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

CASE NO: AR191/13

In the matter between:

T.I CELE **APPELLANT**

Vs

THE STATE **RESPONDENT**

JUDGMENT

Date of hearing: 04 November 2015
Date of judgment: 12 January 2016

D. Pillay J (dissent)

[1] How does an appeal court approach the evidence of a single witness, a child testifying at the age of eight years about an accused allegedly raping her three years earlier? With caution and common sense, the authorities say.[1] Children are both 'highly imaginative' and open to 'suggestions by others'.[2] Caution in the context means applying common sense to assess whether the truth has been told and the evidence is trustworthy.[3] Caution cannot displace common sense. Credibility must be assessed 'in the light of all the evidence'. Caution is exercised not inflexibly but practically to avoid 'injustice to the innocent'[4] and, I add, the injured. The trier of fact should be aware of the risks of a wrongful conviction

[1] Hoffmann and Zeffert *The South African Law of Evidence* 4th edition at 574, 581.
[2] Hoffmann and Zeffert at 581.
[3] *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G.
[4] Hoffmann and Zeffert at 579.

arising from the evidence of a single witness in the prosecution of a sexual offence[5] and, I add, a guilty person being erroneously let loose on society. The traditional assumption that the motive to falsely implicate an accused is prevalent in sexual offences must be balanced with the ever-increasing prevalence of rape, particularly of children, often by people they know. Corroboration as independent evidence that confirms the testimony of a witness[6] provides a safeguard. To be relevant and material such corroboration must point to the guilt of the accused.

[2] Consistency is another safeguard,[7] bar the rule against self-corroboration. [8] Reporting the offence is not corroboration[9] but goes to consistency of the complainant's version.[10] Demeanour is not decisive of a witness's credibility but could reinforce an objective assessment on the possibilities. Against the backdrop of these trite rules of evidence I turn to analyse the evidence in this case.

[3] I am in respectful disagreement with Chili J. As the nature of the disagreement turns largely on findings of fact and the inferences drawn from them I pen my own judgment for clarity and coherence but alas at the expense of brevity.

[4] The appellant appeals against his conviction only for rape. He was sentenced to a term of fifteen (15) years imprisonment. The charges arise from a complaint that he raped a child of five years in 2008. The trial proceeded three years later. No explanation is evident from the record for this lengthy delay in prosecuting the complaint, especially as the complainant reported the incident immediately after she was medically examined about 9 days later.

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[5] *S v B* 1976 (2) SA 54 (C) at 59A; *S v MG* 2010 (2) SACR 66 (ECG) at 75E-I.
[6] Hoffmann and Zeffert at 584.
[7] *S v Hanekom* 2011 (1) SACR 430 (WCC).
[8] *S v M* 1980 (1) SA 586 (B); *S v MG* at 73B-D.
[9] Hoffmann and Zeffert at 580.
[10] Hoffmann and Zeffert at 584-585.

[5] The grounds of appeal or rather the attacks against the prosecution's case at the hearing of the appeal were as follows:

1. There was no medical corroboration for the complainant.
2. The complainant's evidence in court that she wore a pair of pyjama pants contradicted her statement to the police, which recorded her as having said that she wore a skirt when she was allegedly raped.
3. The complainant's mother Ms Magwaza coached the complainant to report to the police.
4. The complainant did not make a first report to Nokthula Cele, her paternal aunt.
5. Notwithstanding the contradiction in 2 above the learned magistrate misdirected herself by finding the complainant to be a 'very credible and impressive witness'.
6. The magistrate failed to analyse the evidence of the appellant.
7. The complainant went twice to report to the police station.
8. Ms Magwaza's evidence that the complainant had a rash is not supported by medical evidence.
9. The complainant did not identify the appellant in court.

I will deal with each point in the order presented and respond to the judgment of Chili J along the way.

Medical Evidence

[6] Ms Sikhakhane who represented the appellant in the trial court consented to the J88 being 'handed in as part of the record' at the commencement of the proceedings when she tendered a plea of not guilty in terms of s 115 of the Criminal Procedure Act 51 of 1977. The J88 recorded that 'signs and symptoms compatible with vaginal penetration cannot be excluded' and 'erythema noted bruising noted' on the schematic drawing of the vagina. Although the appellant denied raping the complainant he did not dispute that she could have been sexually abused. Unsurprisingly therefore the defence elected to admit the J88 and dispense with leading oral evidence of the doctor who compiled the J88.

[7] This is the classic situation identified in *S v MM* 2012 (2) SACR 18 (SCA) 21, 24 for dispensing with evidence of the doctor. The SCA recommended:

> 'In principle, unless there is no issue about the fact of rape, the doctor should be called as a witness. Certainly, wherever the implications of the doctor's observations are unclear, the doctor should be called to explain those observations and to guide the court in the correct inference to be drawn from them.'

