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

APPEAL NO: AR 435/18

In the matter between:

SIBONGINHLANHLA KIZA RADEBE **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: MOSSOP J and BOND AJ
Heard: 23 October 2026
Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by release to SAFLII. The date and time at which it was handed down is deemed to be 10h00 on 30 October 2026.

ORDER

On appeal from: Ixopo Regional Court (sitting as the court of first instance):

1. The appellant's petition to appeal his conviction and sentence on count one is granted.
2. The appeals on both counts of rape are upheld.
3. The appellant's convictions and sentences on both counts of rape are set aside and are replaced with verdicts of 'Not Guilty' on both counts.

4. A copy of this judgment must be provided to the registrar of this court for her to consider the conduct of her staff and whether any action can and should be taken against those who dealt with the appellant's petition received by the registrar on 30 July 2018.

JUDGMENT

MOSSOP J (BOND AJ concurring):

[1] The appellant was charged with two counts of rape. The complainant in each instance was the same young girl, who was aged 13 at the time of the first rape, 14 at the time of the second rape and 15 when she testified in the court a quo. I shall simply refer to her hereafter as 'the complainant'.

[2] The appellant stood trial in the Regional Court, Ixopo and was convicted on both counts of rape. He was sentenced to 20 years' imprisonment on the first count and to life imprisonment on the second count, with the sentence on count one being ordered to run concurrently with the sentence on count two.

[3] The appellant has, by virtue of the sentence imposed upon him on count two, an automatic right of appeal in accordance with the provisions of s 309(1)*(a)* of the Criminal Procedure Act 51 of 1977 (the Act), and he has exercised that right. But he has no automatic right of appeal in respect of his conviction on count one.

[4] Following his conviction, and on 10 February 2017, the appellant consequently applied for leave to appeal only his sentence on count one. In refusing that application, the regional magistrate who heard the trial commented that:

'When a person applies for leave to appeal, there must be some real chance that another court will interfere with the sentence. This accused pleaded not guilty, he made everybody else to be liars, except himself, take responsibility, he showed no remorse for what he has done wrong at all. The court has got no problem to refuse the application because no other court will interfere with such a sentence.'

This court takes a different view of matters, contrary to the regional magistrate's prediction of what another court might find.

[5] The regional magistrate went on to state that:

'Accused will have to apply for leave to appeal to the High Court on count 2, as that is life imprisonment.'

From this it appears that the regional magistrate was unaware of the provisions of s 309(1)(*a*) of the Act.

[6] Having considered the record of proceedings in the regional court, I came to the view that both convictions were potentially unsound. When the appeal was argued, I explained my misgivings to counsel for the State, Ms *Ntsele*, and to counsel for the appellant, Ms *Anastasiou-Krause*. Ms *Ntsele*, very correctly, in my opinion, conceded that the convictions could not stand. She later delivered additional heads of argument setting out the State's position on the issue. But the truth of the matter was that the conviction on count one was not before us. What to do?

[7] The court drew counsel's attention to the provisions of s 304(4) of the Act. It reads as follows:

'If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.'

[8] As was stated by Opperman J in *S v Moyo*,[1] that section entitles a court:

'… to interfere in respect of both errors of fact and of law (those which classically resort under the appeal procedure), and errors of procedure (those which resort under the review procedure), in assessing whether the proceedings were in accordance with justice.'

[9] Both counsel were in agreement that this court should apply the provisions of this section and deal with the matter on the basis that both convictions were being challenged before this court. Ms *Ntsele* very correctly indicated that it was in the interests of justice that this should occur.

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[1] *S v Moyo* 2018 (1) SACR 658 (GJ) para 29.

[10] However, after the appeal was argued, I had cause to read the record of proceedings in the court a quo again. On the same day that the regional magistrate dismissed the appellant's application for leave to appeal on count one, 10 February 2017, the appellant made an affidavit. It was to be used in conjunction with a notice of motion that was later signed on 13 March 2017. I assume that this was intended to be a petition to the Judge President of this division. There is no indication what happened to the petition. It has no case number inserted nor does a copy of the documents appear embossed with the registrar's stamp. In short, there was nothing to indicate that the petition had ever found its way to this court or that it had been considered by two judges of this court.

