REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A050/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
DATE: 16/02/2022

In the matter between:

MODISE EPHRAIM SAMSAM APPELLANT

And

THE STATE RESPONDENT

JUDGMENT

MATJELE AJ:

1. The appellant was charged and convicted, in the Regional Court, Soweto, on two charges:

1. Count one: kidnapping
2. Count two rape of a six years old child.

2. The appellant was sentenced to four years imprisonment on the charge of kidnapping and fourteen years imprisonment for the rape charge. The four years' imprisonment on the charge of kidnapping was ordered to run concurrently with the first term of fifteen years imprisonment on the charge of rape. and was further declared unfit to possess a firearm in terms of Section 103(1) of Act 60 of 2000. The effective term of imprisonment is thus a period of fourteen years direct imprisonment. The appellant now appeals against conviction and sentence with leave of the Court *a quo*.

3. Heads of argument were filed and arguments by both counsel were heard on the 17th January 2022.

Facts

4. The State led the evidence of three witnesses, the complainant, first report and the medical practitioner Dr Thompson. The complainant who was 6 years old at the time of the incident, and 7 years old when she testified before the trial court that Friday the 23rd January 2015 when she came out of school, the Appellant met her at the main gate of her school, N[....] Primary School in Moletsane around 13h30, and asked her to go with him but she refused stating that she has been taught that after school she must go home to wash her socks, polish her shoes, and eat before taking her bath. When she refused to go with him, the Appellant then held her by hand and walked with her by force against her will. They went pass a tavern, and he went with her into a yard with a red gate next to the tavern, where he took her into a shack. It is her evidence that no one witnessed this. When inside the shack he removed her clothes and panty, and he also removed his own. He made the complainant to lie on her back on the cement floor of the shack, climbed on top of her and then penetrated her vagina with his penis. He made up and down movements while on top of her, and she was feeling pain inside her vagina or "kookoo" as he did so, the pain caused by his penis or "pee-pee". After he finished he let her go. She dressed herself and left going to her home. After the Appellant told her not to tell anyone. He also gave her R2.

5. The second witness called was M[....] M[....], the first report, who is the complainant's stepmother. She confirmed the age of child being 7 years old, born on the 18th August 2008. Her evidence is that on the 23rd January 2015 she was woken up by her husband, the complainant's father, who handed her the complainant's panty from the laundry basket. It was having whitish substance, and he wanted her enquire from the complainant what happened to her. She woke up and asked the complainant, who told her she got hurt by a swing at school. The child confirmed that she did not tell her about this when she got home from school, and also that she did not tell the teachers or her friends about this injury, from the swing. She tried to open her legs to examine her, but the complainant tightened her thighs, not allowing her. She left her, but the following day as she was bathing her the complainant continued tightening her thighs.

6. When she enquired why she was doing so she stated that she got hurt at the swing, pointing at her buttocks. She then took her and placed her on the bed, and opened up her thighs with the assistance of her father. She noticed that she was *"swollen on both sides in between her private part or inside the private part, she was swollen"*. Also she noticed that on the opening or mouth of the vagina "it was a bit wider and it was swollen as well". She only noticed these injuries but never touched her private part. Even after her discovery she asked her to tell her the truth, but the child maintained that she fell on the swing. Later that day as they went to the salon she recalled that the complainant and her friend Palesa while playing outside the house the previous day, they had R2 with them. She decided to go ask Palesa in front of her mother and in the presence of the complainant. Palesa said it was from her own uncle, but the complainant corrected her that is was from the appellant, Karabo's uncle. Asked where he lives, she said he stays "there", without being specific. But later as she disclosed she realised appellant lived where they previously rented, and that is where they were fetching their mail from. On their way back home she asked and pleaded with the complainant to tell her the truth as to why the Appellant gave her money and also what happed to her. She then told her she and Palisa went to where Appellant's stays to get the money he had promised to give her after school.

7. After a lot of probing, after being asked why he had promised her money, that's when he stated to her what she testified in court that he met the appellant at the gate, who asked if the school was out, and upon her confirming he asked her to go with him, to which request she refused and told him that her mother's instructions are that after school she must proceed straight home to wash her socks and polish shoes. He then provided her R2 if she went with him and that it won't take long. However, she also later said they went to fetch the R2 where the appellant stays, when she was with Palesa. She promised to show the mother the following day when they go to church where they had gone to with the appellant.