There was nothing unclear about the doctor's observations that there was vaginal penetration, erythema and bruising. The appellant did not challenge these observations. On the facts *S v MM* is also distinguishable. In that case it was unclear whether penetration had occurred.

[8] Equally unsurprising therefore senior counsel, Mr Snyman, who represented the appellant on appeal, did not rely on *S v MM;* neither did he criticise the learned magistrate for not calling the doctor to testify. The learned magistrate correctly identified

> 'the only issue in question that the court (had) to decide (was) who did this to the child once it became common cause that the child had been sexually abused.'[11]

[9] The appellant speculated suggesting that men who drank with Ms Magwaza at her house might have abused her. Ms Cele introduced evidence of glands she allegedly found in the complainant's 'inner thigh close to the private part'. [12] Her speculation that these glands somehow caused vaginal penetration, erythema and bruising has no factual, anatomical or medical foundation. On being 'told' from the bar in the course of discussion the court heard for the first time that the injuries might have ben self inflicted. Respectfully, Chili J speculates from this that 'the bruising and erythema could have been self-inflicted' by the complainant scratching herself. None of these speculations were put to either of the prosecution witnesses. Significantly, it was never an issue at the trial. If self-infliction caused the bruising and erythema it does not explain away the vaginal penetration. If self-infliction were a reasonable possibility then the defence would have raised it upfront and would not have consented to the J88 being handed in as evidence of the doctor's observations.

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[11] Page 62 lines 17-20 of the record.
[12] Page 42 line 12-13 of the record.

[10] Instead, the high water mark of Mr Snyman's submission regarding the J88 was that it did not corroborate the complainant's version because it was done nine days after the incident. Furthermore the doctor did not indicate whether the injuries were old or recent.

[11] The fact that the complainant was taken to the doctor on 11 August 2008 nine days after the event, which occurred on 2 August 2008 was no fault of the complainant or Ms Magwaza. The complainant testified that she reported the rape to Ms Cele first but the latter did not take her for a medical examination. Nor did Ms Cele 'hit' the appellant as said she would. Significantly, under cross-examination the complainant denied that Ms Cele took her to Kwamakhuta Clinic. [13] Therefore Chili J's findings about Ms Cele that

> '(s)he gave undisputed evidence that the child was examined by the doctor…. it was never suggested that she lied about having taken the complainant to the doctor'

are not correct. It was her maternal aunt 'Lungile' who took her to the doctor eventually. [14]

[12] Ms Magwaza testified that Ms Cele had informed her telephonically that the child was bleeding when she urinated and that she suspected that the child might have bilharzia. Ms Cele informed Ms Magwaza that she would take the child to the clinic and Ms Magwaza believed that she had indeed done so. When Ms Magwaza called again Ms Cele informed her that the child was fine.[15] As the trial court correctly found that Ms Cele was 'trying to protect the accused'[16] it is unlikely that Ms Cele would have taken the complainant for a medical examination. The appellant accepts and relies for its defence on the fact that the first time that the complainant was examined was on 11 August 2008. The contradictions in Ms Cele's testimony, her vagueness about having the complainant medically examined and her overall performance as a witness

[13] Page 20 line 3 of the record.
[14] Page 10 line 8 of the record.
[15] Page 24 line 12-15 of the record.
[16] Page 63 line 20 of the record.

discussed more fully below convinces me that she did not take the complainant to be medically examined for rape.

[13] Ms Cele's evidence conflicts with the complainant's evidence. I note that Mr Snyman does not rely on Ms Cele's evidence at all. When Ms Magwaza had asked Ms Cele to take the complainant to the doctor, Ms Magwaza was not aware that the complainant had been abused as she had not seen her at that stage and she had not reported to Ms Magwaza. Furthermore as Ms Cele had told her that the complainant was fine she would not have seen the urgency to have the complainant examined immediately. It was Ms Cele's duty to have the complainant medically examined. Consequently no adverse inference against the prosecution witnesses can be drawn from the delay of 9 days in seeking a medical examination. As to whether the injuries were old or recent goes to timing, not that they did not exist. The fact that the complainant's hymen was intact does not discount penetration.

Consistency

[14] The primary challenge to the reliability and credibility of the complainant's evidence is levelled at differences between the complainant's evidence and her statement to the police. The only difference the appellant relies on in its Heads of Argument relates to what she said she had worn when she was allegedly raped. Another difference related to where the rape occurred. The complainant testified that the rape occurred in a shack occupied by the appellant. The statement records her as saying that he raped her in his house. After the appellant confirmed that he lived in a shack his counsel correctly abandoned this line of attack. However, Chili J takes up two more differences not pursued as grounds of appeal. I will also have to deal with them.

[15] The complainant testified that the appellant pulled down her pyjama pants when he raped her. In her statement to the police she is recorded as having said that he pulled down her skirt.