[11] To be certain, I called upon the registrar of this court to indicate from her records whether the application had been received by her office and had been dealt with in terms of law. The answer that I received was most distressing. The registrar confirmed that the petition had been received by her office on 30 July 2018. Her records recorded its arrival but not that it had been allocated to any judges for consideration. All that appeared in her register were the letters 'C. A. V.'[2] There was no indication of what happened to the petition, who was allocated to deal with it or what the final outcome of the petition was.

[12] This was a shocking discovery. Had the matter enjoyed the attention of two judges of this division, there is the possibility that they may have come to the same conclusion that I have come to regarding the conviction of the appellant and he may not have been required to remain incarcerated these past eight years.

[13] It occurred to me then that a far more elegant and satisfactory way of dealing with the problem of count one not being before this court on appeal would be to simply deal with the petition and to grant leave to appeal on count one. This alternative had not been canvassed at the hearing of the appeal and I accordingly wrote to both counsel and invited them to submit any further representations that they wished to make on this aspect. Both responded swiftly, for which I thank them

[2] *Curia advisari vult*, the ordinary meaning of this is that the court reserved its decision for a later date.

most sincerely, and indicated that they consented to the matter being dealt with in that fashion.

[14] This court must act when it appears to be in the interests of justice that it does so,[3] as it is the function of this court to ensure that real and substantial justice occurs in proceedings that are brought before it. The court is not required to sacrifice the interests of justice on the altar of strict legal principle or procedure.[4] I am accordingly satisfied for the reasons that follow that the petition should be granted and the appellant is accordingly granted leave to appeal against conviction and sentence on count one.

[15] I turn now to consider the evidence presented by the State. As may be expected given the intimate and personal nature of the offences, the complainant, a young girl at the time of the offences, was a single witness to the events of which she spoke in her evidence. She was one of only three witnesses called by the State. The other two witnesses were her mother and the district surgeon who examined her after she finally disclosed what had allegedly happened to her.

[16] As regards count one, the complainant, who resided in a rural area with her grandmother, stated that on a day in October 2014 she was alone at home, as her grandmother was away attending a cultural ceremony elsewhere. The appellant was known to the complainant and her family because he was their immediate neighbour. She said that she went over to the appellant's home in order to borrow something from him and was told by him to go into his room where she would find what she was looking for. The affidavit that she made to a member of the South African Police Service (SAPS), to be considered in greater detail shortly when her cross-examination is mentioned, specified that she was looking to borrow a pen from the appellant. She went into the appellant's room and the appellant followed her in, told her to undress, and raped her. He threatened to kill her if she mentioned what had happened to her to anyone else.

[17] The second rape occurred on an unspecified date in June 2015. The complainant stated that she was at home with her younger siblings, as her older

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[3] *S v Mafu* 1966 (2) SA 240 (E) at 241H.
[4] *S v Van der Merwe* 2009 (1) SACR 673 (C) at 681C-D.

family members had gone to a relative's funeral. The time of day was not revealed at the trial. The complainant was watching television in one room of her grandmother's four-roomed house when the appellant entered the home, took her to one of the other rooms, and raped her on a bed, telling her, again, that he would kill her if she either made a noise that would alert the younger children then in her care or if she mentioned what had happened to her to any other person.

[18] Fearing for her safety if she revealed the truth of her experiences, the complainant explained that she remained mute and did not disclose what had occurred to her to any adult. At some stage, again at a time not disclosed at the trial, although it is likely to have been in November 2015, she did, however, confess what had befallen her to a friend, Ms N. Ms N was also a neighbour of the complainant and was the same age as the complainant. In due course, on a further undisclosed date, Ms N reported the events that she had been told by the complainant to the complainant's mother. The complainant thereafter revealed all to her mother. The complainant's mother, having now learned of what had allegedly occurred, immediately removed the complainant to the local police station, and laid a charge against the appellant. The complainant was taken to be examined by the district surgeon, a Dr Bana, the next day.

[19] The complainant's mother testified after the complainant had testified and confirmed that the appellant was well known to her and her family and was a neighbour. She also testified that she had been told of what had occurred to her by the complainant. Indeed, she was invited by the prosecutor to provide details to the court of what the complainant had informed her about the first rape. A similar invitation was extended to her with regard to the details of the second rape. The complainant's mother accepted both invitations and testified in great detail about what the complainant had told her of the two rapes. Significantly, the prosecutor asked her what had happened to the complainant after the SAPS arrived. The complainant's mother answered as follows:

'They took her with them to make some statements, Your Worship. The following day they came back to take her to Umzimkulu, Your Worship, to check her that if this thing had happened to her, Your Worship. Then they came back and told me that she is no longer a

virgin, meaning that something had happened to her, but they are not sure whether it is the accused who did this thing, Your Worship.'

