REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/A46

(1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

11/5/12
DATE

SIGNATURE

In the matter between:

**EVANS, MICHAEL** Appellant

and

**THE STATE** Respondent

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**JUDGMENT**

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**SUTHERLAND J:**

*Introduction*

[1] The appellant was convicted of repeatedly sexually assaulting and raping his step-granddaughter over a six year period when she was between 6 and 11 years old. The prosecution contrived to formulate six counts to cover this alleged course of conduct. The effective sentence was life imprisonment. The appeal is against conviction and sentence.

[2] The case implicating the appellant was based wholly upon the evidence of the complainant, an eleven year girl. The appellant flatly denied he abused her in any way.

[3] The critical issue was whether or not the complanant's allegation that the appellant was responsible for any sexual interference with her was reliable and sufficient to result in a safe finding of fact that he was indeed the perpetrator of such deeds.

[4] It has to be said at the outset of this judgment that the view we take of the investigation of the allegation, the prosecution of the charges and the conduct of the trial is one of dismay. It ought to be obvious that matters of this nature are intrinsically difficult, for several reasons, and the forensic exercise to establish such a case ought to be carried out with care and circumspection. Our society

reflects an honourable instinct when it deals with vulnerable classes of persons, not least of all, children, with delicacy. There is however a real danger that our indignation at the violation of the rights and dignity of vulnerable people can cripple our critical faculties. When that happens there is a danger that one reaches for what is thought to be the right outcome without having properly conducted the fact finding exercise upon which to create a platform to stand and assert one's values. This case is an illustration of what happens when we succumb to that danger.

*The Case Advanced by the State*

[5] The charges were formulated as follows:

5.1 Indecent assault in 2005, at 47 Rietfontein road, Primrose, by touching her vagina and buttocks and letting her to play with his penis.

5.2 Rape in 2007, at 12 Suikerbos street, Boksburg, by having sexual intercourse without her consent.

5.3 Sexual assault in 2008, at 12 Suikerbos street, Boksburg, by licking her breasts, vagina and compelling her to lick and suck his penis and his breasts.

5.4 Rape, in 2009, at 12 Suikerbos street, Boksburgby an act of sexual penetration, by inserting his penis into her vagina.

5.5 Rape in 2009, at 12 Suikerbos street, Boksburg, by an act of sexual penetration, by inserting his fingers into her vagina.

5.6 Rape in 2009, at 12 Suikerbos Street, Boksburg by inserting his fingers inside her anus.

The addresses are the homes of her grandparents.

[6] In my view, the construction of the charges is singularly artificial. No exact dates are given, nor would it be expected that, on the probabilities, a child of her age during this period would be able to fix exact dates. However this plainly strained effort to create a chronological superstructure to establish *prolonged* abuse smacks of reconstruction, perhaps prodded by suggestions by the investigators. Also of significant oddity, is that the sequence of alleged happenings does not demonstrate an escalation as one might expect to see when studying the evolution of the abuse, but rather a random array of acts. Moreover, the absence of an event in 2006 calls attention to itself. These aspects are addressed again in relation to the complainant's evidence and that of the Constable Meyer who made a statement derived from an account that she says was given to her by the complainant.

[7] The first report of the abuse occurred on 30 November 2009. It was made to constable Meyer shortly after the conclusion of a sexual abuse awareness talk given by her, at school, in response to an invitation to the children to approach her to ask questions or just to talk. It emerged, in due course, that the complainant had never previously said anything about being abused to anyone. Meyer says the complainant was hiding her face and shaking when she approached Meyer. Meyer interpreted this as shyness and being scared. Meyer says that she was told by the complainant that her grandfather had molested and raped her over about seven years. Regrettably, Meyer made no contemporaneous note of complainant's exact words at that time, or, if she did, it was not produced. This was a pity. It would seem to me to be imperative to capture the spontaneous utterances in such circumstances because of the importance it could have for resolving controversies at trial, especially when the credibility of the allegation is a central issue.

