Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: A523/15

Before: Mr Justice Binns-Ward
Mr Justice Henney
Mr Acting Justice Parker

In the matter between:

SONGEZO CEKWANA Appellant

and

THE STATE Respondent

Order: The appeal is upheld and the conviction and sentence are set aside. The order of the trial court is substituted with an order that the appellant is acquitted and discharged.

JUDGMENT delivered on 30 MARCH 2017

BINNS-WARD J (HENNEY J concurring; PARKER AJ dissenting):

[1] This an appeal from a judgment of the regional magistrate sitting at Khayelitsha in terms of which the appellant was convicted of having committed an act of sexual penetration in contravention of s 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007. The appeal is with leave obtained on petition to this court, and is in respect of conviction only. I have had the advantage of reading in draft a judgment prepared by Parker AJ after he had had the opportunity of reading the initial draft of this judgment; and thereafter, the finally revised judgment of the learned acting judge given below. For the reasons that follow I regret that I am unable to agree with his conclusion that the appeal should be dismissed. Indeed, owing to the inability of Parker AJ and I to reach consensus, the appeal was heard a second time after the addition, in terms of s 14(3) of the Superior Courts Act 10 of 2013, of Henney J to the panel.

[2] The offence was allegedly committed during the night of 15/16 January 2012. The complainant is a […] of the appellant. Her date of birth was […] 2001, so she was only ten years and ten months old at the time; although the medical evidence indicated that she had reached a fairly advanced stage of physical maturity with Tanner stage 4 breast and pubic hair.[1] The examining physician described Tanner stage 4 as '*teenage stage of maturity maturation*'.

[3] It is common ground that the appellant was visiting the complainant's family as a houseguest at the time. Apart from the complainant's […] sister, A., who had encountered the appellant during a visit to the Eastern Cape during the previous month, the family had not met him before. He had arrived there on the day in question and spent three nights and then returned for a second visit later in the week, when he again spent a few nights at the complainant's family home. (That much was common cause between the appellant and the complainant's sister, although the complainant gave evidence that the appellant had been there since a few days earlier, during which time she had treated him as a brother, including making breakfast for him. The contradiction in the state's evidence in this respect appears to have been overlooked by all concerned at the trial, including the appellant's legal representative - it is also not accounted for in Parker AJ's assessment that the complainant's evidence was satisfactory in all material respects.) He hailed originally from the Eastern Cape and was new to Cape Town, where he was residing with an aunt in the Makhaza area of Khayelitsha.

[1] The Tanner scale is a five stage measure of physical development based on external primary and secondary sex characteristics. Stage 5 is indicative of the attainment of adult maturity in respect of these characteristics.

[4] The complainant, who testified in English, related that she was with the appellant in the sitting room of the house on the night in question. They were watching an 'action movie'. A., was with them initially, but she then retired to sleep in another room. Also in the house, apparently having already retired for the night, were the complainant's mother, in whose room the complainant usually slept, and another sister and the latter's child. The complainant said that she fell asleep on a sleeping bag on the floor. She said '*I was sleeping on the floor and then Songezo Cekwana* – the full names of the appellant – *woke me up to show me a porn movie*'. The prosecutor then said '*Proceed*', whereafter the complainant continued her evidence as follows:

> And then I fell asleep again; he picked me up; he put me on the couch; he closed my mouth. And then he took off my pantie and then he put his penis inside my vagina and then when he was done, I ran to the toilet and then when I got to the toilet I saw white bubbles on my leg and on my pantie. And then it was Monday morning when I was getting ready to go to school and my [...] was watching every move because he did not want me to tell my parents what happened yesterday. So I wrote a letter in his cell phone on Thursday saying that I am going to tell my mom about what happened. Friday afternoon I went to my father's house. When I got back Sunday my sister saw the message on the phone and then she asked me what was the message about. And then I told her that my [...] raped me and then she told my brother; B..

[5] There are two striking features in that passage of the complainant's evidence in my view. Firstly, the apparent easy familiarity of the by then 11-year old complainant with the concept of a '*porn movie*'; and secondly - if events did transpire as she described, but which the appellant denied – the fact that after the appellant had tried to interest her in watching a pornographic video, she was not sufficiently discomforted to leave the room and go to sleep with her mother, as she usually did. The inherent probability is that a child treated in a way that made her feel uncomfortable would have left the room and gone to sleep in the different room where she usually did. The magistrate did not find these features worthy of consideration in his judgment. This may have been because they did not receive the sort of treatment they deserved in the appellant's legal-aid appointed attorney's cross-examination of the complainant. But it was the trial court's duty to scrutinise the complainant's evidence with particular care; not only was she a single witness, she was also a child witness. Her evidence had to be satisfactory in every material respect for the court to found a conviction on it.

[6] When asked why she did not cry out when the appellant was raping her, the complainant said that he was holding her mouth shut. Somewhat inconsistently, she also said

that while he was raping her he was kissing her on the face '*saying that I love you and if you tell mamma I am going to kill you. All those stuff*'. The complainant's description of events in this respect also arouses my scepticism. It depicts the appellant as extraordinarily physically dexterous; managing to keep the complainant's legs over his shoulders, hold her mouth closed and kiss her face while speaking to her all the while - all at the same time. Its manner of delivery, with the dismissive touch '*All those stuff*', adds to my discomfort with it.

[7] The complainant testified that after the rape she went to the toilet and noticed a white substance running down her leg and on part of her panties. She then went to sleep in another room instead of with her mother, as she apparently usually did. She explained this as follows: '*I went to sleep on the couch next to the kitchen because I did not want my mother to notice me that I was crying*'. The prosecutor asked '*Is there a reason why you did not want your mamma to see that you were crying?*', to which she answered '*Yes, because I did not want her to die*'. She expanded '*Because my [...] threatened me that he is going to kill my family*'.

[8] The evidence concerning the complainant's report of the alleged rape was inconsistent and contradictory. The complainant's sister testified that the complainant did not of her own accord make a report to anyone. Her elder sister said that she had found the message that the complainant had left on the appellant's phone. Why the complainant's sister should have been delving in a drafts folder on the appellant's phone was not satisfactorily explained. The appellant's sister did not confront the appellant with the find; she raised the matter with the complainant who then made a report. Under cross-examination, the complainant at one stage suggested that she had reported the matter to her sister of her own volition '*... because it was disturbing me at school. I could not concentrate*'. She subsequently reverted to a version consistent with that of her sister.

[9] The complainant's sister's evidence was that the complainant had initially not been forthcoming when shown the message on the telephone, and had only come out with her story after being pressed. That was inconsistent with the complainant's evidence under cross-examination that she had decided on the preceding Friday already that she was going to report the matter. She said she had made this decision after hearing a story about the arrest of a bad man who had abused a child and threatened to kill her family, but who had been arrested after the child had informed her mother about what had happened. The judgment of the court a quo (and that of Parker AJ) gives no attention to the inconsistency. Indeed, the magistrate held in his judgment that the complainant had told the appellant the following day

that she was going to report the incident to her mother. There was no evidential foundation for that finding whatsoever.