[16] Under cross-examination the complainant confirmed that the African police officer who took her statement read it to her, that he had written down what she had told him, and that she had made the statement of her own free will.[17] Notwithstanding the fact that she was 5 years, in grade 1, her literacy seriously in doubt and the value of her signature questionable, the defence asked her about whether she had signed or written anything on the statement. She denied this but acknowledged the name 'Cele' alongside the space for the 'victims' signature where Ms Magwaza's signature appeared.

[17] Although the defence meant to hand in the statement as an exhibit it does not form part of this record. However, Ms Sikhakhane had read out the statement to the complainant. It consisted of about five short sentences. If there were more to the statement the parties would have brought it to the attention of the court. It became common cause and not disputed that her statement recorded that the appellant had pulled down her skirt.

[18] Three years later when asked to explain differences in the statement and her evidence she stated 'when this was being written down I was still young, I didn't know',[18] and 'I wasn't talking properly because I was crying.'[19] Her response 'I didn't know'[20] related to the difference between 'house' in her statement and 'shack' in her evidence that the appellant helped to clarify.

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[17] Page 12 of the record.
[18] Page 12 line 24-25 of the record.
[19] Page 13 line 3-4.
[20] Page 15 line 18 of the record.

[19] There could be cogent explanations for the other differences including the skirt-pants difference. For instance, a person making a statement to a policeman in a highly emotional state may not be fully attentive to every word in the statement when it is read back to her. If the statement is made in an unfamiliar

language she might miss some details or nuances. There is no evidence that the statement in English was translated into IsiZulu for the complainant. And when the complainant agreed that the statement read out to her contained what she said to the policeman it could be an assumption on her part on the basis that she would not have expected a policeman to write anything that she had not said and attribute it to her. All these are reasonable possible inferences but they were not fully explored in evidence.

[20] The complainant corrected her cross-examiner saying that she was not wearing a skirt but a pair of pants when the incident occurred.[21] Throughout her testimony the complainant was unwavering in her evidence that she wore a pair pyjama pants and not a skirt. Whether she or her mother told the police that she wore a skirt or the police recorded that in error was not tested fully. Neither party called the officer to testify about the circumstances in which he recorded the statement. The defence who relied on it as a previous inconsistent statement ought to have called the policeman. In the circumstances there is no confirmation that he had recorded the statement correctly.

[21] Notwithstanding her testimony during examination in chief that she was not wearing panties but a pair of pyjama pants, under cross-examination Ms Sikhakhane unfairly asked her whether there was blood in her panties. The intermediary reminded Ms Sikhakhane that the complainant had already testified that she was not wearing panties.[22] A girl of five years wearing a pair of pyjama

[21] Page 15 line 11-12 of the record.
[22] Page 19 line 3 of the record.

pants without panties is more likely than her wearing a skirt without panties, which is probably why she was sure of her evidence in court.

[22] Statements taken by the police are notoriously imprecise. The purpose for which the police take statements is to ascertain whether a crime has been committed, who the offender is and whether he should be arrested, charged and prosecuted. Manifestly, given the brevity and content of the statement of the prosecution witnesses, they were taken for the limited purpose of establishing that a crime had been committed. Police officers do not necessarily have in mind the production of such statements during the trial. To properly prepare a statement by a witness for trial requires considerably more skill and resources than most police officers have.

[23] Her evidence that she was crying when she gave her statement[23] and that she was too upset when she was taken to make a statement to the police on the first occasion were not challenged under cross-examination. Nor did the appellant challenge her emotional state on appeal. However Chili J appears to doubt this evidence of the complainant at paragraph 16 of his judgment because the doctor recorded on the J88 that the complainant was 'co-operative and calm'. The doctor was based at Prince Mshiyeni Hospital, which was in the same precinct as the police station. As the J88 was completed on the same date (11 August 2008) as the prosecution witnesses testified that the applicant was too upset to make a statement to the police on the first visit, Chili J infers that the complainant was not genuinely upset.

[24] Respectfully, I distance myself from his line of reasoning. Neither the complainant nor Ms Magwaza were cross-examined as to why the complainant presented as "co-operative and calm"[24] to the doctor but emotional and crying

[23] Page 13 line 3-4 of the record.
[24] See entry made by the doctor in para 6 under "mental health and emotions" at page 70 of the record.

when she had to make a statement to the police. In fact the defence did not challenge the evidence for the prosecution that she was upset on both occasions when she went to report to the police. I infer from this that the defence correctly accepted that a child of 5 years having to give an account of sexual abuse would predictably be upset. Accordingly, the appellant conducted his defence on the tacit assumption that the complainant had been abused, the only question being: who abused her? Furthermore, policemen are more likely to instil fear than medical doctors. The complainant would also not have had to recount the degree of detail to the doctor as she would have when she spoke to the police. On these facts I cannot draw an adverse inference against the complainant as Chili J does.