It would appear that even at that early stage of proceedings, there was some doubt over whether the appellant committed the offences of which he was accused. Why there was this doubt was never explored by the prosecutor.

[20] The final witness called by the State was Dr Bana, the district surgeon who had examined the complainant. He confirmed that he examined the complainant on 5 November 2015. He completed a J88[5] document upon which he recorded the details of his examination and he explained the most significant aspect of his observations as follows:

'The gynaecological examination revealed that the hymen was raptured (sic). There were fresh tears of the hymen and a yellowish discharge was observed. On page 3 of the examination, the fresh tears occurred at regions of 6 o'clock, 7 o'clock and 9 o'clock. There were no other findings.'

[21] Dr Bana's findings regarding the tears to the complainant's hymen and the position of those tears, as well as the fact that they were adjudged by him to be 'fresh', were also inscribed in manuscript in that part of the J88 document that contains a sketch of the external aspect of the female reproductive organs.

[22] That was the evidence for the State. The appellant gave evidence in his defence and denied the allegations against him. He denied point blank that the events mentioned by the complainant had ever occurred and suggested that a dispute with the complainant's grandmother over the behaviour of his goats, which were allegedly eating the complainant's grandmother's bananas and sweet potatoes, might explain why he was falsely being blamed for the counts of rape.

[23] It is trite that when the State prefers a prosecution against an accused person on a charge of rape, it is required to consider, prepare and present the

[5] There is some uncertainty about whether the J88 document was ever formally received as an exhibit by the court a quo during the trial. There is a discussion about that document in the record. Only one page of it was apparently before the court and the record does not mention that the full document was later handed in. However, it now appears as an annexure to the record of proceedings.

evidence at its disposal with the utmost care. In my view, even greater care must be displayed when the complainant, as in this appeal, is not an adult.

[24] The principal focus of an analysis of the evidence led at the trial must, naturally, be on the evidence of the complainant, for it is on that evidence that the prosecution of the appellant was predicated. As may be expected, there were few, if any, difficulties with her evidence in chief through which she was led by the prosecutor. The difficulties came when she was cross-examined. John Henry Wigmore, an American lawyer and legal scholar, famously called cross-examination 'the greatest legal engine ever invented for the discovery of truth'.[6] What follows is an example of that adage being put into practice.

[25] The cross-examination of the complainant was performed by the appellant's legal representative, Mr Ndlela, in an understated, perfunctory and, on the face of it, a somewhat laconic fashion. But that belied its effectiveness because it produced some important answers and concessions from the complainant.

[26] The cross-examination centred on a statement that the complainant had provided to the SAPS when she was taken to the local police station by her mother after she had finally disclosed what had allegedly happened to her. When in the witness box, the complainant was shown the statement that she was said to have made and confirmed that it was, indeed, her statement and that she had signed it.

[27] Focussing on the first act of rape in October 2014, the appellant's legal representative asked the following question with regard to what was contained in the complainant's statement:

'Okay, now if you look at your statement, paragraph 4, there is sentence number 3 on paragraph 4, that he closed my mouth with a sellotape brown in colour. Is it your evidence, that one? --- Yes, Your Worship.

Is it what you told the police? --- Yes, Your Worship.

Why did you not tell the court that he closed your mouth with sellotape? --- It is because I am forgetting some of the things, your worship.'

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[6] *Wigmore on Evidence* 3 ed Vol 4 para 1367.

[28] That then led to the following question:

‘Okay, it is also your evidence that when he got into the room he was not carrying anything? --- He was carrying nothing, Your Worship. He only found the sellotape inside the drawer which was inside the room, Your Worship.’

[29] Mr Ndlela then drew the complainant’s attention back to her statement and asked the following question:

‘If you look at paragraph 4 again and sentence number 4, he took the knife and told me that if I ever tell anyone he will kill me. --- Yes, Your Worship.

Where did he take the knife? --- On the roof, Your Worship, in the house of the normal guy, Your Worship, he used to put his traditional... [indistinct] Then he was putting his knife over there, Your Worship.

Why did you not tell the Court that he was also in possession of a knife? --- Your Worship, as I also mentioned that I sometimes forget some things, Your Worship, but he was carrying a knife that he took it from over - from the roof.’