[8] Only in cross-examination was Meyer asked about the statement she had prepared of the complainant's report to her. It is dated 30 November 2009 at 14H00. Meyer says that some phrases 'came out of [the complainant's] mouth'. The statement was not word for word as spoken by the complainant, but as Meyer put it, "what she said I wrote down". She asked questions to clarify what was divulged. She read it to the parents who expressed satisfaction. It is not plain if the parents were present during the revelations, but this remark seems to

imply that fact. The statement was an assembly of descriptions of several scenes and must be understood as Meyer's composition of what was reported to her. Meyer says that among the disclosures made were that there were occasions when the grandmother was in the next room when the interference occurred and when it seemed that she might scream, the appellant "het .... teruggetrek" It is not clear from the record whether this word was intended to convey a metaphoric or literal 'withdrawal'. Regrettably, the ambiguity was not clarified.

[9] Self-evidently, what was garnered in this statement was what the investigation had to start with. The material portion states:

> "...I went to visit weekends and school holidays at my ouma's and oupa's house since I was four years old in 2003. They stayed in a flat No 47 Rietfontein road, Primrose and then in 2004 they moved to the main house. It was at this house, when I was 6 years, old that my oupa Michael Evans started to touch my vagina and my bum. He would come to my room when my ouma was asleep and make me play with his penis and he would play with my vagina.
> In 2007 they moved to 12 Suikerbos road in VanDyk Park where they stayed for 2 years. Every night I slept over, my oupa Mike would come and wake me up to play our game. While I was staying over there on weekends or school holidays and my ouma was sleeping or at work, my oupa Mike would come and force me to have sex with him and told me that if I tell anyone he will kill me and my parents and that this must be our little secret.
> He forced me to lick his penis and boobs and he licked my vagina and boobs. He forced me to put his dick into my mouth and suck on it and then he would suck my vagina. He forced his fingers inside my vagina as well as inside my bum. Then as he is playing with me white stuff came out if his penis and he

forced me to suck on it, and swallow it. He tried to out his penis inside my vagina but he pulled out when I wanted to scream from the pain.
This was going on for 4 years, it started when I was 6 years old and and the lat time was when I was 10 years old, then he left because my ouma and oupa Mike got divorced. I kept going back there because I was scared for my ouma. I was very scared to tell anyone about this until the police came to visit our school and I realised they can help me. I never gave anyone permission to rape or molest me. I am very afraid of my oupa Mike as he threatened to kill me....."

[10] There was no other statement produced, but as is self-evident, the charges contain details not foreshadowed by the content of the initial statement. The peculiar time frame in the charges, in particular, is absent from the initial statement.

*The Medical Evidence*

[11] Presumably having obtained the parent's consent, Meyer took the complainant to the Ethemba Rape and Trauma Centre, Benoni. The visit to the Centre is recorded on the J88 Form (Report by an authorised medical practitioner on the completion of a medico-legal examination) at 08h30 on 1 December 2009; ie the next day. She was examined by Christina Rollin, who describes herself as a Registered Nurse and Midwife.

[12] Meyer understood that "the test was positive and a case was opened of rape and molestation." Who assumed the role of the investigation officer is not

clearly stated. The name 'Inspector Du Toit" appears on the J15 (Charge sheet cover page). However, no evidence was led, nor can it be assumed that Du Toit was the investigating officer throughout the matter.

[13] The appellant was living in Durban when arrested in about February 2010, and he was in custody thereafter until the conclusion of the trial. He first appeared in court on 26 February 2010. Thus, a period of about 11- 12 weeks elapsed after the accusation before he was arrested. What work was done during that time to investigate the allegations, if any, is not revealed. The trial began on 1 April 2011, 13 months later. What this time was used for, if anything, in the investigation of the allegation is not specifically explained, but passing reference exists to the collection of several reports from various social workers. Reference to these reports will be made in due course and the impression is that the gathering of the reports was the sum of the investigation.

[14] What Rollins' evidence establishes, if it be accepted that the opinions she expressed were appropriate for a nurse to express, was as follows;

14.1 That the urethral opening was dilated and thickened, a scar was evident, the hymen was not intact, was rolled and a cleft was evident.

14.2 The anal examination revealed what was called a 'tag', and there was redness and pigmentation presented. Some signs were not inconsistent with constipation, but the number of signs inclined her to infer forceful penetration.

14.3 Significantly, Rollins expressed an opinion that in respect of her vaginal examination there was:

"Clinical evidence of *ongoing forceful penetration*- not acute"

and in respect of the anal examination that there was:

"Clinical evidence of *forceful penetration- ongoing*- not acute".

The implications of this opinion, ie that 'forceful penetration was *ongoing*' appear to have been totally missed by the police, the prosecution and subsequently by the Magistrate.