[25] At most her statement to the police amounts to no more than a previous inconsistent statement. The reasons for the inconsistency she explained under cross-examination as best as a child of five could possibly do. She can hardly be expected to account for what the policeman wrote. Nor could she as a child who did not speak English account for what Ms Magwaza narrated to the police in English. In the circumstances to reject the complainant's evidence because her statement to the police, which she did not make under oath, and which was not properly proven to be what she said to the police, would be unfair.

[26] It does not necessarily follow therefore that the only reasonable inference to be drawn from the inconsistency is that the complainant was mendacious or even mistaken when she was testifying. The inconsistency has to be weighed in the context of all the evidence. In the circumstances it cannot be said that the inconsistency amounts to a contradiction. Furthermore what the complainant wore is immaterial to whether the appellant committed the offence.

[27] The next difference not raised by the defence but by Chili J at paragraph 12 of his judgment relates to the complainant's evidence that the appellant followed her into the shack and her statement that the appellant called her into his house and that she found him in the house. Other than showing the difference between the

complainant's evidence and the statement, the cross-examination and re-examination did little to establish the reason for the difference. At least the cross-examiner should have attempted to show that the complainant appreciated the difference before any adverse inference can be drawn. My observations above in relation to the skirt-pants difference apply equally to the followed-called/found difference. To expect a clear explanation from anyone let alone a child of 8 years why she said 'called me' three years earlier is unlikely to yield a reliable response if for no other reason but the loss of memory over the passage of time. Apart from the lapse of time the complainant did not speak English; she could not account for the police officer's choice of words when he wrote her statement.

[28] The last difference, which was also not a ground of appeal but which Chili J regards as a contradiction relates to the complainant's evidence that the incidence occurred 'during the day.' Chili J finds that 'in evidence in chief she had testified that the rape incident occurred in the morning'. The complainant did not testify in chief about what time the incident occurred. Neither did she 'amplify that version' nor recant 'her earlier version'. Linking the pyjamas to the morning Ms Sikhakhane cross-examined the complainant as follows:

> 'In your evidence you said that this incident whilst you were wearing your pyjamas. Was it still in the morning? … It was during the day.' (*sic*)

The J88 notes that the incident occurred in the morning. 'In the morning' and during the day' are not mutually exclusive. Unsurprisingly, considering that the J88 was prepared 9 days after the incident the complainant was more precise then than she was three years later.

[29] Whilst on the topic of contradictions it is convenient to deal with the differences that Chili J finds between Ms Magwaza's evidence, her statement and the complainant's evidence. These are also not the appellant's grounds of appeal. The fact that Ms Magwaza's statement to the police consisted of only one sentence and her evidence a more detailed account of what she understood from the complainant's report cannot amount to a contradiction. Her single sentence

statement to the police records the most relevant information to justify arresting the appellant. Ms Magwaza was at pains to remind the court repeatedly that she was not present and could therefore not give a personal account of how the rape occurred. If it was her plot to falsely implicate the appellant to snatch an advantage in divorces proceedings against the complainant's father she would have had a lot more to say to establish her plot without having to rely on a child of 5 years. Respectfully, I distance myself from the adverse inference that Chili J seeks to draw from the brevity of her statement to the police and her evidence in court.

[30] Chili J takes up as contradictions the issue that Ms Magwaza persisted with her stance that the complainant had reported to her that she had 'found' the appellant in the shack and that the prosecution did not lead evidence of the complainant's report to Ms Magwaza. Ms Magwaza's account of the rape is hearsay; its relevance is only to establish whether previous statements by the complainant were consistent with her evidence. The report to Ms Magwaza was not the first report of the abuse. Neither the prosecution nor the defence asked the complainant whether she reported the incident to her mother. Only the magistrate asked her whether Ms Cele was the 'first' person she reported to and she replied 'Yes'.[25] If either party had considered the differences in Ms Magwaza's statement, her evidence and that of the complainant to be material they would have teased this out during the trial and addressed the court accordingly on appeal. The fact that they have not done so accords with my own view that such differences were immaterial and should not be elevated to contradictions.

Coached

[31] Mr Snyman submitted that Ms Magwaza told the complainant what to say to the police. He conceded at the hearing that this is not born out by the evidence. It was also submitted for the appellant that Ms Magwaza did not need to assist the complainant as an IsiZulu speaking police officer had taken the statement. There

[25] Record page 19 lines 11.

is neither evidence of an IsiZulu speaking police officer taking the statement from the complainant nor indeed that an IsiZulu statement was taken. The only evidence and explanation for Ms Magwaza assisting the complainant emanated from the complainant herself.

[32] The prosecution witnesses were adamant that Ms Magwaza did not tell the complainant what to say. She merely assisted the complainant as her child especially as she did not speak English. That this evidence emerged spontaneously during cross-examination of a child witness eschews any inference that such evidence might be false. Further, Ms Magwaza's reluctance to comment on the rape during her testimony because she was not present fortifies her evidence that she did not coach the complainant. If she did coach the complainant as alleged by the defence then this should have been obvious to the police officer recording the statement. If the police had reason to doubt the authenticity of the report they would not have risked a malicious prosecution.