[10] The complainant was taken for a medical examination. The examining doctor endorsed the report '*She has clinical findings consistent with previous vaginal penetration with a blunt object like a penis*'. I shall return to the medical examination presently. It appears to have been on the basis of what was taken to be objective corroboration of her report in the medical examination that the appellant was thereafter arrested at his aunt's house. It would also seem that his mobile phone was seized, although no proper chain of evidence in this respect was adduced by the prosecutor. The unchallenged evidence of the appellant was that his phone was left behind at the house where he was staying when he was arrested, so it must have been seized later.

[11] The appellant's phone was forensically examined. A number of videos were found loaded on the device, but according to the police officer who carried out the examination none of them was of a pornographic nature. There were also some photographs found on the phone. Print-outs of them were put in evidence as exhibit C. Some of them might be regarded as suggestive in nature, but none of them fitted the complainant's definition of 'pornographic', which was 'naked persons having sex'. The appellant testified that he had not put the pictures on the phone. They had been on a memory card he had been given for use in the phone by a relative in the Eastern Cape. Although it was not referred to in the course of the oral evidence, it is apparent from the printed information on exhibit C that the photographs were uploaded on to the memory card on various dates during November 2011. The forensic examination did not turn up the message that the complainant alleged that she had left on the phone or that her sister claimed to have seen on the phone. The forensic examiner (Sergeant Mfreke) said that it was impossible for him to retrieve deleted messages from the drafts folder of the model of phone that the appellant had. That evidence had to be seen, however, in the context of the appellant's evidence that he had never seen the message and therefore not had cause to delete it. As I shall show presently, that evidence is not only reasonably possibly true, it is supported by the probabilities.

[12] The evidence concerning the message allegedly left by the complainant on the appellant's telephone was problematic on a number of levels.

[13] At a basic level, the act of leaving what, according to its tenor, would have been an unambiguously threatening message on the appellant's phone would have been behaviour

entirely inconsistent with the complainant's claim to have been too terrified to tell anyone about the incident. The inconsistency was left unexplained. It detracted materially from the plausibility of the complainant's evidence. It gave rise to further inherent improbability in the complainant's version. Again, the magistrate failed to deal with this aspect at all in his judgment, as indeed does Parker AJ.

[14] Secondly, the evidence failed to explain technically how the complainant could have done what she claimed to have to have done by leaving the message in the drafts folder. The evidence was unclear in this regard, but the onus was on the state to make the case clearly. This was after all an important element of the evidence adduced in support of its case. The appellant's legal representative tried to explore the question in cross-examination, but having been interrupted by the magistrate, who does not seem to have appreciated the essence of the questioning, '*moved on*'. It was not clear whether the message was an sms or an email. I think that in this modern world a court is entitled to have judicial notice of how these means of communication operate, rather as expert evidence is not required to prove what is entailed in driving a motor car. I have never encountered a system in which one can save draft sms's or whatsapp messages for that matter. One is able to save draft emails, and it is not necessary for that purpose even to have entered an addressee's address. The complainant spoke of entering her own name instead of a telephone number. That implied that she must have intended to convey that she had written an sms, not an email. That it was an sms is furthermore suggested by the forensic examiner, Sergeant Mfreke's evidence that his instruction was to retrieve sms's. He said his system could not open drafts. I find that unsurprising because, as noted, I have never encountered a phone that stores draft sms's.

[15] But even if it was possible to save draft sms's, it was not explained how the complainant's sister would have been able to access such a draft when the forensic examiner's system was unable to do so. Parker AJ suggests that a draft may be retained in an sms folder simply by not sending it. That is obviously so, but that was not the import of the evidence. The evidence was that the message had been saved in a drafts folder. Furthermore, the evidence of the complainant's sister was to the effect that it was the folder in which the appellant stored his pictures or photographs. A. Cekwana testified in that regard '*... it is his photos that I saved on the draft. And that is where I saw the message on the draft*'. Under cross-examination, she put it differently saying '*... I went to Drafts, because his photos are saved on the Draft in that phone*'. (As I shall indicate presently, that was inconsistent with the complainant's evidence.)

[16] Moreover, it is impossible to reconcile Sergeant Mfreke's evidence that it had not been possible to retrieve any message of the import described by the complainant and her sister with the evidence of A. Cekwana that '*And if the Court wants to see this message, the Court can also be able to see that message because it is still available*'. Not surprisingly, in view of the subsequently adduced forensic evidence, the prosecutor did not pursue that invitation. (The appellant's legal representative's failure to challenge that evidence is explicable in the context of the fact, to be discussed presently, that she was at that stage not aware of the content of the forensic evidence.)

[17] Thirdly, even if the complainant had used email to store the message, a drafts folder is the last place one would expect someone to find it. An owner of a phone is likely to look in the drafts folder only to retrieve something that he or she has him- or-herself put there. Drafts are kept of something one has composed, and intends to send later; it is the last place anyone would look to *receive* messages.

[18] Fourthly, the complainant's sister's evidence of how she allegedly stumbled across the message in the drafts folder is inherently most improbable. Just as the phone's owner is only likely to look in the drafts folder for something he or she knows that he or she has left there when it is time to send saved the item; it is inexplicable why a third party casually looking at the phone would look there. The witness's explanation that that was where the photographs on the phone were stored is inconsistent with the evidence of Sergeant Mfreke who found pictures, but obviously not in the elusive draft sms folder. The sister's evidence was also inconsistent with that of the complainant who testified in this respect that the appellant did not '*have anything on the drafts*' apart from the message she had left for him. The judgments of the trial court and Parker AJ pay no attention to these inconsistencies.

[19] The complainant's sister's evidence in other passages suggests that she had a peculiarly discriminatory approach in browsing the appellant's phone. Under cross-examination she testified as follows:

> Q Tell me did you see any pornography on the phone? --- I don't even go to the videos.
>
> Q But you said you browse the phone, so you didn't go and look at the videos? --- When I browse the phone, I go to music, to pictures, but I do not go to the videos.

But why then go to drafts? Her claim that that was where the appellant stored his pictures was not only inherently improbable; it was not borne out by the forensic evidence.

[20] Fifthly, there was no trace of the message when the phone was forensically examined. It is however apparent that the sms folder was accessible because the investigating officer testified there were sms's on the phone 'not related to the case'. If the appellant had been concerned about what might be found on his phone and for that reason effected deletions, the inherent probabilities are that he would also have deleted the sexually suggestive photographs that were found on it. But he did not. Again, the inherent probabilities in this regard received no attention in the magistrate's judgment. Parker AJ too does not deal with this aspect.

[21] The magistrate made no mention whatsoever in his judgment of the forensic evidence. Indeed, he appears to have had no regard to the evidence of either Sergeant Mfreke or the investigating officer. He recorded that *three* witnesses had given evidence for the state when there had in fact been *five*.