14.4 Although she indicated that these clinical signs take years to disappear and that some are permanent, she was not invited to explain and justify any opinion about the actual age of these signs in this patient.

14.5 Her remarks about the clinical signs being 'non-acute' meaning just that they were more than ten days old left the critical question

begging, ie could the marks observed be consistent with an encounter at the time the appellant last had an opportunity to interfere with the complainant. On this point, no evidence was led nor an opinion solicited.

[15] Moreover, the value of her opinions cannot be established with certainty because her expertise to express such opinions and draw such conclusions was not adduced. Rollins spelt out her professional credentials which included diplomas in general nursing, midwifery, and paediatric nursing. She has nursed for over 25 years.

[16] She worked at the Rape centre from April 2009. She says it was there she trained as a 'Sexual Assault Examiner Nurse'. At the time she testified she said she was a senior nurse there and had attended to over 600 rape and (sexual) assault cases. However, when she examined the complainant on 1 December 2009, she had, including her training period which is undisclosed, been at the Centre for 8 months.

[17] Why the victim was not referred to a doctor after the initial examination resulted in the nurse's opinion that there had been forcible penetration is not explained. Similarly unexplained is why it is appropriate for a nurse to submit a J88 report, which ostensibly requires a 'medical practitioner' to complete, albeit that there is no reason to question the accuracy of Rollins clinical observations.

[18] As a result, the un-insightful presentation of Rollins' evidence undermined its usefulness. The glib assumption that the bare bones of the report were all that was necessary for the prosecution to succeed in the case was a serious lapse of judgment by the prosecution.

*The Evidence on Trial*

[19] The prosecution thus, went into the trial, with evidence available to them that the complainant had experienced some form of penetration, the allegations by the complainant that her grandfather abused her, and the common cause fact that the appellant had the opportunity to commit such a crime. The prosecution ought to have appreciated that the fate of the case rested on the evidence of a single child witness and that other than her say-so, there was no evidence which implicated the appellant as the perpetrator. This regrettable failure, ostensibly, to follow up on any investigation or search for corroborative evidence will be addressed hereafter.

[20] The complainant gave evidence with an intermediary in attendance. Some remarks about how that was handled are appropriate. Section 170A of the Criminal Procedure Act 51 of 1977 provides for an intermediary to interpose between the counsel and the witness where the Court takes the view that the witness, who must be less than 18 years old, might suffer trauma in testifying. It

seems appropriate that a court in these circumstances should be informed fully about the intermediary, and about the engagement which had occurred between the witness and the intermediary before the proceedings. Moreover, the record on appeal ought to be capable of conveying to the reader, unequivocally what is said by the witness and by the intermediary, and what side-conversations, if any, have occurred and what clarifications, explanations or re-formulations have taken place. This record does not do this to any useful extent, and the impression is left that exchanges have occurred that have not been transcribed. Counsel for the State on appeal acknowledged these shortcomings.

*The evidence of the complainant*

[21] The artificiality of the formulation of the charges has already been mentioned. However, common sense dictates that some context as to time and place had to be given to facilitate an account of the alleged abuse. It was, thus, wholly proper and sensible to invite the complainant to relate what happened at various places. The very fact that the grandparents moved house from time to time helped to contextualise time in relation to place in her account. However, asking her what happened in '2005 when she was six years old' and getting an answer smacks of a 'pre-cognition' of the witness that spoils the answer. Her evidence would have been more convincing if she had merely told the court what happened long ago and not so long ago at what place. The suspicion that she was coached in this regard is unavoidable. That criticism is not to impute

dishonourable motives to those persons who were responsible for doing so, but to point out that their un-insightful intervention has the effect of spoiling the reliability of an otherwise child-like, however less coherent, but more convincing account. This is an especial danger when a witness is relating events that occurred over a period of years where the risk of reconstruction, rather than genuine memory of the details of an event, is acute. A witness is not assisted by trying to mask these problems; they should be squarely faced and resolved by practical means.

[22] It is common cause that the appellant married the complainant's' grandmother after the complainant was born and she was introduced to him at that time. She often visited and often had a 'sleepover'at weekends or during school holidays. The grandmother worked and during the working week until 17h00 and on two Saturdays per month she would be at work. The appellant did work too, apparently for his own account, and self evidently, from time to time was available to be at home and mind the child. The complainant was often alone with the appellant during the grandmother's absences. There is no suggestion that Kirsten was alone with the appellant during the night. These visits continued on and off for some six years. The appellant left the home permanently in about May/ June 2009 for the Cape, and subsequently went to Durban in pursuit of work. The couple divorced in 2009.