[33] At paragraph 17 of his judgment Chili J assumes that Ms Magwaza assisted the complainant in the interview with Dr Naidoo because she knew English better. On this assumption he seems to suggest that Ms Magwaza might have given Dr Naidoo false information about the complainant being sexually abused. This was never canvassed in evidence and certainly not the case for the defence. Underpinning Chili J's assumption is his further assumption that Dr Naidoo communicated in English hence Ms Magwaza would have assisted the complainant to communicate with the doctor. This assumption arises from stereotyping Dr Naidoo as a person does not speak IsiZulu because he or she does not have a Zulu name. There is no basis for such an assumption. To draw any inference from unsubstantiated facts is manifestly a misdirection.

[34] For proof that the complainant was coached the appellant pointed to the complainant's description of the rape. Appellant's counsel contended that the police had coached complainant to say that the appellant inserted his penis and made up and down movements. Given the prevalence of this description in

sexual abuse cases counsel correctly attributes the vocabulary to the police. This is typically the description of rape that surfaces in many statements. Otherwise what vocabulary does a child of five years have to describe rape, a trauma that no human let alone a child should ever experience? Assisting the complainant with vocabulary to describe her ordeal is not on its own evidence of coaching. I find that the complainant was not coached when she reported the offence to the police.

The complainant 'a very credible and impressive witness'

[35] Although the appellant testified through an intermediary her cross-examination was robust. On several occasions the learned magistrate had to ask Ms Sikhakhane to simplify her questions reminding her that the witness was a child. The complainant withstood the cross-examination stoically. She answered every question. Her evidence in court was without contradiction whatsoever and entirely coherent and consistent. Counsel for the appellant had to concede that the complainant testified without contradicting herself or being evasive. She also took care to be as precise as possible. For instance she corrected herself to say that she was staying with her granny not her mother in 2008. She listened carefully to the questions and occasionally corrected the versions put to her by the prosecutor. When it was put to her that she informed Ms Cele that she was urinating blood she responded with the correction that had she also told Ms Cele that the appellant had 'put his penis'.[26] When it was put to her that the appellant would say that he was away from home from 6am to 6pm she replied rhetorically: 'He was there, if he wasn't there and he didn't do this where would I get this from?'[27] Her explanation that her mother assisted her because her mother could speak English is evidence given convincingly under cross-examination showing that the complainant was a thoughtful, truthful witness giving her own account of her own unfortunate experience.

[26] Page 19 lines 15-16 of the record.
[27] Page 18 lines 14-15 of the record.

[36] The appellant deliberately denied the complainant an opportunity to respond to suggestions about her motive for falsely implicating the appellant whom she loved. In addition to corroborating the complainant, Ms Magwaza dispelled any suggestion of an ulterior motive for falsely implicating the appellant. It is common cause that Ms Magwaza learnt of the complainant's problem from Ms Cele. Ms Magwaza was not aware of the alleged rape until after 'Lungile' had taken the complainant to the private doctor. Whatever that doctor had reported to 'Lungile' prompted Ms Magwaza to question the complainant. [28] Ms Magwaza learnt of the cause of the bleeding when she attended with the complainant at Prince Msheyeni Hospital. [29] So the medical evidence of possible abuse came before any questions about who the perpetrator was. She was never asked whether she had scratched herself.

[37] Furthermore, until the incident Ms Magwaza had a good relationship with Ms Cele and the appellant. Ms Cele's evidence also bears this out. If there was discord in her marriage it had nothing to do with the appellant. If Ms Magwaza or the complainant falsely implicated the appellant then the real culprit would be at large with the risk of repeated abuse ever present for the complainant.

[38] Some corroboration also emerged from Mandlenkosi Richard Cele, the father of the complainant. Testifying for the appellant he stated that he learnt of the allegations of abuse when 'Lungile' had taken her to the clinic where it was found that the complainant had been raped.[30]

[39] The gist of his evidence was that Ms Magwaza, his wife, had instituted divorce proceedings against him because he had not supported the complainant when she reported that the appellant, his nephew had raped her.[31] It was also his evidence that they had not lived well together as husband and wife since 2006.

[28] Page 25 lines 21-24 of the record.
[29] Page 27 lines 15-17 of the record.
[30] Page 55 lines 15-20 of the record.
[31] Page 57 line 1-10 of the record.

On his own version their marriage had already broken down long before the alleged rape. In response to the first question under cross- examination he stated that he was still living with Ms Magwaza.[32] He stated unequivocally that the reason for the divorce was his nephew's rape of his child.[33] If the rape triggered the divorce then it supports the prosecution's case. But for the rape and Mr Cele's failure to support his child Ms Magwaza would not have instituted divorce proceedings. Ms Magwaza had to merely establish irretrievable breakdown of the marriage which she could have done easily as the couple were living apart. She did not need to falsify evidence, perjure herself and her child, and have a youth of 20 years sent to prison for 15 years just so that she can get divorced. If the suggestion is that making a false accusation of rape gave Ms Magwaza an advantage in relation to custody of the complainant then this angle was never canvassed in evidence or argument in any proceedings. For all one knows Ms Magwaza who was a security guard who worked shifts preferred to leave the complainant in the care of the Celes instead of her mother in Inanda with whom Ms Magwaza did not live.