[30] Moving on to consider a different weapon, Mr Ndlela again directed the complainant’s attention to her statement and asked the following question:

‘OK, if you go to paragraph 6, the last sentence of paragraph 6, you said that he also showed you a firearm. --- Yes, Your Worship.

Where did he take that firearm? --- I think, Your Worship, since he is a security guard he normally carries the gun, Your Worship, but at that time he took it from the other side of the bed.

Why did you not tell the Court that he also pointed you - or pointed you with a firearm? --- Your Worship, as I also mentioned that I forget some things You Worship, but he did show me a firearm and he told me that if I ever tell anyone he will shoot me with that firearm.’

[31] Reverting back to the issue of the knife, the appellant’s legal representative asked:

‘Okay, and what did he say when he was showing you a knife? --- He was also telling me that he will kill me using that knife.

Why did you not tell the Court that evidence? --- I forgot also that, Your Worship, since I also mentioned that I am used to forget some things that had happened on that day, but what I am telling the Court is what had happened on that day.’

[32] What the cross-examination revealed was unmentioned by the complainant in her evidence in chief. It is surprising that the complainant forgot to mention having her mouth sealed with Sellotape. Being gagged in this fashion is an extremely unusual occurrence and must have been very distressing for her. It is difficult to accept that this is a detail that the complainant would simply forget. Likewise, her evidence that she was threatened with a knife and a firearm. One would imagine that the threat of these weapons must have been seared into her memory. Yet, the complainant forgot to mention that any of these things had happened.

[33] In the circumstances, I am unable to agree with the regional magistrate's finding that the complainant:

'… gave a very good impression on the court as a reliable, honest witness. She was not shaken in cross examination at all. There were no improbabilities or inconsistencies in her evidence.

[34] The complainant did not fare well under cross-examination. Her imperfect recall of events was exposed for all to see. The newly revealed evidence created a different factual scenario, far more menacing than the scenario initially described by her. It is important to remind judicial officers that they are required to distinguish between the assessment of the credibility of testimony and the reliance that can be placed upon it. In *S v Saban en 'n Ander*,[7] the Appellate Division observed that:

'What must be proved is the truth of the account of the party bearing the onus and not merely the honesty of the witnesses who present it.'

[35] The effect of Mr Ndlela's cross-examination of the complainant was not the only difficulty in the State's case. As already mentioned, during the course of her evidence in chief, the complainant's mother referred extensively to what she had been told by her daughter concerning the two counts of rape. She was purposefully and deliberately invited to mention that evidence by the prosecutor. There was no objection to this from the defence and the court did not inquire, or consider, whether this was admissible evidence.

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[7] *S v Saban en 'n Ander* 1992 (1) SACR 199 (A) at 204c, as per the translation in *SEM v S* [2025] ZAKZPHC 132 para 41.

[36] It appears that the State tendered the evidence of the complainant's mother on the basis that she was the first report to whom the complainant relayed her experiences. This is a speculative assumption on my part because I can conceive of no other possible way for that evidence to be tendered to, and be accepted by, the court. The complainant's mother was not a witness to the rapes nor did she have any direct personal knowledge of them. It is so that in sexual offence cases, the first report, which essentially consists of a retelling of the details of the sexual offence alleged to have been perpetrated upon the person making the report, is regarded in law as being admissible. Such reports are accepted by courts not on the basis that the repetition to the receiver of the complaint proves its truth, but on the basis that the report establishes the consistency of the existence of the complaint and the absence of consent.[8]

[37] However, as is evident from the summary of the State's evidence discussed earlier, the complainant's mother was not the first person to hear the complaint. The first report was, in fact, made to Ms N, who, for some unexplained reason, was not called to testify by the State.

[38] The repetition of the complainant's version by her mother simply amounted to a previous consistent statement made by the complainant and was neither cogent nor relevant and was, therefore, inadmissible.[9] That evidence ought not to have been received by the court. It certainly did not prove the truthfulness of anything that the complainant had told her mother because simply repeating a story does not provide any assurance that it is true. But the regional magistrate fell into the trap of finding truth in the evidence of the complainant's mother, when he stated as follows in his judgment:

'The mother confirmed her evidence that she gave the report to the mother via another child, because at some stage it became too much for the complainant to bear anymore. That is also an indication that the complainant did not make up a false story.'