*47 Rietfontein road (the first House)*

[23] The complainant's account of what happened at 47 Rietfontein road where her grandparents lived in 2005 is dealt with first. The place was a flat.

[24] She says that it was when the grandparents lived at this place that the appellant first molested her. She was six years old. The appellant would " take her koekie (vagina) and her bum, and he would come in the night and he would force me to play with his dick (Penis)." He would put his fingers into these organs. Also, he forced her to play with his penis. This account is what she said in chief. Under cross examination, when asked where these happenings occurred she said in the bedroom on the bed, but vacillated about when these events occurred, during the day or night. She said these incidents happened a lot. Further, asked where she slept, she said she did not always sleep with the grandparents in their bed. Sometimes she slept on a couch in the lounge.

[25] However, her Grandmother stated that the complainant never slept at night other than in their bed with both grandparents. This directly contradicts the complainant's statement that the appellant would come to her room when the grandmother was asleep, and contradicts her evidence in chief that the events occurred at night. Her vacillation in cross examination suggests that her recollection is vague and as to place and time and her evidence about these

aspects is thus unreliable. If she is correct about place, the abuse could not have occurred as she says. If she has reconstructed the place as an innocent false memory, when might the occurrences have taken place? On the probabilities, later rather than earlier, given her age. All of this points to the unrealistic expectation of asking an eleven year old to accurately fix a memory as to time and place. Given this body of evidence, the glibness of the framing of count no 1 in the terms formulated, is obvious. It is not apparent that any safe finding of fact can be made.

*12 Suikerbos street (The Second House)*

[26] All the other charges relate to the events alleged to have occurred in the house at 12 Suikerbos street, where after the (ostensible) hiatus year of 2006, abuse resumed in 2007. Of course it could be that she simply cannot connect any memory to 2006. However that on the probabilities, would be true of the other linkages too.

[27] Again, prompted to say what happened in the years 2007, 2008, and 2009, the complainant produced answers.

27.1 In 2008, the appellant 'put his dick into my koekie', while on the grandparents bed. When asked 'where was ouma', she replied either sleeping or at work, an answer which has the ring of a

rehearsed mantra, given without grasping the improbability of one half of the answer. A leading question from the intermediary then produced the answer that if it happened on that bed, 'Ouma would be a work'.

27.2 In 2008, the appellant would lick her 'boobs' and her vagina. She in turn would lick his penis and his 'boobs'. The symmetry of this answer provokes a need for clarification, but no-none appeared to appreciate that point. When asked where this happened she said it happened at 47 Rietfontein but then corrected herself in response to a prompt and said 12 Suikerbos.

27.3 In 2009, the appellant would lick her vagina and stick his fingers into her vagina and her bum. Asked if that was all he put into her vagina and bum, she answered that he also put his penis in. A lot of questions were put about the nature of the interference, but none of the answers relate the descriptions specifically to the year 2009.

*Evaluation of the evidence of the complainant*

[28] A comparison of this evidence with the charges shows that the prosecution's tactic to relate episodes to the various years flopped. This observation is not necessarily a criticism of the complainant as a witness, but it

certainly shows the poverty of the presentation of her case. In the result, it is not plausible to evaluate her evidence in relation to time, and only partially plausible to do in relation to place.

[29] A measure of confusion is to be expected from the evidence of a child about these events, if they indeed occurred. In addressing the probabilities inherent in her version, her veracity to pointing out the appellant as the perpetrator, and her overall reliability several other considerations come into play. They are now addressed.

[30] The ambivalence about the presence or absence of grandmother is troublesome. On the probabilities these interferences would be unlikely to occur when the grandmother was in the house; yet the complainant's evidence is that on some occasions they indeed did occur when the grandmother was nearby. As mentioned before, on one occasion she said that the appellant was trying to penetrate her but because she was about to scream and alert grandmother, he withdrew. The frequent allusion to the grandmother being asleep fortifies the fact that, at least, she believes or claims to believe that her grandmother was in the vicinity.