8. The following day, Sunday the 25th January 2015 as they went to Church she reminded her what she promised. The child pointed to her to a spot not far from the school gate, where there was some polony plastic, and said that's where the appellant raped her. She was adamant, and as she interrogated her further she changed and said it was not there, but did not say where, but rather kept quiet as they went to church. She was not satisfied with the complainant's answers as she was *"…. saying one thing after the other".*

9. On Monday the 26th January 2015 both parents decided to get her examined by a medical practitioner, and were referred to Nthabiseng clinic in Baragwanath hospital. While there Ms. M[....] further pleaded with the child to speak the truth, indicating she didn't believe what she had told her earlier, and telling her that such things don't just happen to kids but for other reasons. She begged her for the truth, and it was then the child gave her a different version that from the main gate of the school they went to a house next to where people sit outside drinking alcohol. She pointed out to her a yard with a white gate, with shacks within, and said they went into one shack that is not occupied or owned by any person. In that shack he pulled up her dress up, pulled down her panty and made her lay down, and slept on top of her. She did not want to hear further, stopped her and said the child must show her the yard. The child showed her the yard, but she didn't go in the yard. The following day they went Jabulani Police Station where the child was interviewed away from the mother. When they returned with her they told the mother that the child knows what

is happening, the only thing is that she is only scared the parents will give her a hiding if she told them.

10. Dr Lloyd Darosum Thompson from Nthabiseng TC situated in Baragwanath Hospital testified that he examined the complainant, then 6 years old on the 26th January 2015 at about 20h15. The child said an identifiable man took her to a nearby house, undressed her and subjected her to virginal penetration. There was no visible injury on her body. He conducted a gynaecological examination, and discovered that the labia majora was red; the hymen was not torn but angular with a swelling at 9o'clock area; and there was irregular bruising at about 6 o'clock area on the perineum. His conclusion was that it was consistent with vaginal penetration. He could not comment whether it was penis or finger, but he was certain something had entered there because 9o'clock is quiet high. The were no other injuries or tears anywhere else. The J88 Medico-legal report was accepted as Exhibit "A" and the DNA paediatric sexual assault evidence collection kit information was accepted as Exhibit "B" of panty taken for DNA analysis.

11. For the defence the Appellant testified first, followed by Marry Samsam, his siter in law and Roland Hill, the owner of the yard where the incident allegedly took place. The appellant testified that he was arrested on the 27th January 2015, while at his home. He knows the complainant and his father whom he refers to as Mr. Maratha. The father and the child were in the company of 3 police officers. He says on the 23rd January 2015 he got home at 7am in the morning coming from work, as he was working night shift the previous day. He prepared food, ate breakfast and went to sleep and only woke up at 14h00, when he rushed to Jabulani Mall to buy school stationery for his child. The people present at home were his brother Tsetse, his grandmother, and Mary Samsam, his sister in law. It was on his way to the mall he saw the complainant and her friend in front of the school's small gate. They were not in school uniform. The complainant greeted him and he greeted back. When the complainant heard he was going to the mall she asked him to buy her ice-cream. He promised that he will buy it, though he did not mean it.

12. After he returned home, and resting in his outside room, he was woken by a knock on the door, from his nice, Karabo, presenting the complainant and Palesa.

They had come for the ice cream he had promised the complainant during the day. He laughed and placed the hand on the mouth. The record says he did so on her mouth, which does not make sense, as he was apologising not to buying her the promised ice cream. She then asked for R1, and since they were two he gave her R2, in the presence of Tsetse, Mary, Thabang his younger brother; and Mary's friend. The two children then left happy. He never saw the child after that. He denied the complainant's version that he met the complainant at 1h30 pm at the school gate, dragged her to a shack. He denied there's a home with red gate next to the tavern. Also denied that he took her into the shack and vaginally penetrated. His blood sample was taken a month later while in custody

13. He attacked the credibility of the complainant alleging she is a liar, who does even at school to her teacher, according to the complainant's friend, Palesa. He got to know this after he was in custody from his sister, Masekwala Mary Samsam, who had gone enquire from Palesa's mother why he the accused had been arrested. He also made an allegation that there was another teenage boy who had sexual intercourse with the complainant, and this information as well was from Masekwala. Confronted with the findings of the doctor that had the child had sex before he would have stopped his examination and called the police, he said he does not know about that. Also he was surprised as to why this child who was comfortable with him would make such allegations against him.