[22] Continuing with a general examination of the evidence in the context of the inherent probabilities: It would have been extraordinarily bold and reckless conduct by the appellant to sexually assault the complainant in the circumstances she described. The house was small. It was described at one stage as consisting of two rooms, although the evidence in this respect was at times confusing. What did emerge clearly though was that it was small enough to require its permanent occupants to share sleeping quarters. There was no suggestion that the appellant was intoxicated. He therefore would have had to be acutely conscious that he could easily be caught in the act by the other persons in the house. It is also striking that on the complainant's version of events, the appellant did nothing to control her movements after the act had been done. He did not stop her going to the toilet or moving to another room. These features demonstrate a further element of inherent improbability in the complainant's version. The magistrate's assessment of the evidence shows no sign of his having taken it into account. It also does not receive consideration in the judgment of Parker AJ.

[23] The complainant was medically examined a week after her alleged rape. No abnormalities were found on examination. The dimensions of the annular hymen opening were recorded as 15mm transverse and 14 mm vertical. In his oral evidence the doctor qualified those measurements with the word '*about*'. The doctor explained that it was not unusual for a virgin to have a hymen with an opening, but said that '*its opening will be within limits of the child's age*'. Later in his evidence the doctor made the following statement *'... the opening of the hymen though it tends to be disputed tends to go along with the age of the*

victim. At some point we tend to add an additional two millimetres to the age of the victim to go with the opening ...'. It follows therefore that the opening in the complainant's hymen was within a tolerance of about 1 mm within that which might be expected in a virgin of her age. (As mentioned earlier, her physical maturity was in point of fact comparatively advanced for her age.)

[24] What the examining physician also described, however, were 'bumps' at 15h00 and 17h00, as he described it, on the opening in the complainant's hymen, as well as 'clefts' at 08h00 and 09h00. He explained, not altogether clearly, that '*bumps and clefts are scars within the hymen. Bumps are scars that do not go the entire width of the hymen ... bumps would be a tear that it went half way through and it healed. So as we examine it you will see there is a cleft that goes in and out whereas a cleft will go all the way through to actually have moved that part of the hymen tissue*'. Elsewhere in his evidence he put the matter a little more clearly '*Bumps would have been healed previous tears that were not deep enough to have gone right through the whole length of the hymen itself and clefts would be the tears which would have been considered severe had gone through the hymenal breadth and when they heal they would leave a cleft like shape.*'

[25] The doctor found no 'fresh tears' on examination.

[26] The doctor resisted the prosecutor's attempt to get him to say that the bumps and clefts afforded proof that the child had been sexually assaulted. He made it clear that he had interpreted them in the context of an acceptance of the history given to him by her to make the conclusion that '*she has clinical findings consistent with previous vaginal penetration with a blunt object like a penis*'.

[27] It was clear, as Parker AJ also acknowledges and counsel for the state conceded in argument at the hearing of the appeal, that the medical evidence was inconclusive. The doctor could not give any indication of the age of the bumps and clefts and it was evident that those features could even be the result of self-inflicted injury by way of the insertion of a finger which could occur say if a child was suffering irritation from a urinary tract infection. He said that bumps would be visible a year after the causative injury to the hymen; *a fortiori* presumably with a cleft.

[28] The magistrate's treatment of the medical evidence in his judgment was confused. At one point he recorded that the doctor had '*also observed tears on the vagina of the victim*' – there was no such evidence. He gave no indication of having appreciated that the

complainant's hymenal opening was consistent with what might ordinarily be expected in a girl of her years, that there was no indication of the age of the bumps and clefts, and that they were symptoms that could have been caused by other methods of penetration other than sexual assault. Had he undertaken a critical analysis of the medical evidence he would have recognised its inconclusive nature and that the doctor had expressed his opinion premised on an acceptance of the veracity of the complainant's report – a matter for the court, not the doctor to determine.

[29] The minority judgment does not address these material flaws in the magistrate's treatment of the evidence and gives no consideration to its effect on the trial court's determination of the case. Parker AJ finds instead that although the magistrate's judgment did not '*necessarily reveal a very scientific approach*' and was '*robust*', he could not find that the magistrate had misdirected himself in any material respect and that his assessment of the evidence of the witnesses and his conclusions had to be presumed to be correct in the absence of such material misdirections. For the reasons I have given, as well as certain other deficiencies to which I refer below, I am in fundamental disagreement with Parker AJ's endorsement of the magistrate's evaluation of the evidence. The magistrate's approach was not 'robust'; it was - I am sorry to have to say - careless, superficial and misdirected.

[30] With respect, I also find the reliance in the minority judgment in support of the conviction on the oft cited enjoinders in *Van der Meyden*[2] and *Van Aswegen*[3] that regard must be had to all the evidence adduced in the case in deciding whether a conviction or acquittal is indicated not a little ironic in view of the magistrate's demonstrable and very material failure to have done just that. The deference that appellate courts ordinarily give to the factual findings of trial courts, upon which Parker AJ has also placed considerable emphasis, is not blind or unwavering; compare, for example *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC), at paras. 105 -106 (per Ngcobo CJ)[4] and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA

[2] *S v Van der Meyden* 1999 (1) SACR 447 (W), 1999 (2) SA 79.
[3] *S v Van Aswegen* 2001 (2) SACR 97 (SCA).
[4] At para. 106, the learned chief justice made the following observations:
The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys, which the appellate court does not. These advantages flow from observing and hearing witnesses, as opposed to reading 'the cold printed word'. The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to 'tie the hands of appellate courts'. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts, and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it. (Footnotes omitted.)

1 (CC), 1999 (10) BCLR 1059, at paras. 78-80. It is not afforded when it is apparent, as in my view was clearly the case in the current matter, that the trial court's treatment of the evidence was selective, demonstrably erroneous in material respects, lacking in any regard for evident contradictions and inconsistences, and oblivious to the inherent probabilities; cf the principles numbered 8-11 of those enumerated by Davis AJA in *R v Dhlumayo and Another* 1948 (2) SA 677 (A), at 706.[5]

[31] The appellant testified that he had been watching television on the evening in question while the complainant was listening to music on his mobile phone. When he finished watching television he fell asleep on the couch, where he had earlier indicated he would be spending the night in preference to the accommodation in a backyard structure at the property that had been offered for his use. He said that the complainant was still playing with his phone when he went off to sleep. He had asked her to put it on a table when she was finished with it. He said that the complainant was sleeping in the room when he awoke the next morning. He acknowledged that he gave free access to his phone to the complainant and her sisters during his visits. He had no idea that there was any problem before he was suddenly arrested. He suspected that he had been framed because of some or other property dispute in the family, although the complainant's family had been friendly and welcoming up to the time of his arrest. The appellant was not upset on any material point in cross-examination, and although Parker AJ finds him to have been an unimpressive witness, he offers no instance of the appellant having been upset in cross-examination.

