew in accepting the complainant's version and rejecting the appellant's witness on this issue, were also not sufficiently justifiable.

[59] The magistrate is correct that the allegations by the complainant's sister and the defence witness Gazu, were not canvassed with State witnesses when each was cross-examined. Clearly, they ought to have been. The magistrate held this against the appellant. She said, for example: "the greater difficulty lies with the dismal failure by the defence to cross-examine the witnesses they sought to discredit".

[60] However, what the magistrate ignored was the fact that both the complainant's sister and the witness Gazu testified that they only spoke to the defence counsel on the day they gave evidence. That means that the appellant's counsel did not have their version when she cross-examined the relevant State witnesses. The appellant's counsel submitted as much to the magistrate. This was a legal aid counsel, and such unfortunate circumstances systematically can, and do, occur.

[61] The magistrate had the power to remedy that problem by recalling the witnesses in terms of section 186 of the Act as set out above. In my view, before holding those failures against the appellant, the magistrate had a duty, in ensuring a fair trial and justice, to have exercised that power. The charges were extremely serious, as already discussed above, with very serious potential consequences for the appellant. In my judgment this constitute another clear example of where a presiding officer ought to have applied section 186 of the Act in order for the appellant to be tried fairly and in accordance with our required Constitutional principles.

[62] To reiterate, in my view it was incumbent on the trial court, in the interests of justice, to have at least ordered the recall of those witnesses for cross-examination on these allegations, before finding against the appellant as it did. As set out above, the criminal trial, whilst adversarial in South African law, is not a game. There is an obligation on the presiding officer, without necessarily entering the arena, to ensure that justice is done. In this instance the trial court failed to do so.

[63] As far as the appellant was concerned, his witnesses, the complainant's sister and the witness Gazu, were very important witnesses, to show that there was a reasonable possibility that the complainant and her mother's version were false. Gazu testified that the complainant's mother had previously falsely accused him of raping one of the complainant's sisters. He also said that at some stage the complainant herself had told him that her mother was "pushing her to say that a particular person committed that crime." She had said to him that the person arrested (appellant) had not committed the crime.

[64] The magistrate's analysis of Gazu's evidence is in my judgment superficial and incomplete. She concluded that the only relevance in Gazu's evidence was that it was "intended to show the propensity of the complainant's mother in creating false accusations". She then appears to have rejected it only because he was not cross examined on it. In my view, that magistrate constituted another serious misdirection because, in fact, Gazu testified about two important issues. The first was the complainant's mother's apparent propensity for false accusations about rape of her daughters, but the second was that the complainant had met him after the case against the appellant was "opened" and had told him that the appellant had not committed the offences and had been wrongly arrested.

[65] The magistrate ignored the second issue. It seems likely that the magistrate simply rejected everything he said because his version was not put to the state

witnesses. In my judgment, to reject the relevant and exculpatory evidence of Gazu for that reason was wrong.

[66] The trial court also rejected the alibi witness (the appellant's girlfriend who had allegedly been with him on the day of the last rape in a different town) because of an inconsistency regarding when the appellant had left her after they had returned from Empangeni. In my judgement that inconsistency was not material, nor adequately established. There was, in my view, fundamental and material consistency in their version about where they were on 11 May 2022.

[67] The trial court found the appellant to be "a very poor witness". I am alive to the fact that the trial court, with the witness in front of it, is usually in a better position to consider a witness's credibility than is an appeal court. Nonetheless, I am unable to conclude, from the record, that the appellant was a materially poor witness. In any event, even if he were a poor witness, our law requires that the State must provide evidence to establish both the commission of the crime, and the perpetrator thereof, beyond a reasonable doubt. In my judgement the State case did not do so in this matter. That is, inter alia, because material witnesses were either not called or were not recalled, as the interest of justice requires that they ought to have been. The result is that the rejection of the appellant's witnesses, who, prima facie, exonerate the appellant, or at least cast material reasonable doubt about his guilt, was unjustifiable.

Conclusion

[68] In my judgement the court a quo erred and misdirected itself in concluding that the evidence on record established that the alleged rapes had taken place and/or that the appellant was guilty of committing any rapes as alleged.

[69] The evidence was required to have proven the guilt of the appellant beyond a reasonable doubt. The appellant had no onus to establish his alibi or his innocence. If his defence was reasonably possibly true, he should have been given the benefit of the doubt. In my judgment, the evidence, weighed up holistically, objectively and rationally, did not establish the appellant's guilt beyond a reasonable doubt and the magistrate erred in so concluding.

[70] I emphasise that this is not a finding that the appellant is innocent of the crimes, however. That it is necessary that I say so is unfortunate because, had the court a quo ensured that the proceedings proceeded in accordance with justice as it was obliged to do, the result may have been different.

[71] Before I set out my proposed Order it is necessary that this Court once again repeat the multiple warnings of our Courts, and particularly the Supreme Court of Appeal, that a trial court in a criminal matter is obliged to ensure, in the interests of justice and a fair trial, that witnesses, such as medical doctors in sexual cases, or witnesses who need to be recalled to deal with late allegations should, and must, be called or recalled. The charges faced by the appellant in this matter had seriously potential consequences if he was convicted. He faced the heaviest penalty available in criminal proceedings, that being life imprisonment. That fact gravely emphasises the importance of the requirements and obligations on a presiding officer in a criminal case to ensure that the interests of justice and a fair trial are not only verbalised but are in fact put into practice.

Order

[72] I accordingly propose the following Order:

1. The appeal against the appellant's conviction on the rape count (in respect of all 5 alleged incidents) is upheld.
2. The conviction and sentence of the Regional Court on 26 July 2024 are set aside and replaced with the following Order:

“The appellant is found not guilty and discharged”

JUDGE PITMAN

I agree and it is so ordered

JUDGE MATHENJWA

APPEARANCE

Counsel for the Appellant: Mr P Mkumbuzi

Instructed by: Legal Aid South Africa
Pietermaritzburg Justice Centre

Counsel for the Respondent: Ms T.L Mlondo

Instructed by: Deputy Director of Public Prosecution

CASE INFORMATION

Date Judgment Reserved: 13 March 2026

Date Judgment Handed Down: 24 April 2026