14. Roland Hill, the owner of the yard with shacks, where the rape incident allegedly happened testified that he knows the complainant because she came to his house with the police and her father pointing one of the three shacks in his yard. According to him this pointed shack has always been occupied by two brothers Vusi and Mzwanzi, for the last 10 years, inclusive of the period of the alleged incident. One of them was present when the child pointed out the shack. He testified that the shack has proper locks and remains locked when neither one of them is present, as they each have a set of keys. The shack is furnished with a bed, wardrobe, fridge, kitchen unit and a television contrary to what the child testified before court. Also there are people in the yard all the time, even when he is absent. He denied his gate was ever red in colour, but always black and white. He alleged he was at home on the 23rd January 2015 cleaning the house, the yard, including cutting the grass, took

a bath and the watered his lawn with a hosepipe, which contradicted what he said in examination in chief that he was suffering from flu and sat next to the kitchen door. He maintained he did both. He has never seen the complainant in his yard ever before.

15. The last defence witness was Mary Masekwala Samsam, who corroborated the accused about the time he arrived at home on the 23rd January 2015 in the morning, going to sleep in his outside room and waking up at 14h00 before going to the mall. She also confirmed that is the one who told the accused about the complainant's tendency to lie according to M[....] M[....] her step mother, which information she had received from Palesa's mother who was relating deliberations of how the complainant and her step mother came to her to enquire from her about what had happened to the children on the 23rd January 2015. She heard how the complainant kept interrupting and trying to stop Palesa from talking truth until M[....] told her to stop it as she knows the complainant talks a lot of lies. She got this information when she went to enquire why the accused got arrested.

16. About the allegations that the complainant had been caught red-handed with a teenage boy having sex, she got the story from the complainant's father, Maratha, who informed him he found them in the rented garage. He found the boy on top of the complainant and her dress was lifted and the boy on top of her. He took his daughter away and reported that boy to his parents. At home the mother apparently asking the child where did she see what they were doing, she said from TV. She also confirmed being present when the accused gave the complainant money while in the company of Palesa. What reminded her was the noise they made as they entered the yard, due to their fear for the dog. She also corroborated the accused that when he returned from the mall he had plastic bags carrying stationery with him. Tested with her recollection of dates under cross examination, she was so ever accurate and never contradicted herself.

17. The Court a quo reconciled itself with the fact that the it relies on the evidence of a single witness who is a very young child implicating the appellant. He was also alive to the cautionary rules applicable in relying on the evidence of a single witness,

and the need for some required corroboration he should apply to reduce the possibility of wrongful conviction. Also relying on the case of **Woji vs Samtam Insurance Company Ltd**.[1] the Court showed that it was also alive to the danger of accepting the evidence of child witnesses, and the need to ensure it is trustworthy. Relying on the child's ability to identify the accused accurately as the incident happened during the day and she knows the accused well.

18. The court also concluded that there is **no difference in the versions of the child and that of the appellant**, except for the person who raped the child. It acknowledged the fact that there were contradictions in the evidence of the child witness. These were not on how she was raped and who raped her, hence the Court a quo considered them immaterial. The Court was also alive to the inadmissibility of evidence where it was induced by intimidation, and concluded that in this case there was none, and the complainant was not subjected to **interrogation** as to the name of the accused as perpetrator. Based on confirmation of **vaginal penetration by medical evidence** the Court concluded that was sufficient corroboration of the complainant's evidence. The court a quo found the Appellant guilty of both counts as charged.

The Issues, the law and reasons.

19. I will now deal with the issues raised on appeal by the appellant, the counter-arguments and my ruling, per issue raised.

20. The first issue raised by the appellant is whether the complainant was raped at all. The arguments on behalf of the respondent cited the evidence of the complainant and Dr. Thompson's evidence. It is my conclusion that based on the evidence of Dr. Thompson it is clear there had been some penetration of the vagina of the complainant to an extent, based on the redness of the *labia majora*, the swelling of the hymen at 9 o'clock and the bruising of the perineum at 6 o'clock area that he discovered through his gynaecological examination. He confirmed that something did go in there, whether a finger or penis he was not sure.