[40] Therefore the trial court's finding that the complainant was 'a very credible and impressive witness' was not hyperbolic. Furthermore, an appeal court should be slow to overturn a trial court's findings on credibility.[34]

The appellant 'not a great witness…evasive'

[41] For the appellant it was submitted that the trial court's finding that the appellant was 'not such a great witness' and that he was 'quite evasive at times' is a misdirection. Chili J is also critical of the trial court's finding for the further reason that the 'learned magistrate advanced no reasons at all for arriving at a conclusion' *(sic)*. Respectfully, I do not share his view that the record does not show the appellant to be evasive.

[32] Page 57 line 18-20 of the record..
[33] Page 57 line 9 of the record
[34] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 687.

[42] The failure to give reasons for finding that the appellant was evasive at times is not necessarily a misdirection if such finding is borne out by the record of the proceedings. When cross-examined about the complainant's visits to Thembile the appellant avoided answering whether the complainant was allowed to visit the shack.[35] Yet earlier he had testified that the complainant would come over to play with other young children. He whittled this down to saying that she would only come to drink water and be there for a short while. I find that the appellant was evasive when he answered questions about the complainant and her movements in the vicinity of the alleged rape.

[43] For the rest the appellant answered the questions directly until he was asked if he knew of any reason why the complainant would implicate him. He then proffered that Ms Magwaza had influenced the complainant.[36]

[44] When the complainant was being cross-examined the court enquired whether the defence was going to forward a motive as to why the complainant's mother would influence the complainant. The defence declined to do so. [37] Declining to put one's version[38] is damaging to one's case as the only reasonable inference to be drawn in the absence of an explanation is that one does not want to subject one's version to scrutiny probably because one is not confident of its merits. In this case the failure to put the defence version as to motive was not an inadvertent omission because the magistrate invited Ms Sikhakhane to do so. The defence made a clear and conscious choice not to test the motive with the complainant. This must count against the appellant.

[45] When it was put to him that the medical report confirmed that 'she had been sexually abused' and that she was not making up a story he then speculated that according to his aunt, Ms Cele, Ms Magwaza drank alcohol with men at her

[35] Page 37 line 17 to page 38 line 7 of the record.
[36] Page 40 line 10-15 of the record.
[37] Page 18 line 18-21 of the record.
[38] *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) para 26.

house and that when the complainant complained about her private parts being painful Ms Magwaza took no heed.[39] This information was never put to Ms Magwaza when she testified. Finally the appellant had no comment to the prosecution's version when it was put to him.

[46] The appellant's version that he was in school when the incident occurred could easily have been corroborated by evidence from the school that he was present in school on 2 August 2008. Teachers and learners would have seen him there. However, as he was not cross-examined about his failure to secure corroboration that was genuinely independent to support him I do not draw any adverse inference. An accused is not obliged to lead the evidence of an alibi. Furthermore he has a right to silence and against self-incrimination. However as a matter of common sense he could so easily have spared himself the risk and expense of a prosecution had he simply informed the police when he was arrested that there were independent people who would confirm that he was at school on the day in question. He could have saved himself the risks and trauma of a trial.

[47] Although it is not hard to maintain a bare denial defence in a sexual offence in which the complainant is a single witness, there are serious weaknesses in the defence case. Most damaging to the defence are the flaws in the evidence of Ms Cele.

Denial of First Report

[48] Although the appellant relies on the evidence of Ms Cele to deny that the complainant reported to her first, he does not analyse her evidence. Nor was it submitted for him that she was a credible witness. Respectfully I disagree with Chili J's analysis of Ms Cele's evidence. A credibility analysis is needed to resolve the conflict as to whether the complainant reported first to Ms Cele.

[39] Page 40 line 15-24 of the record.

[49] Nokuthula Cele began her testimony by mentioning that she had observed in April of 2008 when the complainant came to live with her in order to attend school that she had glands on her inner thigh close to her private part.[40] I have already discussed the improbability of glands in the inner thighs causing vaginal injuries and the lack of any medical evidence about the glands. On that occasion Ms Cele did not take the complainant to the doctor because Mandlenkosi Cele 'did not arrive'.[41]

[50] She denied that the complainant made the first report of sexual abuse to her.[42] She also denied that the complainant told her that she was urinating blood. Significantly, this contradicted her instructions to Ms Sikhakhane who had put to the complainant that Ms Cele would say that the complainant did report that she was urinating blood. [43] Ms Cele persisted that she got such a report from her grandson.