[32] It was put to the appellant that a denial by him put to one of the state witnesses in cross-examination that there was any pornographic material had been contradicted by the pictures depicted in exhibit C. He made no attempt to deny that the pictures were on his phone. Whether any of the photographs qualified as pornographic is debatable. They did not depict full nudity or the engagement of anyone shown in them in sexual intercourse. I am constrained to differ from Parker AJ's finding that one of the photographs showed '*a naked*

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[5] *8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.*

9. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

11. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.

female kissing a man'. The only photograph to which he could have been referring shows a fully clothed man kissing a woman who is wearing a pink top and what appear to be black trousers drawn down to below her buttocks. One is unable to make out whether or not she was wearing an undergarment. There is no exposure of either party's private parts. I also disagree with his statement that the photographs '*clearly depict people either completely or substantially naked*'. On the contrary, all the males depicted in the photographs are fully clothed and there was no exposure of the private parts or naked breasts of any of the women depicted. I would describe the sexually suggestive photographs (numbering only three of the total of eight pictures shown on exhibit C) as lewd, rather than pornographic. I am also impelled to differ from Parker AJ's characterisation of the photographs as being what the complainant had referred to when she claimed to have been shown a 'porn movie'. Apart from the fact that that proposition was never put to the complainant, or indeed any of the other witnesses at the trial, it was quite evident from her testimony considered as a whole, that the complainant was sophisticated enough to distinguish still photographs from a movie.

[33] It also bears mention that the evidence concerning the photographs found on the phone was adduced without a copy of the recovered material having been made available beforehand to the appellant or his legal representative, which is not in accordance with fair trial practice. A six-minute adjournment was given for the appellant's legal-aid appointed representative to take instructions. It was hardly surprising in the circumstances that the origin of the photographs that were found on the phone was not put to Sergeant Mfreke, or any of the other witnesses. Quite clearly, if fair trial requirements were to have been met, the appellant and his legal representative should have been afforded adequate notice of Sergeant Mfreke's evidence and the opportunity to have the phone independently examined. As it was, despite these unsatisfactory aspects to the conduct of the trial, the forensic evidence concerning the phone was as inconclusive as the medical evidence. It failed to advance the state's case.

[34] In weighing up the mutually contradictory versions, the magistrate placed great weight on the undisputed hospitality that the complainant's family had extended to the appellant to discredit the latter's hypothesis that he had been framed. The minority judgment appears to endorse the trial court's approach in this respect. While that aspect of the case did present certain difficulties for the appellant, his evidence in that regard was, however, confessedly speculative and therefore quite obviously of no value to the determination of the case. In *S v Van der Watt* [2010] 3 All SA 434 (SCA), at para 16, the Supreme Court of

Appeal pertinently observed '*It is trite that an accused may tender an explanation why he believes he has been falsely implicated and it may turn out another reason unknown to him exists or is more probable. The accused is called upon to speculate, not testify on a matter of fact. In such circumstances he cannot be blamed if it turns out that his explanation is found to be wanting.*' The appeal court cited a number of earlier judgments in support of its observation, including *S v Ramochela* 1997 (2) SACR 494 (0) at 496a-e and *R v Mtembu* 1956 (4) SA 334 (T) at 335H-336B, where reference was made with approval to the observations of Millin J in an unreported judgment to the following effect '*It is a wrong approach in a criminal case to say "Why should a witness for the prosecution come here to commit perjury?" It might equally be asked: "Why does the accused come here to commit perjury?" True, an accused is interested in not being convicted, but it may be that an inspector has an interest in securing a conviction. It is, therefore, quite a wrong approach to say "I ask myself whether this man has come here to commit perjury, and I can see no reason why he should have done that; therefore his evidence must be true and the accused must be convicted.' The question is whether the accused's evidence raises a doubt*'.

[35] The central question for determination by the trial court was not a matter of motive, but one of fact. An accused person's speculation as to why another person or a police officer should have reason to falsely incriminate them is of no primarily probative effect at all. The factor is merely one to be weighed as part of the probabilities. The fact that the probabilities weigh against the appellant in this respect cannot by itself be determinative. A holistic approach to the evidence requires it to be taken into account along with the internal contradictions and improbabilities, discussed above, that characterised the factual evidence in the state's case. Was the appellant's inability to explain convincingly why his family members should falsely incriminate him sufficient to negate the doubts raised by the state's case when the evidence is analysed holistically? In my judgment that was certainly not the case. Indeed, during the appellant's evidence in chief the magistrate questioned the relevance of his evidence as to the history of family tension, and interrupted the line of questioning by the appellant's legal representative, ending with the remark '*... your client can just say yes there was animosity between our families; that is all; we will accept that'*.

[36] I regret to say that the magistrate's treatment of the evidence was skewed and lacked any cogently reasoned analysis. The trial court's approach brings to mind the flawed approach in comparable circumstances described by the appeal court in *S v Raghubar* 2013 (1) SACR 398 (SCA), at para. 18-19. It bears mention in this regard that the magistrate

throughout the trial referred to the complainant as '*the victim*', and even directed the interpreter to refer to her as such during the appellant's testimony. That was unfortunate, to say the least. The epithet would only be appropriate after a conviction had been brought in. For the court to refer to a complainant as a 'victim' at any earlier stage is want to give rise to impressions of prejudice. The magistrate would be well advised to eschew the practice in future.

[37] The only part of the judgment of the trial court that approached any form of analysis was the last two paragraphs, which went as follows:

> On my view, despite the fact that the child's evidence was not supported by the DNA, I am of the opinion that the witnesses for the state were trustworthy. They were honest and reliable witnesses. Their evidence was credible. It is my view that the State has proved its case beyond reasonable doubt.
>
> The accused on the other hand tried to find a way to get out of this case. He has fabricated his evidence. He has told a lot of lies in this Court. This Court has decided to reject his evidence as it false beyond reasonable doubt.

There was no DNA evidence. And it was unjudicial to hold, without explanation, that the witnesses for the state were honest and reliable, in the context of the contradictions and inherent improbabilities that affected it. It was also impermissible to hold that the appellant had fabricated his evidence in the absence in the evidence of a single demonstrable example to sustain the finding. The magistrate's approach appears to have been based on his general impression of those of the state witnesses whose evidence he chose to discuss. It calls to mind the following remarks of Nugent JA in *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 (5) SA 339 (SCA), [2005] 4 All SA 16, at para 14:

> *It has been said by this Court before, but it bears repeating, that an assessment of evidence on the basis of demeanour - the application of what has been referred to disparagingly as the "Pinocchio theory" - without regard for the wider probabilities, constitutes a misdirection. Without a careful evaluation of the evidence that was given (as opposed to the manner in which it was delivered) against the underlying probabilities, which was absent in this case, little weight can be attached to the credibility findings of the Court a quo. Indeed, on many issues, the broad credibility findings, undifferentiated as they were in relation to the various issues, were clearly incorrect when viewed against the probabilities*. (footnotes omitted)

[38] The appellant was entitled to the benefit of the doubt raised by the contradictions, inconsistencies and inherent improbabilities in the state case. The magistrate did not have to believe him in order to acquit him. He was bound to acquit him if, after a consideration of all the evidence, it was not proved beyond reasonable doubt that the appellant had committed

the offence. Indeed, in the circumstances it was not surprising that counsel for the state conceded that she was unable to contend that the conviction was safe. In the result I am of the view the appeal must be upheld.

[39] The following order is made:

The appeal is upheld and the conviction and sentence are set aside.