[1] 1981 (1) SA 10 (A)

21. Pointedly, in my view, the question should be whether the complainant was penetrated by the Appellant? One has to consider the evidence of the complainant and Dr. Thompson in totality and compare it with reasonable probabilities. The appellant is an adult male who has his own child, for whom on the 23rd January 2020 he had gone to Jabulani Mall buy school stationery. It begs the question, whether if he had penetrated the complainant as per her evidence, including making movements up and down, her hymen would still be intact and not torn, and would her vagina remain be without any tears? Logically speaking, if I have to accept the child's evidence as true regarding the sexual act she explained, we would not be talking about the minor injuries as discovered by Dr. Thompson. I believe that something happened or "silly things" did happen between her and some other possibly younger inexperienced male. For instance, there is somewhere in her evidence she mentions a certain "Tshediso", which is a male person's name, and which is not the accused's name, though the complainant said it is his other name. This was not followed up sufficiently.

22. Also as argued by the appellant's counsel, that based on the Dr. Thompson's evidence in order to inspect a child for vaginal injuries, gentle labia traction has to be practiced to pull the labia apart as the area there is close or tight, or else the person inspecting can cause injuries. Yet evidence before us is to the effect that while the child was resisting to open her legs the mother with the assistance of the father forcefully opened her thighs apart and she *"…noticed that she was swollen on* ***both sides just between*** *her private part* ***or inside her the private part****, she was swollen"*[2](my emphasis). Even though she denied touching her in her evidence, but in terms of Dr. Thompson's evidence it would have been impossible for her not to touch in order to see what she observed.

23. The second ground of appeal raised is that the complainant's version should be approached with caution as she is a single witness. It is clear that in terms of Section 208 of the Criminal Procedure Act 51 of 1977 the accused can be convicted of any offence on the single evidence of any competent witness. A final evaluation

[2] Page 148 Line 20-25.

can rarely be made without considering whether such evidence is consistent with the probabilities.[3] In ***S v Sauls and Others***[4] Diemont JA stated:

> *"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness… The trial judge will weigh his evidence,* ***will consider its merits and demerits and, having done so will decide whether there are shortcomings or defects or contradictions in his testimony****, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 (in R v Mokoena), may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence where well founded …." It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."* (my emphasis)

24. In ***Stevens v S***[5] it was stated that:

> *"In terms of s 208 of the Criminal Procedure Act, an accused can be convicted of any offence on the single evidence of a competent witness. It is, however, a well-established judicial principle that the evidence of a single witness should be* ***approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility****."* (my emphasis)

25. In light of these cases, the main question in this matter is whether the child's evidence was substantially satisfactory in all material respects, when considering the probabilities, her credibility, merits and demerits of that evidence in order to decide whether there are shortcomings or defects or contradictions in her testimony.

26. Firstly, there are three versions from the complainant and her mother regarding when and how she received the R2 the mother saw her and Palesa playing with it. The first one is that the appellant gave it to her when they were playing on the grass inside the school yard. The second one is that he gave it to her

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[3] Texeira 1980 (3) SA 755 (A) 761
[4] 1981 (3) SA 172 (A) at 180E-G
[5] 2005 [1] All SA 1 (SCA) 5d-e

immediately after the rape incident after telling her not to say what happened. The third version one that tallies with the accused's version that the child and her friend Palesa went to the accused's place of residence and he gave it to them there. The last version, which was also confirmed by Mary Samsam, raises the question as to how probable is it that the child who was sexually molested a few hours earlier would be comfortable to go to her perpetrator's yard later on just to ask for R2 or ice cream? While the Court a quo may have seen this contradiction as immaterial, I hold a different view, because it is the consistent enquiry about this R2 by the mother that ultimately made the child to pin-point the appellant as the perpetrator.

27. Secondly, what is the probability of there being no children at all after school around 13:30 when the classes ended at 13:00. Is it really probable that in a township there would be no people to see the appellant pulling the child against her will, kidnapping her, and not intervene? It does not make sense that the complainant is pulled against her will even pass a usually busy tavern where people sit outside to drink alcohol, but on that day there is no one to see this unusual occurrence, till they even reach the house with shacks. Throughout, there is no one to witnessing or reprimanding the appellant.

28. Thirdly, as I have stated above, the kind of injuries suffered by the child are they consistent with penetration by a sober adult male, with sexual experience, considering the evidence of the complainant that he was moving up and down on top of her with his penis inside her vagina. How probable is this version in comparison with Dr. Thompson's evidence of injuries he discovered? It is my conclusion that this is not probable that the hymen and the vagina would be without tears on a 6 years old child. There is probably another explanation out there, but not the one supplied by the complainant.