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[8] *S v Vilakazi* [2016] ZASCA 103; 2016 (2) SACR 365 (SCA) para 15, quoting RL Milton *South African Criminal Law and Procedure Vol II* 3 ed at 461.

[9] *S v Mkohle* 1990 (1) SACR 95 (A) at 99d-e; P J Schwikkard and T B Mosaka *Principles of Evidence* 5 ed (2023) para 9.1; *Fox v General Medical Council* [1960] 3 All ER 225 at 230, referred to in *S v Bergh* 1976 (4) SA 857 (A).

The complainant's mother's narration of what she was told by her daughter could not establish that the complainant's was not a 'false story'.

[39] A more serious difficulty for the State's case, however, was presented by the evidence of Dr Bana. He stated that he observed 'fresh' tears to the complainant's hymen when he examined her. This is of singular significance. I am not certain that the term 'fresh' has any defined medical meaning and Dr Bana was not asked what he meant by the use of that word. Perhaps the meaning of that word is obvious and did not require clarification. But just to be sure, it is apposite to note that the ordinary meaning of the word 'fresh' is:[10]

'New or different;… recently made, done, arrived, etc ., and especially not yet changed by time.'

[40] A significant proposition was put to Dr Bana by the prosecutor while he was being led by the State. The proposition was framed as follows and Dr Bana's answer followed immediately thereafter:

'According to the victim she was raped in October and you examined her on 5 November. According to your conclusion there were fresh tears, would that be consistent with what the victim said as she said that it happened in October? --- Yes, consistent with the findings of penetration in October, yes.'

[41] Dr Bana was not asked whether what he observed was consistent with the complainant being raped in June 2015, five months before he performed his examination of the complainant, because, presumably, in that event, the tears could not be regarded as being fresh. The proposition thus put was that the tears were consistent with the complainant being raped in October 2015, shortly before she was examined by Dr Bana on 5 November 2015. Dr Bana agreed with that proposition.

[42] The proposition was, however, a false proposition. There was no evidence, nor any suggestion, that the complainant had been raped in October 2015. Her evidence was that she had been raped in October 2014 and, again, in June 2015. Not in October 2015. To avoid any possible doubt over this issue, I refer to this extract from the complainant's evidence in chief:

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[10] Cambridge Online Dictionary: https://dictionary.cambridge.org/dictionary/english/fresh.

'Miss N[…], tell us about the event in October 2014 which led you to be here today? Just tell us where were you and what you were doing there? --- In October 2014, Your Worship, I was alone at home …'.

[43] That evidence is entirely consistent with the allegations in the charge sheet relating to count one, which reads that the act of rape occurred during October 2014. The second act of rape was stated by the complainant to have occurred in June 2015, and this, too, is reflected in the wording of the second count.

[44] Thus, it is difficult to reconcile the evidence of Dr Bana regarding the freshness of the tears that he observed with any of the evidence tendered by the State through the evidence of the complainant. The 'fresh' tears were the only observations of any significance made by Dr Bana. He did not mention any older scars or healed injuries. Indeed, he confirmed that there 'were no other findings'. On the complainant's version, the last act of rape occurred, allegedly, in June 2015, five months before Dr Bana examined the complainant. Dr Bana was an experienced doctor, having practised his profession for 37 years, and it is difficult to conceive of him describing tears of that antiquity as being 'fresh'. Dr Bana's evidence accordingly does not sit well with the evidence of the complainant and is redolent of a much more recent act of penetration than the dates of the two offences for which the appellant stood trial.

[45] Dr Bana's answer that his observations were consistent with an assault in October 2015 therefore cannot be accepted when considered against the factual matrix of this case. Dr Bana knew of the alleged instances of rape in October 2014 and in June 2015. We can be certain of this because he wrote those dates down in manuscript on the J88 document but he still concluded that the tears were 'fresh'. In rejecting Dr Bana's conclusion, I do not intend any personal criticism of Dr Bana nor do I question his professionalism or his observations. On the contrary, I accept both. The fact of the matter is that Dr Bana was asked to respond to a palpably incorrect proposition. The prosecutor ought to have known that what she put to him was inaccurate. And the regional magistrate ought to have corrected the proposition before Dr Bana was even called upon to answer it.[11]

[11] It is interesting to note, in passing, that the regional magistrate himself got the date wrong when he stated in his judgment that:

[46] Dr Bana's evidence makes it plain that the complainant was penetrated at a time in close proximity to his examination of her, hence his description of the tears being 'fresh'. He made it clear in his answer to the prosecutor that if it was suggested that the complainant had been raped in October 2015, that would conform with his observations. If the complainant was sexually penetrated in October 2015, then it cannot have been by the appellant, for he was not charged with raping the complainant during that month nor did the complainant say that he had.