[51] She alleged that she took the complainant to the clinic on the Friday and was told to return on Monday the following week. She did not return as the complainant had already left. Subsequently she added that she did not take the complainant back to the doctor because Ms Magwaza had already taken her to the clinic.[44]

[52] Under cross- examination she testified about seeing a discharge in the complainant's panty. She did not mention this in her evidence in chief allegedly because she had forgotten and because she was scared.[45]She did not do

[40] Page 42 line 1 – page 43 line 15.
[41] Page 43 line 13-15.
[42] Page 43 line 17-18.
[43] Page 19 line 12 –15.
[44] Page 48 line 8-10
[45] Page 51 line 25- page 52 line 3 of the record

anything about the discharge as she awaited a date to visit the doctor. Whether this was in April or August 2008 is unclear.

[53] Ms Cele contradicted other witnesses for the defence. She testified that the complainant had not said that she experienced pain. In contradiction, the appellant testified that she had informed him that the complainant was experiencing pain in her private part.[46]

[54] She denied reporting to Ms Magwaza that the complainant had bilharzia. Yet both Ms Magwaza and Mr Cele testified that Ms Cele had informed them that the complainant had bilharzia.

[55] Ms Cele was evasive. The learned magistrate warned Ms Cele on several occasions to focus on the questions when answering them.[47] The prosecutor had to ask Ms Cele four times if she had asked the complainant what caused her to bleed when she urinated. Ms Cele gave four different contradictory answers.[48]

[56] Much of Ms Cele's testimony that was put to the complainant was denied. Presumably on instructions, Ms Sikhakhane put questions to the complainant about Ms Cele taking her to Kwamakhuta Clinic and her staying with her mother when she started Grade 0. The complainant denied that Ms Cele took her to Kwamakhuta Clinic and that she ever went to Grade 0.

[57] Some of what Ms Cele testified about was not put to the prosecution's witnesses. For instance it was not put to them that the complainant had an appointment in April 2008 allegedly for a vaginal discharge and that appointment

[46] Page 40 lines 20-24; page 49 lines 25- page 50 line 2 of the record
[47] Page 46 line 13
[48] Page 50 lines 2-15 of the record.

had not been kept because Mr Cele had not taken Ms Cele and the complainant to the clinic. A vital aspect of the appellant's case was Ms Cele's version that the complainant had a virginal discharge before the alleged rape. It was put to the complainant that according to Ms Cele the complainant had reported to Ms Cele when the complainant arrived to stay with Ms Cele that she had a discharge. The complainant replied that she had no discharge until she bled with her urine, which was after the rape.[49] The question was repeated to Ms Magwaza who responded that she did not know that because the complainant resided with Ms Cele. Under cross-examination Ms Magwaza corroborated the complainant but Ms Cele was a single witness on this issue. Notwithstanding its importance, Ms Cele omitted to mention the discharge during her evidence in chief.

[58] Ms Cele testified that she took the complainant to the clinic immediately because she was concerned that she was bleeding. The medical staff allegedly told her after examining the complainant that 'they could not see anything.' This was also not put to the prosecution witnesses.[50] She seems to suggest that she took the complainant to the clinic on the Friday before the Monday when Ms Magwaza took the complainant to Prince Mshiyeni Hospital. In contrast it was Mr Cele's evidence that he fetched the complainant as he usually did at Ms Cele's request to take her for medical attention as the latter was concerned about the complainant having bilharzia. If she did have the complainant examined at all it is strange that the medical staff did not make the same observations of sexual abuse as the doctor at Prince Msheyeni Hospital had done. If it is indeed true that the clinic staff had not observed any abuse that would have been vital evidence for the defence case that was omitted.

[59] Ms Cele's statement, which forms part of the record was not canvassed either during the trial or the appeal. It conflicts with her evidence in several material respects as this summary shows: She states that in August she noticed that the complainant was urinating blood. She questioned the complainant who allegedly

[49] Page 21 lines 12-14 of the record.
[50] Page 50 lines 20-24 of the record.

informed her that she had no pains in her private parts. Ms Cele took her to the clinic in Clairwood where she received medication to use for two weeks from 5 August 2008. Before the two weeks lapsed Ms Magwaza took the complainant away. On 11 April 2008 the appellant was diagnosed with '"glands" just below the bladder line close to her private parts.' Ms Cele's statement attested to on 30 December 2008 has fatal, material inconsistencies with her evidence in court, far more so than the inconsistencies in the complainant's statement. It is unsurprising therefore that the defence did not rely on Ms Cele's evidence but perplexing that Chili J is uncritical of her.

[60] As for her demeanour, shortly into cross-examination Ms Cele started sobbing purportedly because she was 'coming to court for something (she) didn't know.'[51] As the trial court correctly pointed out that was 'nothing to cry about'. Nevertheless the court had to adjourn so that Ms Cele could compose herself.