29. Fourthly, the State's failure to call the evidence of either the arresting officer or the child's father about the condition of the shack where the incident allegedly happened, especially in light of the evidence of the defence witness, Roland Hill, that the shack has never been empty in the last 10 years, having been occupied by two brothers and fully furnished, contrary to the complainant's evidence. This leaves

much to be desired and it is a failure to put relevant safeguards by the state to avoid wrongful conviction.

30. The third ground of appeal is the fact that the complainant is a 7 years old child. The appellant argues that such evidence should be approached with caution and a guarantee should be found that it is truthful and correct in all material facts. A balanced approach was expressed in **S v K**[6] as follows:

> *"Judicial officers ought to be vigilant in the assessment and the evaluation of evidence to* ***eliminate a risk of conviction on the basis of evidence of doubtful quantum****. The complainants in matters of this nature, unfortunately, happen to be the most vulnerable members of our society. …****the vulnerability of this section of our society should not be allowed to be a substitute for proof beyond reasonable doubt or to cloud the threshold requirement of proof beyond reasonable doubt.*** *Judicial officers ought to and are expected to evaluate evidence properly and objectively as a whole and against all probabilities in order to arrive at a just and fair conclusion. Anything falling short of this test is nothing other than a miscarriage of justice."* (my emphasis)

31. In ***Woji v Santam Insurance Co Ltd***[7] it was stated:

> *"****Trustworthiness*** *… depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified …* ***There are other factors*** *as well which the Court will take into account in assessing the child's trustworthiness in the witness-box.* ***Does he appear to be honest*** *– is there a consciousness of the duty to speak the truth?"* (my emphasis)

32. Section 60 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that a Court may not treat evidence of the complainant with caution only on account of the nature of the offence (sexual

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[6] 2008 (1) SACR 84 (CPD) para [6].
[7] 1981 (1) SA 1021 (A) 1028B-D

offence). However, the circumstances of each will have to be considered based on its merits. In S v Dyira[8] the following was stated that:

> *"Our courts have laid down certain general guidelines which are of assistance when warning themselves of the danger of relying upon a single witness who is also a child witness. In the ordinary course (a) a court will articulate the warning in the judgment, and also the reasons for the need for caution in general and with reference to the particular circumstances of the case; (b) a court will examine the evidence in order* ***to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in all material respects****; (c) although corroboration is not a prerequisite for a conviction, a court will sometimes, in appropriate circumstances,* ***seek corroboration which implicates the accused before it will convict*** *beyond reasonable doubt; (d) failing corroboration, a court will look for some feature in the evidence which gives the implication by* ***a single child witness enough of a hallmark of trustworthiness to reduce substantially the risk of a wrong reliance*** *upon her evidence." (my emphasis)*

33. In this matter, from the evidence of the mother it is clear the child was reluctant over several days to say what happened. In fact, it is clear that her confession followed an extensive interrogation, even in front of her friend and the friend's mother enquiry about who gave her the R2; coupled with the whitish substance that was found on her panty, it was clear the said interrogation was based on a strong suspicion that the person who gave the complainant the R2 should be the one who was responsible for the whitish substance on her panty. This goes without reason. The questioning was not without purpose, but a reasonable suspicion. The length of time and the probing it took for her to confess to her mother as to who sexually abused her. All these factors create the need for the Court to tread with caution to avoid a wrongful conviction when accepting the evidence of this child witness.

[8] 2010 (1) SACR 78 (ECG) at para 10

34. The contradiction about what the child was wearing on that Friday of the 23rd January 2015 cannot be downplayed. The child testified about how he undressed her black tunic and white jersey, whereas as a fact on that day she was not wearing the uniform she explained how it was removed from her body, and how she dressed it up again after the rape. The fact that the appellant and the complainant's mother state that she was not wearing uniform is important. I'm of the view that the court a quo made an error in considering this contradiction among others as immaterial. Could the child not creating things in her mind, or re-playing what happened in another incident, and decided to protect the real perpetrator with the appellant, adding some spices along the way, of things that did not happen. Even if I am wrong with this proposition, the evidence presented by the State are full of contradictions that no reasonable court could convict on that evidence alone.

35. The dictum in ***Blom***[9] remains relevant, that the two cardinal rules of logic must be applied if the court seeks to reach a conclusion in reasoning by inference, namely, that:

a. the inference sought to be drawn must be consistent with all facts, and if not, the inference cannot be drawn; and

b. the proved facts should be such that they exclude every reasonable inference, except the one sought to be drawn. If not, then there must be doubt whether the inference sought to be drawn is correct.