A.G. BINNS-WARD
Judge of the High Court

HENNEY J (BINNS-WARD J concurring; PARKER AJ dissenting):

[40] I have had the advantage of reading the judgment of Binns-Ward J as well as that of Parker AJ. I respectfully disagree with the judgment of Parker AJ. I concur with the decision of Binns-Ward J to uphold the appeal against conviction and his reasons for doing so, but I would like to state further and additional reasons for holding that the appeal should be upheld.

[41] In my view, the regional magistrate materially misdirected himself by not properly analysing the evidence and by not giving reasons why he convicted the appellant. I disagree with the conclusion of Parker AJ that the regional magistrate had properly or at all, evaluated and assessed the evidence of the witnesses. There was no such assessment or evaluation.

[42] From a perusal of the judgment[6] handed down by the regional magistrate, it seems that the regional magistrate only made a critical appraisal of the evidence of the appellant. No evaluation was undertaken, in particular, in respect of the evidence of the complainant, as well as the other state witnesses. He did not even mention the evidence of Mfreke regarding the cell phone evidence. The regional magistrate, after having evaluated and rejected the appellant's version, goes on to say: "*In my view, despite the fact that the child's evidence was not supported by DNA, I am of the opinion that the witnesses for the state were trustworthy. They were honest and reliable witnesses and their evidence was credible. It is my view that the state has proved its case beyond a reasonable doubt".*[7]

[6] Record page 129-131.
[7] Record page 131.

[43] The regional magistrate, failed to state why he came to the conclusion that the evidence of the state witnesses were trustworthy, reliable and credible. His conclusion is not supported by any reasons. It is trite that judicial officers have a duty to give reasons for their decisions. In *S v Mokela*[8], *Bosielo JA* stated: "*I find it necessary to emphasise the importance of judicial officers giving reasons for their decisions. This is important and critical in engendering and maintaining the confidence of the public in the judicial system. People need to know that courts do not act arbitrarily, but base their decisions on rational grounds. Of even greater significance is that it is only fair to every accused person to know the reasons why a court has taken a particular decision, particularly where such a decision has adverse consequences for such an accused person. The giving of reasons becomes even more critical, if not obligatory, where one judicial officer interferes with an order or ruling made by another judicial officer."*

[44] In *S v Mcoseli*[9] where a regional magistrate also failed to set out the evidence at all, Pickering J held: "*It is regrettable to have to criticise the calibre of a judgment of a regional magistrate, but this particular judgment falls so far short of the minimum standard which can reasonably be expected of a magistrate, much less a regional magistrate, that I would be failing in my duty were I not to do so. So shoddy and careless is the judgment that it amounts, in my view, almost to a dereliction of the regional magistrate's duty as a judicial officer."*

[45] In a decision of this court in *Xaba v S*[10], Savage J in dealing with a judgment of the same regional magistrate that also presided in this case and where she was faced with a similar situation as in this case refers to the above-mentioned judgments as well as the decision of *Mphahlele v First National Bank of SA Ltd*[11]. In *Mcoseli* (supra)[12] the regional magistrate dealt with the evaluation of the evidence in a similar manner in which the regional magistrate dealt with the evaluation of the evidence in this case, where Pickering J held: "*The regional magistrate further made no effort whatsoever to analyse the evidence which was tendered on behalf of the state, contenting himself with a criticism of appellant's evidence"*.

[46] Savage J in *Xaba* concluded that a Court of Appeal is permitted in terms of section 309 (3) of the Criminal Procedure Act 51 of 1977 to confirm, alter or quash a conviction or

[8] 2012 (1) SACR 431 (SCA) para 12.
[9] 2012 (2) SACR 82 (ECG) at 85I.
[10] (A588/14) [2015] ZAWCHC 53 (8 May 2015).
[11] 1999 (2) SA 667 (CC).
[12] *Mcoseli* n4 at 86H.

sentence by reason of an irregularity or defect where on appeal it appears that a failure of justice has resulted from such irregularity or defect.[13] She further was of the view that the right to reasons is a fundamental right to a fair trial, that the failure to provide reasons constitutes an irregularity and that where no reasons are provided there is a failure of justice, such as contemplated in s 309 (3).

[47] In this regard she relied on the decision of Cameron JA in *S v Mavinini*[14], where it was held that:

> *It is sometimes said that proof beyond reasonable doubt requires the decision-maker to have 'moral certainty' of the guilt of the accused […] It comes down to this: even if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction – in our case, the rules of evidence interpreted within the precepts of the Bill of Rights – remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system.*

[48] Further, Savage J concluded that it is impossible for this court to step into the shoes of the trial court and arrive at conclusions on the evidence as a whole, without the benefit of assessing the credibility and reliability of witnesses in the witness box. In addition, that on appeal, there can be no moral certainty on a conspectus of the evidence that the state discharged its burden of proof.

[49] She concluded that the accused's right to a fair trial under section 35 (3) of the Constitution has been compromised by the magistrate's failure to take into account all of the evidence before the trial court and provide the reasons for the appellant's conviction and sentence. On this basis she held in that case, that the appeal against conviction and sentence should succeed.[15]

[50] Similarly in this case, there was no assessment of the credibility and reliability of the witnesses in the witness box. In my view, this is therefore a gross misdirection on the part of the magistrate by firstly, not properly assessing the evidence; secondly, by failing to make a proper evaluation of the evidence; and thirdly by failing to give any reasons for his judgment before convicting the appellant. On this basis alone the conviction falls to be set aside.

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[13] *Xaba* n 5 para 17.
[14] [2009] 2 All SA 277 (SCA) para 26 .

[15] *Xaba* n 5 para 21.

[51] Even if I should be wrong in my above conclusion regarding the basis on which the conviction should be set aside, for the reasons that follow, I am also of the view that the conviction should be set aside.

[52] A further fundamental misdirection was the regional magistrate's failure to deal with the evidence of the complainant who was a single witness. The magistrate, in my view, even though he did not give reasons as to why he accepted the evidence of the complainant, on a conspectus of the evidence, could not have and did not apply the cautionary rule applicable to a single witness in a criminal case. In a case like this, it has been held in *S v M*[16] by Melunsky AJA that:

> *Prior to the decision in* S v Jackson *1998 (1) SACR 470 (SCA), it had long been accepted that criminal cases of a sexual nature fell into a special category. It was said that there was an 'inherent danger' in relying upon the unconfirmed testimony of a complainant in a sexual case. This resulted in the courts adopting a cautionary rule of practice. The rule required –*
>
> *(a) the recognition of the 'inherent danger'; and*
>
> *(b) the existence of some safeguard that reduced the risk of a wrong conviction, such as corroboration of the complainant in a respect implicating the accused, or the accused's failure to give evidence or his obvious untruthfulness.*
>
> *(See* S v Snyman *1968 (2) SA 582 (A) at 585C - H.) In* S v Jackson *it was pointed out at 476e-f that the application of the cautionary rule to sexual assault cases was based on irrational and outdated perceptions. Although the evidence in a particular case might call for a cautionary approach, this, it was emphasised in the judgment, was not a general rule: the State was simply obliged to prove the accused's guilt beyond reasonable doubt. The factors which motivated this Court to dispense with the cautionary rule in sexual assault cases apply, in my view, with equal force to all cases in which an act of a sexual nature is an element.*[17]

[53] In coming back to this case, the regional magistrate, in my view has failed to recognise the inherent dangers in accepting the evidence of the complainant as a single witness. In the absence of any reasons, it seems that he uncritically, accepted the evidence of the complainant, without dealing with the following issues:

1) He accepted her version on face value that she did not complain to her mother or someone else immediately after the rape had taken place, to be true. There was no reason afforded by the magistrate why he accepted her evidence in this regard, and why he found this version plausible.