[47] Turning to consider the reasoning employed by the regional magistrate in formulating his judgment, he correctly found in his judgment that he was dealing with the evidence of a single witness and, moreover, a witness that was not an adult. He acknowledged that he was required to approach her evidence with caution. Again, he was correct. The reason for the need for caution may be found *S v Dyira*,[12] where the court observed that:

'Similarly, the courts have developed a cautionary rule which is to be applied to the evidence of small children. 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. Here, more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness.' (Authorities omitted.)

[48] In terms of s 208 of the Act, a court may convict an accused person on the single evidence of any competent witness. As was said in *R v Mokoena*:[13]

'Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by [the section], but in my opinion that section

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'On the second occasion, it happened in June 2014, when she was home alone …'.
The second rape actually occurred in June 2015.

[12] *S v Dyira* 2010 (1) SACR 78 (ECG) para 6.

[13] *R v Mokoena* 1932 OPD 79 at 80.

should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc.'

[49] In this division, a full bench stated as follows regarding the evidence of a single witness:[14]

'The cases dealing with single witnesses do not, as we understand them, lay down any rule of law but merely indicate that a court should approach the evidence of a single witness with caution and should not easily convict upon such evidence unless it is substantially satisfactory in all material respects or unless it is corroborated.'

[50] Since the decision in *Woji v Santam Insurance Co Ltd*,[15] the Supreme Court of Appeal has, however, cautioned against what is now commonly known as the double cautionary rule, which is that caution should be exercised where the complaint is of a sexual nature and involves a child. It has been held that the double cautionary rule should not be used to disadvantage a child witness on that basis alone. As was stated by the Supreme Court of Appeal in *Maila v S*:[16]

'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.'

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[14] *S v Ganie and Others* 1967 (4) SA 203 (N) at 206H.
[15] *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028B-D.
[16] *Maila v S* [2023] ZASCA 3 para 18.

[51] Was the evidence of the complainant substantially satisfactory in all material respects? In my view, it was not. The evidence disclosed under cross-examination raised doubts about her reliability and trustworthiness as a witness.

[52] The regional magistrate acknowledged in his judgment that there were:

'… some contradictions between the complainant's evidence and her police statement, but once again, the Court must evaluate that in terms of who wrote down the statement. Once again, it is a policeman who cannot even read or properly write. I have marked out probably about 40 grammar, spelling errors in this statement written down by a policeman, and it is also a policeman who did not use an official interpreter while interviewing the child. One cannot expect a child of that age to remember each and every minute detail because while it happened she was not thinking, "Oh, I must remember this and this and this for the court purposes one day." So the fault with those so-called differences in her statement lies with the police taking it down, and not with the child.'

[53] This is a remarkable statement, but for the wrong reason. Rather than consider the deviations between the complainant's statement and her viva voce evidence and, therefore, her potential unreliability, the regional magistrate attacked the SAPS official who recorded the complainant's statement. Unnecessary ad hominem attacks on persons doing their best to serve society, such as members of the SAPS, have no place in judgments. The regional magistrate would do well to acknowledge, and remember, that for the vast majority of citizens of this country, English is not their first language. It is no easy thing to express yourself gracefully and grammatically correctly in a language that is not your language of first choice. In my view, the statement was recorded in an entirely acceptable manner and is understandable.

[54] The regional magistrate's outburst, for that is what it was, is all the more unfortunate when it is acknowledged that the contradictions in the complainant's evidence were not occasioned by the manner in which her statement had been recorded. It follows that the premise upon which the regional magistrate criticised the recording of the complainant's statement was entirely incorrect, for the transcript of evidence reveals that the complainant acknowledged that the statement was correct but that she had forgotten what she had recorded in it when she gave her evidence.

The error was therefore not that of the member of the SAPS who took down the statement but was that of the complainant. There was never any suggestion in the evidence of the complainant that the scribe who took down her statement had erred in any respect.

[55] The regional magistrate mentioned in his judgment that he was required to approach the complainant's evidence with caution, but it does not appear to me that he acted in conformity with his own admonition. Had he done so, the difficulties just considered would have enjoyed his attention, but they seemingly did not.