36. As stated above there are at least two other inferences that could be drawn, other than that the accused raped the complainant, vis, the first report and the child's father could have caused those injuries when she inspected the child on the 24th January 2020. The second possibility, is that the complainant did "silly things" with another child a little older than her, but inexperienced, hence she kept on referring to falling on a swing, pointing at her buttocks, yet refusing to be examined on her vagina. She was clearly hiding something, and correctly avoiding to be beaten by her parents, considering she had been found with a boy before.

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[9] 1939 AD 188 at 202.

37. It is very telling that she remained adamant that she fell on the swing for three days, until she was asked about where she received the R2 she and Palesa were playing with on Friday the 23rd January 2021. After the mother promised she won't assault her and won't tell the father, she clearly began alleging the accused is the one who did "silly things" with her, instead of some possible Tshediso or another boy around her age. More so that she had previously been caught red-handed with another young boy in the room both naked or having attempted to do what she informed her mother she had seen on TV. The accused became a scapegoat, to protect the real culprit, just for the parents to stop asking her any further and to avoid a hiding. The interrogation about the R2 could easily have amounted to the suggestibility[10] and an easy way out for her as it was clear her lie about falling from the swing, for reasons unknown to her, was accepted by her parents.

38. In addition, it must be remembered that the accused's defence was that of alibi, that at the time the complainant alleges she was kidnapped and ultimately raped, around 13h30 he was at home sleeping as he had been working night shift the night before. This story was corroborated by the defence witness, Masekwala Samsam. This alibi was never proven to be false, except that it is evidence that is mutually destructive to that of the complainant.

39. When it comes to the defence of alibi the SCA in ***S v Shabalala*** stated:

> *"It is trite law that, where an alibi is raised there is no burden on the accused to prove his alibi. The onus rests on the state to prove his alibi is false. ... The effect of the falseness of an alibi on an accused's case is to place him in*

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[10] **S v S 1995 (1) SACR 0 (ZS)** Ebrahim JA 55i-j – 56a: "Suggestibility – Among the most important is a child's propensity to give an answer other than the one he knows to be correct because it suits him to do so. There are numerous reasons for so doing: the child, for example, may want to be finished with the examination; or he may wish to please the questioner; or he may agree with the suggested answer because he assumes that the questioner, being an adult, is correct. In connection with the last two examples, it must be remembered that children are taught from an early age that adults know best, that adults should not be contradicted, and that they ought to be polite to strange adults. These are desirable social attributes but they ill-prepare a child for the ordeal of giving evidence in court."

57a-b: "It is true that a child's existence is more centered around his or her imagination than is adult existence, but anyone who has watched children at play will have noticed that their play fantasies reflect their experience derived from hearing stories, as when small boys play soldiers. Children do not fantasize over things that are beyond their own direct or indirect experience."

a position as if he had never testified at all."[11]

40. But in applying this test, the alibi does not have to be considered in isolation but with regard to the totality of evidence in the case. If on all evidence there is a reasonable possibility that this alibi evidence is true then that means there is a possibility he did not commit the crime, and should therefore be acquitted.[12] While very much alive to the fact that the court of first instance has the benefit of seeing, hearing, appraising a witness[13] and watching the demeanour of witnesses, It is my view that considering the evidence in its totality, the court a' quo erred in its conclusion that, the state had discharged the onus on it to prove the case beyond any reasonable doubt, and the appellant's version was not reasonably possibly true.

41. In all the circumstances I am of the view that the State failed to discharge the onus of proving the guilt of the appellant beyond reasonable doubt.

ORDER

42. The following order is made.

(a) The appeal is upheld and the conviction and sentence are set aside on both counts.

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L M A Matjele

Acting Judge of the High Court, Johannesburg

I agree and it is so ordered

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M Senyatsi

Judge of the High Court, Johannesburg

Appearances:

[11] 1986 (4) SA 734 (A) at 736 B-C.
[12] R v Hlongwane 1959 (3) SA 337 (A) at 340H – 341A; R v Biya, 1952 (4) SA 514 (AD) at 521.
[13] S v Francis 1991 (1) SACR 198 (A) at 204E.

On behalf of the applicant : Adv. S Simpson

Instructed by: Legal Aid Board

On behalf of the respondent : Adv A M Williams

Instructed by : DPP

Date of hearing: 17th January 2022

Date of judgment: 16th February 2022