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[16] 1999 (2) SACR 548 (SCA).
[17] *Ibid* para 17.

2) Why she elected to leave a message on the phone of the appellant under her name in the draft messages section of the phone, without considering why she would do that instead of complaining to her mother or another adult person.

3) That by pure coincidence, she got hold of the appellant's phone on the Thursday, where after she entered the draft message onto the phone.

4) What she thought might be achieved by entering this message onto his phone.

5) That the sister also by pure coincidence, quite fortuitously, also on the Thursday managed to get hold of the phone of the appellant and came across this message.

6) How it was possible for a person whose name or cell phone number or a particular number is not a contact on a particular cell phone, that has not been entered onto that cell phone, to save the message in the draft section on the cellphone. This is a fact which is known to all users of a cell phone, which the court can accept,[18] that it is impossible to send a message in the draft message section of a phone. It is common cause that the complainant did not have a phone or number in order to have a draft message saved on the appellant's phone.

[52] It is not clear what safeguards the court a quo took into consideration in reducing the risk of a wrongful conviction, such as corroboration of the complainant in respect of implicating the appellant. If it was the draft message, the pornographic video on the cell phone, the evidence of her sister to confirm the existence of the draft message and the medical evidence. I am not convinced that such evidence could assist the court in reducing such risk. In this regard, I concur with the conclusions of my brother Binns-Ward J that such evidence is either highly suspicious, has little evidential value and unconvincing to have assisted the court in concluding that, after applying the cautionary rule, that the evidence of the complainant should be accepted beyond reasonable doubt to convict the appellant.

[53] For these reasons, I would also set aside the conviction and sentence.

R.C.A. HENNEY

[18] *S v Mthimkulu* 1975 (4) SA page 765 paras D - F

Judge of the High Court

PARKER AJ (dissenting from the majority judgments):

[54] I have had the significant benefit of reading the judgment of Binns-Ward J and the concurring judgment of Henney J. In my view the state had succeeded in proving the appellant's guilt beyond reasonable doubt.

[55] The appellant stood trial in the Regional Court, Khayelitsha, on a charge of rape, in contravention of section 3 of the Criminal Law Amendment Act (sexual offences and related matters) 32 of 2007. He was convicted of rape on 21 October 2013 and on 20 November 2013 sentenced to 10 (ten) years imprisonment. Though the prescribed minimum sentence of life imprisonments was applicable, the trial court found compelling and substantial circumstances enabling it to impose the lesser sentence. On petition to this court leave to appeal against conviction only was granted on 6 October 2015.

[56] I respectfully do not agree that the Regional Magistrate had materially misdirected himself, certainly not to the extent where interference by this court is justified. I say this even though I agree that the Regional Magistrate's judgment is not crafted very eloquently nor does it necessarily reveal a very scientific approach. It certainly does not comprise of a detailed evaluation and assessment of the evidence of every witness. It is unfortunate for example that the evidence of Mfreke, the police witness who analysed the cellphone, was not evaluated by the Regional Magistrate. He similarly did not in any detail elaborate on exactly how he came to the finding that the state witnesses were trustworthy, reliable and credible.

[57] The fact that he may not have followed a more conservative and routine method of crafting the judgment does not necessarily have the effect of such possible feature justifying the setting aside of the proceedings unless it is clear that the appellant was prejudiced thereby. In this regard see *S v Kwinda* 1993 (2) SACR 408 (V). See also *Hlantlalala and Others v Dyantyi NO and Another* 1999 (2) SACR 541 (SCA) where it was held that a failure to inform an accused of the right to legal representation, and particular availability of legal aid, was potentially irregular. However such irregularity would only vitiate a conviction if a failure of justice resulted therefrom. May I add that an appellant would have to establish that there in fact was such a failure of justice. It was further held in this case that a failure of justice would be established where an accused suffers actual or substantial prejudice.

[58] On the totality of the evidence in this matter, and even though it may be conceded that the apparent failure by the Regional Magistrate to give comprehensive reasons for his judgment may be disconcerting to some, it certainly cannot be concluded that in this particular instance such failure, as there may be in his method of crafting the Court's judgment (or the lack of reasons), resulted in a failure of justice. I say this, because the evidence is available on record and a proper assessment and evaluation thereof can be made on appeal. I am of the view that if proper regard is had to the evidence on record the Regional Magistrate's findings of fact are not only understandable but, in the context, become meaningful, and rational.

[59] It is trite that a presumption exists that a trial court's findings of fact are correct, in the absence of demonstrable and material misdirections by the said court. Such findings of fact are presumed to be correct and only susceptible to be disregarded if the recorded evidence shows them to be clearly wrong. In determining whether or not the trial court's findings of fact were clearly wrong it is useful to break the body of evidence down to its component parts, but, in doing so, one must guard against a tendency to focus too leniently upon separate and individual parts of what was, after all, a mosaic of proof where the evidence ultimately needs to be assessed as a whole. In this regard see *S v Hadebe and Others* 1998 (1) SACR 422 (SCA).

[60] In the Supreme Court of Appeal case of *S v Ntsele* 1998 (2) SACR 178 (SCA) it was likewise held that if it is not possible to say that the findings of fact are palpably wrong and that a reasonable court could never have made such findings, the court of appeal is not entitled, under such circumstances, to interfere with the trial court's findings. See also *S v Monyane and Others* 2008 (1) SACR 543 (SCA).

[61] In assessing whether or not the conviction was proper, free of any material misdirections, it must be borne in mind that an evaluation has to be made on the totality of the evidence. In this regard see *S v Van Aswegen* 2001 (2) SACR 97 (SCA) where the court relied on the following passage in *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449 G for its decision that the court should not base its findings, on whether to convict or acquit, only on a portion of the evidence but that the decision that you have taken on all the evidence. The court inter alia contended that –

> The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any

particular case will depend on the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or ought to acquit) must account for **all** the evidence [underlining and emphasis supplied]. Some of the evidence might be found to be false, some of it might be found to be only possibly false or unreliable but none of it may simply be ignored.

[62] It is against the above back-drop that an evaluation of the evidence on record needs to occur in deciding whether or not the conviction is sustainable or alternatively whether or not there were material misdirections on the part of the trial court which justified interference by this court.