[56] It appears, furthermore, that the regional magistrate did not consider the true meaning and effect of Dr Bana's evidence. All that was mentioned in the judgment in this regard was that:

'… the mother took her to the doctor and the doctor did find some fresh tears which indicates that somebody did penetrate the complainant. Obviously the doctor did not take DNA swabs because the incident was long before she was taken to the doctor and in that time she would have bathed, she would have washed, so there would not be any more semen left to determine.'

[57] That statement captures the dichotomy inherent in the State's case: the regional magistrate acknowledged that the injuries were fresh but accepted there could be no deoxyribonucleic acid (DNA) evidence to test because the acts of penetration had occurred a long time ago. Both propositions cannot exist together. If the injuries were fresh, why could there not be DNA evidence? If the injuries occurred a long time ago, how could they be fresh? The court a quo ought to have questioned how this could be possible but, unfortunately, did not. The State's case was never that the appellant had penetrated the complainant in October 2015, as alleged by the prosecutor in the proposition that she put to Dr Bana.

[58] As for the appellant, he did not perform poorly when he gave evidence. That having been said, he did not perform spectacularly either. He had a simple version: the events did not happen and he stuck to that version. He provided a reason in his evidence in chief as to why he believed that he might have been singled out for the false allegations that had been made against him. The dispute with the

complainant's grandmother over his goats' behaviour was the only reason that he could come up with to explain the predicament that he was in.

[59] The explanation appears unlikely. But, even so, the appellant found himself in an invidious position. He was accused of criminal conduct of which he allegedly knew nothing. He may have believed that he had to provide a reason why the accusations were being made against him and that if he simply told the truth that he did not know why he was being accused it would not go well for him. The goat story was the only thing of which he could think. If the goat story was not true, that does not mean that the State established that he was the person that violated the complainant on the dates mentioned in the charge sheet.[17] It simply means his speculation as to why he was charged with the offences was incorrect.

[60] In my view, the appellant's guilt was not established beyond reasonable doubt on either count. The evidence of Dr Bana did not permit any findings to be made on the alleged rapes during October 2014 and June 2015, given the unreliability of the complainant. The act of penetration that caused the injuries observed by Dr Bana occurred far closer to the date upon which he examined the complainant. No evidence was presented to allege a rape then or that the appellant was the person who perpetrated it. When that is considered in conjunction with the complainant's unreliable evidence, then serious doubt over the guilt of the appellant arises. It would appear beyond doubt that the complainant was penetrated but it has not been established beyond reasonable doubt that the appellant was the person responsible for that penetration.

[61] The State's case was poorly prepared and presented and was not understood by the prosecutor. Greater preparation by the State and a more considered and methodical presentation of its evidence and a better understanding of the law was called for. While the facts were relatively simple, they were apparently not understood either by the prosecutor or the regional magistrate. That is simply not acceptable.

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[17] *S v Steynberg* 1983 (3) SA 140 (A) at 146A-148A.

[62] At a time when the women of our country are the victims of ever increasing acts of sexual abuse and distressing personal violence, the State owes a duty to them, and to society generally, to present cases involving offences against women in a professional and skilful way to ensure that the guilty are convicted and punished. The State failed in that duty in this matter.

[63] The evidence presented in this matter and the proceedings were not of the required standard and to permit the appellant's conviction on both counts to consequently stand would be unsafe.

[64] I would accordingly propose the following order:

1. The appellant's petition to appeal his conviction and sentence on count one is granted.
2. The appeals on both counts of rape are upheld.
3. The appellant's convictions and sentences on both counts of rape are set aside and are replaced with verdicts of 'Not Guilty' on both counts.
4. A copy of this judgment must be provided to the registrar of this court for her to consider the conduct of her staff and whether any action can and should be taken against those who dealt with the appellant's petition received by the registrar on 30 July 2018.

MOSSOP J

I agree:

BOND AJ

APPEARANCES

Counsel for the appellants:	Ms Z Anastasiou-Krause
Instructed by:	Legal Aid South Africa 187 Hoosen Haffejee Street Pietermaritzburg
Email:	ZinaA@legal-aid.co.za
Counsel for the respondent:	Ms T Ntsele
Instructed by:	Director of Public Prosecutions Pietermaritzburg
Email:	TNtsele@npa.gov.za