[61] The trial court correctly rejected Ms Cele's evidence. Its finding that Ms Cele was trying to protect the appellant is consistent with the analysis of Ms Cele's testimony as being false and unreliable. On the one hand the court has the evidence of the complainant who, even counsel for the defence concedes, was not evasive and did not contradict herself at all during her testimony, all of which are indicators of a truthful witness. On the other hand Ms Cele contradicted herself and other witnesses for the defence. She was evasive and visibly uncomfortable about testifying, all of which are tried and tested indicators of an untruthful, unreliable witness. I find that the complainant did report first to Ms Cele. If her report had not implicated the appellant Ms Cele would have had no reason to lie. It follows too that if she did report first to Ms Cele then the suggested motive that Ms Magwaza coached or influenced her falls away. If the appellant did little to damage his bare denial defence, then Ms Cele sealed his fate. A finding of reliability and credibility favourable to the complainant and unfavourable to the defence is inevitable.

[51] Page 47 lines 8-9.

Twice to Police Station

[62] The appellant seeks to draw an adverse inference from the fact that the complainant reported the rape only on the second occasion. The explanation of the prosecution witnesses as to why the complainant was unable to report on the first occasion is discussed above. However Chili J thinks that the complainant made two statements: one on 19 August 2008 and the second statement in 2011 and that it is the latter statement that was handed into court.

[63] The complainant testified that on her first visit to the police she 'just cried, (she) didn't tell'. That visit occurred on the same day as the visit to Prince Mshiyeni Hospital for the J88.[52] The second statement she made was to an African male.[53] The third contact with the police was with a white officer who came to the complainant's school.

[64] In cross-examination Ms Magwaza was asked to confirm 'that that is the statement that was made by your daughter the first time she made a statement on 19 August 2008.'[54] The statement that Ms Magwaza was being asked to confirm was the same one that Ms Sikhakane had read into the record previously for the complainant and again for Ms Magwaza.[55]

[65] Contrary to Chili J's finding that the complainant made a statement to the police in 2011, the year in which the trial commenced, I find no evidence on the record that the complainant made a statement to the white police officer who came to her school in 2011. Neither does the defence make such a submission. It follows that Chili J's view that the trial court should have explored the possibility that the complainant was coached into making allegations in 2011 has no factual foundation and is not contended for by the defence.

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[52] Page 10 lines 25 – Page 11 line 1 of the record; Page 28 lines 13-18 of the record.
[53] Page 11 line 13 of the record.
[54] Page 29 lines 22-24 of the record.
[55] Page 30 lines 15-23 of the record.

[66] Chili J is clearly wrong in finding that the case against the appellant was only registered in 2011. He relies on the case number of the regional court summons for this conclusion. The police docket number is CAS41/08/2008 indicating that the crime was reported in August 2008. This appears on the statement of Ms Cele.

The Rash

[67] It was submitted for the appellant that Ms Magwaza had testified that the complainant had a rash when there was no medical evidence to this effect. For a layperson erythema, which presents as a redness, could appear to be a rash. In any event she was not challenged on this issue.

Identification of the appellant

[68] The point is taken for the appellant that the complainant did not identify the appellant in court. This would have been a material defect if the complainant did not know her alleged assailant. The complainant testified that her cousin Thokozani raped her. Ms Magwaza identified the appellant as Thokozani, 'the nephew of [her] child's father'. [56] The appellant admitted in terms of s 220 of the CPA that he knew the complainant, mentioning her by name. [57] It was never put in issue that the person in court was not Thokozani the complainant's cousin. There is no merit in this ground of appeal.

Conclusion

[69] Evidence of credibility cannot be approached in a piecemeal manner. All the evidence for and against each party has to be viewed holistically. The appellant himself had an easy row to hoe by raising a bare denial defence. In contrast the

[56] Page 26 lines 10-12; 22-23 of the record.
[57] Page 5 lines 19-23 of the record.

complainant had a traumatic experience to narrate. It was not disputed that she had been penetrated. Speculation that her injuries were self inflicted or caused by Ms Magwaza's male drinking friends is not evidence. Speculation by the majority about the possibility of Ms Magwaza misinforming Dr Naidoo that the complainant had been sexually abused is also not evidence. In the realm of possibilities anything is possible. To allow speculation to trump evidence would amount to a serious misdirection. It was common cause that the complainant had been penetrated and had sustained vaginal injuries. It was also common cause that she bled when she urinated. There is no explanation for how she came by those injuries and why she bled other than the evidence of the complainant, corroborated by the medical report, which the defence admitted. She knew the appellant well; he was her cousin. Her identification of the appellant was not in issue. Another person was not identified as her rapist. Is a child of five years capable of carrying out a conspiracy of such magnitude fashioned by her mother without once contradicting herself during her testimony? I think not.

[70] Accordingly I find that the conviction of the appellant is well founded and the appeal should be dismissed.

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D. Pillay J

APPEARANCES

Counsel for the Appellant	:	Advocate C.J Snyman S.C
Counsel for the Respondent	:	Advocate Pillay