[63] The complainant and the appellant are [...]s. The appellant is the complainant's mother's [...]. Despite this close family relationship the appellant had only recently come to Cape Town for the first time after meeting the complainant's sister, A., in the Eastern Cape where the appellant hails from. It is common cause that the complainant, her mother and siblings were all very excited to meet the appellant, allowed him into their house with open arms and treated him like one of the family. In fact, the complainant testified that she regarded the appellant like an older brother and her mother regarded him like a son. The appellant visited the complainant's family, arriving there on the day in question (the rape allegedly occurred on 15/16 January 2012), stayed for 3 nights and then left and returned again later in the week, when he again spent a few nights there. During this time, according to the complainant, she not only treated the appellant like a bother and made breakfast for him (though denied by the appellant), he also gave her special attention. According to her he gave her things like money and let her use his cell phone, things no-one else ever gave her before.

[64] The complainant's evidence relating to the incident in question was that:

(i) On the night of 15/16 January 2012, she had been in the lounge in the company of her older sister, A., and the appellant. They were watching a movie. Her sister left the lounge and went to sleep in her room at midnight, leaving the complainant and the appellant behind, still watching the movie. The complainant fell asleep where she was lying on a sleeping bag on the floor.

(ii) Also in the house that night were the complainant's mother and another sister and the latter's children.

(iii) The appellant woke the complaint up and showed her a porn movie on his cell phone. She did not look at the movie on the phone as she was not comfortable

looking at pictures of naked people engaging in sexual activity, and fell asleep again.

(iv) The appellant thereafter picked her up from the floor where she had been sleeping, carried her to a couch in the lounge that he was meant to sleep on, put her on the couch, closed her mouth with his hand, took off her panty and put his penis into her vagina. She explained that he closed her mouth, preventing her from making any noise. He lifted her legs over his shoulders when he penetrated her without consent.

(v) Later that morning (Monday), when she was getting ready to go to school, the appellant kept a close watch on her movements, which seemed to her to be aimed at preventing her from telling her mother what had happened during the night.

(vi) On the Thursday following the incident, the appellant was back visiting at the complainant's family home. The complainant left a message on his cell phone to the effect that she was going to tell her mother about what had happened. She had saved this message in the drafts portion of his cell phone. She reflected her own name as the person to whom the message was addressed as she did not know how to change the "to" – the addressee to "from" – the addressor. She hoped that this message would cause the appellant to leave their home.

(vii) Her sister, A., saw the message on the appellant 's phone later on that same Thursday evening but could only confront the complainant about it on the Sunday afternoon when the latter returned from her father's place. The complainant then reported to her sister what had happened.

[65] **A.** confirmed the complainant's evidence relating to the latter's report to her (the witness) of the rape. She had, per chance, come across the message (on the appellant's phone in the drafts) when she was browsing through the appellant's cell phone which was lying on the table. It is common cause that everyone had free access to the appellant's phone, and he in turn also had access to their phones. A. then called in the help of her other sister and brother whereafter they eventually reported the matter to the police.

[66] The complainant was medically examined about a week after the incident. The doctor's evidence was that there were signs of injuries to the genitals of the complainant.

However this evidence was inconclusive in that the doctor could not give any indication of the age of the bumps and clefts as same could conceivably be visible a year after being inflicted. According to the doctor he said bums and clefts could be the result of self-inflicted injury caused by the insertion of a finger or even if a person such as the complainant is suffering from irritation from a urinary tract infection. The doctor indicated that: -

(i) There were no abnormalities – no fresh tears

(ii) The hymen opening was 15mm traverse and 14mm vertical – which according to him was an opening "within the limits of the child's age"

(iii) There were "bumps" at 3 o'clock and 5 o'clock as well as clefts at 8 and 9 o'clock. Though both bumps and clefts are tears within the hymen – bumps go halfway through the hymen and then heal whilst clefts are tears that go through the hymen and when they heal they leave cleft like shapes.

(iv) His observations and conclusion that his clinical findings were "consistent with previous vaginal penetration with a blunt object like a penis" were made in the context of his acceptance of the history given to him by the complainant of what had happened with reference to the alleged rape

[67] The last of the state's witnesses *viz* **Sergeant Mfreke** – downloaded the information from the appellant's cell phone. This forensic investigation revealed that:

(i) There were a number of videos found on the phone but none would be described by the witness as pornographic.

(ii) There were a number of photos found on the phone. These photos, which were handed in as Exhibit "C", inter alia, depicted persons very scantily dressed only in panties, suggestive of being engaged in some sexual activity, for example with one female person having inserted her hand into the panty of another female "in the front or in the private part of the other lady". Another photograph depicted what appeared to be a naked female kissing a man.

(iii) This phone was a Nokia 5130 and was one of those where one cannot retrieve deleted items.

[68] Though, according to the policeman, he would not classify the images that he saw as pornographic, these images could certainly lead a young girl, such as the complainant at the

time, to describe the images as depicting naked people engaged in sexual activity", which evidenced her understanding of "porno movies".

[69] Sgt Mfreke was unfortunately not asked for an opinion on whether or not one can save a draft sms or whats app. However, in this modern era of social media and the dominant presence of cell phones in everyone's life, the way these devices work has almost become general knowledge. I am aware of the feature where one can save a sms message in draft, particularly in the older phones such as the one in question. If such message is drafted and simply not sent, it will remain in draft until either deleted or sent.

[70] Recognising the fact that the complainant was a single child witness as far as the act of rape is concerned I respectfully differ with a view that the Regional Magistrate seems to be unmindful of the need to apply caution in assessing the evidence of such witnesses. The Regional Magistrate had clearly exercised his mind about the caution in dealing with the evidence of a single witness when he made reference to section 208 of the Criminal Procedure Act 51 of 1977. He proceeded to as a matter of fact find that the evidence of the complainant was satisfactory in all material aspects.

[71] Insofar as corroboration of the complainant's evidence relating to the rape, was necessary, despite the findings in the case of *S v Jackson* 1998 (1) SACR 470 (SCA) that the application of the cautionary rule in sexual assault cases was based on irrational and outdated perceptions, it is my view that the complainant's evidence was in fact corroborated, lending a sufficient safeguard reducing the risk of a wrong conviction.

[72] The corroboration I refer to above is in the form of the evidence of the sister A., whose evidence does not in any way lend itself to criticism on the grounds of not being reliable and/or credible. In this regard I need to pause and say something about the evidence that the complainant had left a message in the draft of the appellant's cellphone, which message was subsequently seen by this witness A.. The learned Binns-Ward J and Henney J are of the view that it is not physically possible to have done so and therefore, by implication A.'s evidence stands to be ignored if not outrightly rejected. It is a fact, known to all who use cellphones in the modern era, that if a message is composed and left on the phone it will not delete itself, it will remain there until deleted, as it cannot delete itself. Even if the senders' number is not on the phone of the recipient of the message such message will not simply delete by itself. If one then goes to the drafts, as testified by A., such message will be there to be seen. Nowhere in either of the judgments of Binns-Ward J or Henney J is it

suggested why A.'s evidence should be ignored and not be considered as part of all the evidence as held in the case of *Van der Meyden* supra.

[73] If I am correct and it is possible to thus save the message in the drafts (particularly in view of the fact that this evidence was never challenged, nor is there evidence anywhere on the record that it is not possible for a message to be thus saved, as testified by the complainant and later seen by A.), then Numbulelo's evidence serves as adequate corroboration for the complainant's version of events.