*Evaluation of the State's thesis*

[31] The Prosecution tried to advance a case that the appellant had "groomed" the complainant to be his compliant sexual accomplice. What this attempt amounted to were several juvenile attempts to draw adverse inferences from typical commonplace family interactions and invoke the buzzword 'grooming' to cloak the frailty of the thesis that these activities warranted adverse inferences. The matters included that he bought her sweets, colouring in books and a jacket, he gave or wanted to give her an old cell phone, he bathed naked with her, albeit grandmother was about, he had her sit on his lap, and he hugged her and kissed her. If a case of 'grooming' is to be advanced it must be properly thought through and presented with expert support.

[32] What appears to have escaped the attention of the prosecution was the need to address the facts which, at least prima facie, ran contrary to the credibility and reliability of the accusation against the appellant.

[33] The foremost of these considerations was to give attention to her medically determined condition in relation to the last opportunity the appellant had to abuse her. This seems to have been totally overlooked. Reference has already been made to the limitations of Rollins evidence. On anyones' version, the last opportunity the appellant had to see the complainant was in May 2009. The appellant himself says that was the position. When the complainant's last sleepover took place is less certain. The appellant says that to his recollection, it was in October 2008. The Grandmother corroborates a stayover of some days in

October 2008 whilst the complainant's parents were in Australia. Moreover, the grandmother's best estimate of the last sleepover, if any, in 2009, would have been, she deduces, during the April school holidays.

[34] The absent evidence is important for two aspects of the matter:

34.1 First, an evaluation of the allegations in counts 4, 5 and 6, which were only partially and thinly addressed in the complainant's evidence.

34.2 Second, the elapse of time between the last opportunity for the appellant to abuse her and when the complainant was examined on 1 December 2009. That period is at least 6 months, not improbably, seven months and perhaps, on the appellant's recollection, 13 months. What is missing from the state's case is evidence to tell the trial court that the age of the clinical signs found by Rollins to exist on 1 December 2009 could or indeed were capable of having been as old as the time when the appellant might have molested her. Had that exercise been done, it might have been possible to show that the interference was consistent with the appellant's opportunity to commit the interference or, on the other hand, exonerate him.

[35] Throughout the whole period of the abuse the complainant was enthusiastic about visiting her grandparents. She evinced not the slightest

reluctance to spend time with the appellant. She went so far as to perform a tantrum to persuade her parents to let her go to stay. This course of conduct does not *per se* mean that she is untruthful about her accusation. However, it does point to a serious inconsistency which required exploration and examination.

[36] What was put forward as a counter was that complainant feared for her life and that of her grandmother and for that reason she kept coming back. She said that a fear was induced in her by the appellant's threat to kill her and her grandmother if she revealed their sexual exploits. However what this does not explain is why she remained keen to keep going back to endure more abuse. This case is not an example where the victim does not appreciate the immorality of the conduct and perhaps even has been corrupted to acquire an appetite for sexual encounters with the abuser. It is by no means perverse for a child to nurture an irrational fear, but the problem that presents itself here is not the irrationality of the fear but the irrationality of the response to it. There is no hint in the evidence that she was threatened to keep presenting herself for sex sessions or there would be adverse consequences to a loved one. In my view, the inconsistency was not satisfactorily resolved. It presents a material danger to accepting her evidence in the absence of corroboration.

[37] Why did she not make a report earlier? That fact that she did not do so is no evidence of the falsehood of her accusation. However it remains necessary to

explain it properly. The natural reason for silence is adoration for, or fear of, the abuser. In this case the complainant said she was afraid to speak up. Yet her abuser had been out of her life since at least May 2009. The throwaway remark that she thought he might be returning is not convincing. Nor was there any space in her thinking for an intuitive assumption that her parents would not want to believe that 'grandpa had done a bad thing'. The intervention of the police visit to school did introduce a wholly new dimension. Moreover, there was a direct invitation to speak up; an adult had initiated the opportunity to open up.

[38] It has been assumed by the prosecution and the court a quo that because complainant at once accused the appellant, her veracity on the issue of identifying the abuser was satisfied. Whether such an inference is ever sound must depend on all the known facts. Overlooked, as alluded to already, was the failure to link the clinical evidence to a time when the appellant had the opportunity to abuse her. More seriously overlooked, was the Rollins' opinion that the clinical evidence showed *ongoing penetration*. No one explored the possibility that the penetrations were caused by some other person, and perhaps Kirsten herself. An exclusion of these possibilities might have strengthened the case against the appellant, or led to his exoneration. Moreover the prosecution had information that should have alerted it to such considerations and the need for such investigation.