[74] It is also abundantly clear that the complainant's evidence was rather spontaneous therefore more likely to have been truthful. There is absolutely no basis to reject A.'s evidence other than the speculative, dare I say, almost desperate, reason advanced by the appellant that there was some or other conspiracy against him which by implication involved A., the complainant and others, a contention for which there is no factual basis on the record. In fact, the evidence such as it is strongly suggested the contrary.

[75] In his defence, the appellant testified that he had been watching television in the lounge where he was in the company of the complainant and the latter's sister A., who returned to her room at midnight. The complainant, who remained behind with him after her sister left, was listening to music on the appellant's phone when he decided to sleep. He told her to put it on the table when she was finished with it. He awoke the next morning and everything was normal. The complainant was still sleeping on the floor where she was when he had gone to sleep. He agreed that they had had free access to each other's cell phones. He was not aware that there was any problem until he was arrested on 23 January 2012 and charged with having raped the complainant. He submitted that he had been framed because of some or other property dispute with the family. He was, however, clear that he did not suspect the complainant's mother and/or siblings to be involved in this devious action of framing him. They (complainant's family) had been very friendly with him and were very welcoming.

[76] The appellant was, in my view, not an impressive witness. His version was justifiably found by the trial court to be improbable (not reasonably possibly true). His general response of calling the complainant and her family, particularly her sister A., blatant liars who were intent on getting him into trouble by concocting this elaborate lie that he had raped the complainant only because an aunt of the complainant, who does not live at this house, was behind this exercise of framing him because of the property family dispute, was

unconvincing. There seems to be absolutely no merit in this fanciful allegation. In fact, the common case evidence of how they had reached out to him, treated him with warmth and kindness, and entertained him does violence to this contention. This aspect completely shakes the foundation of his central theme that he had been framed. In fact, this was interestingly never put to either the complainant or A. when they testified.

[77] I am acutely aware that a court does not have to believe an accused, but his version of events must be reasonably possibly true for him to resist the charge against him. I am of the view that his version was improbable. A perusal of his evidence under cross-examination reveals that he simply had no answers to important and fundamental discrepancies with reference to aspects that were either put to state witnesses, which were contrary to his evidence, or aspects that were not challenged because those aspects were contrary to his evidence. The evidence reflects that:

(i) He suddenly in cross-examination testified that A. was the person who did not want him there. According to him, her evidence of how excited she was to meet him and the financial contribution she had made and was willing to commit to for him to educate himself etc. – was all lies. Importantly, this was not canvassed with A.. It was definitely not challenged/disputed when she testified. His only explanation for this was to blame his attorney – see page 92 – 93 of the record.

(ii) He continued to blame his attorney for not challenging the complainant who said she was watching an action movie with him, which, according to him, she lied about as she was not watching a move with him. Once again according to him the complainant was just telling lies.

(iii) His evidence for the first time under cross-examination that he had left his phone with the complainant when he went to sleep, was not put to the complainant when she testified that she did not have his phone. It all was again labelled by him as lies.

(iv) The complainant's evidence that she had gone to sleep elsewhere after the alleged rape and had not woken up in the lounge where the appellant woke up the next morning, was also labelled as lies, though never challenged when she testified.

[78] The record/transcript is replete with such examples of the appellant introducing evidence that was never raised before and whenever his evidence is in conflict with the

evidence of any state witness, then resorting to calling them liars. His attempt to suggest that he was framed due to this property family dispute, is unconvincing and improbable if regard is had to the conspectus of the evidence.

[79] On the other hand, the evidence of the state witnesses and, more importantly, that of the complainant and her sister, was highly satisfactory. They both testified without hesitation, did not contradict each other or other witnesses or themselves, were rather forthright, and evidenced no improbabilities. Cross-examination in no way detracted from their evidence.

[80] The complainant's evidence re the "porn movie" must be seen against the backdrop of her own evidence of her understanding of porn viz that it involves naked people engaging in sexual activity. The photos clearly depict people either completely or substantially naked indulging in sexual acts such as one female, wearing only a panty, inserting her hand into the panty of another female into the other's private parts, while another photo depicts a naked female kissing a man.

[81] The complainant's evidence that she did not immediately tell someone about what had happened is equally probable in the circumstances where she had been threatened by the appellant that he would kill her family if she told anyone. The veracity of this evidence is enhanced if one considers the spontaneous answer by the complainant as to why she did not want her mother to see her cry, when she said "Yes, because I did not want her to die." Her evidence that she subsequently, on the Thursday, left the threatening message on his phone is very plausible if cognisance is taken of her evidence that she was troubled when he returned to their house after having left. She was uncomfortable with him in the house and had hoped the message would cause him to leave the house. It certainly does not make her evidence that she feared for the safety of her family improbable. Instead, it is very conceivable that she had become more desperate to get him out of the house, and that her desperation at that stage was greater than her fear. She would obviously have been more comfortable with him out of the house.

[82] Though no evidence was proffered about the complainant's background and upbringing, she lived in Khayelitsha where the incident also happened. Reading the record of her evidence, one gets the impression that she is a rather confident young girl who was 12 years old when she testified, but appeared rather mature beyond her age, not only physically

(as per the district surgeon) but also emotionally. She seemed rather street wise. It was therefore not at all strange that she was familiar with the concept of a porno movie.

[83] Regarding the probabilities in the matter, I am mindful of what was said by Rumpff JA in *S* v *Rama* 1966 (2) SA 395 (A) at 401 *viz*:

> *... there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by which such a high degree of probabilities is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of a doubt, when it may be said to exist, must not be derived from speculation, but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case*", a rationale followed in *S v Phallo and Others* 1999 (2) SACR 558 (SCA).

[84] The fact that no pornographic movies and/or the message were found on the phone also does not detract from the evidence of the complainant and her sister if regard is had to the repeated evidence of Sgt Mfreke that he could not retrieve any deleted items from the phone.

[85] The fact that the medical evidence was not conclusive, in that the doctor could not determine the age of the bumps and clefts, and further because he came to the conclusion, that his clinical findings were "*consistent with previous vaginal penetration with a blunt object like a penis*", in the context of what the complainant had told him, thus affecting his objectivity, is not decisive of the case. If the evidence was conclusive, it would have been helpful.

[86] If I have regard to the other facts, and, without getting entangled in the issue of motive for falsely implicating the appellant, I believe that the complainant and her sister testified honestly about what had happened. There were no inconsistencies, improbabilities in their evidence and the evidence of both struck me as credible. In arriving at this decision, I have remained cognisant of the need for the trial court to have exercised caution because the complainant was a child witness.

[87] Although the Regional Magistrate seemingly had a robust approach in evaluating the evidence, I cannot find that he had misdirected himself in any material respect. His assessment of the evidence of the witnesses and his conclusions based thereon must be presumed to be correct in absence of such material misdirections.

[88] In the premises, I would dismiss the appeal against conviction (there being no appeal against sentence).

M. PARKER

Acting Judge of the High Court