*Neglected aspects of the case*

[39] There was clear evidence of at least one incident of masturbation. Kirsten was rebuked. The logical result would be that she would in future be discreet. Cross examination was improperly shut down on this issue. It might be that this experimentation by young girls, by no means to be thought uncommon, was responsible for the clinical signs. Proper medical evidence to exclude or prove one or another conclusion was not proffered.

[40] A social worker, Ms Malele reported on 15 December 2010, 5 months before trial, that the complainant related to her that she was shown pornographic videos of pictures by the appellant and that he used sex toys on her. There is no evidence of these items being found, nor, even a search being made for them. Moreover, if indeed the complainant had been exposed to pornography, whether by the appellant or her parents, such a fact would be relevant to enquiring into whether the account she gave did not in some way draw on images she had seen.

[41] There was a suggestion, in cross examination, that the complainant's brother, 13 years old when she was six, had been in trouble for pinching a sex movie from his parents' home. If the parents had pornography in their home was this not a matter that warranted investigation? Moreover, the social worker, Ms

Smit reported that Nathan had the need to leave home during 2010 from time to time because he was traumatised by the revelations about the abuse should have triggered an enquiry. However, no one gave these matters a thought. The prudence of a consideration of whether a close family member warranted investigation was not considered at all, despite the implications of Rollins' report about ongoing penetration, months after the appellant was off the scene.

[42] Although no doubt rare, there is the danger of a false identification of a person as being the abuser because the person accused cannot reap retribution, whereas the real abuser is too close to the victim and the victim wants the abuse to end without getting the abuser into trouble. Some investigation ought to have been undertaken to exclude or establish that possibility, given the aspects of the evidence already alluded to. Rollins' opinions alone should have triggered that consideration. The report of the Social worker Smit, should have enhanced that awareness.

[43] An investigation into the appellant's sexual history was apparently not done, or if done, it was not disclosed.

*The Legal Principles and their application*

[44] The foundational legal principle is that the state bears the onus to prove its case. Single witness evidence is to be satisfactory in all material respects. This

has never meant that it must be unblemished; rather, that after allowing for the frailties of human memory, the limitations in the capacity to articulate which a given witness may reasonably be expected to exhibit, the account given is nevertheless convincing. (See DPP v S 2000(2) SA 711 (T) ; S v J 1998 (2) SA 984 (SCA).) Witnesses often fail because they try to improve on the truth or fill in the gaps between what they do know with what the feel must have happened. In this case, as indicated, there are serious reservations about the reliability of the account.

[45] Similarly, an accused person's account may be rejected when it can be held that it is not reasonable possible that it can be true. ( S v Shackall 2001 (4) SA 1 (SCA) at [30]. )In order to test that principle in practice it is imperative to take the version seriously and probe it for weaknesses as to probabilities. If it stands up to that test then it can only be rejected if there is a rational basis to prefer the contending version. If the state's case does not tip the scales in favour of the state, the state's case is unproven.

[46] In this matter there is no inherent improbability in the appellant's version. That does not mean it is true, but the appellant is not obliged to go that far. Of its very nature, it is not susceptible to corroboration. At best such a defence calls for an examination if the state's case for weakness or anomalies.

[47] The case for the state has been spoilt by well intentioned but inappropriate interventions with the complainant's account and her natural capacity to relate the material events. The inconsistencies in her account were not explored; ie the presence if the grandmother during abuse, her enthusiasm to visit although she supposedly feared the appellant, and the failure of the prosecution to appreciate the need for objective corroboration of actual abuse having occurred at a time when the appellant had the opportunity to abuse the complainant and to appreciate the need for corroboration, whether direct or circumstantial, of the identification of the appellant as the real culprit. The result is that this conviction is not safe.

*The order*

[48] As a result the appeal against the conviction must succeed. An order is made as follows:

48.1 The appeal is upheld.

48.2 The convictions on all six counts and the sentences imposed thereon are set aside.

48.3 The appellant is to be released immediately upon delivery of this order to the department of correctional services.

11 August 2012

**SUTHERLAND J**

I agree.

**MBHA J**

Hearing: 24 July 2012

Delivered: .....

**For Appellant:**
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**Counsel for the State:**
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