Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. A588/2019

Before: The Hon. Mr Justice Binns-Ward
and
The Hon. Mrs Justice Fortuin

Date of hearing: 24 May 2019

Judgment: 31 July 2019

In the matter between:

D J Appellant

and

THE STATE Respondent

Order of the court:

1. The appellant's appeal against his convictions is upheld and the convictions and sentence, including the order that the appellant's particulars be registered in the National Register for Sex Offenders, are set aside.
2. It is directed, however, that the appellant shall be forbidden from resuming contact with the complainant until the desirability of, and appropriate attendant conditions for, any such resumption have been investigated and reported on by a social worker, and that any resumption of contact shall thereafter occur only in accordance with the

social worker's recommendations, alternatively in accordance with an order obtained from a court.

JUDGMENT

---

[1] The appellant appeals against his conviction in the regional court at Mitchell's Plain on *one count* of contravening s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('rape') and *one count* of contravening s 5 of the said Act ('sexual assault'). Both counts were treated as one for sentence and the appellant was sentenced to 15 years' imprisonment, of which five years' imprisonment was conditionally suspended. It was also ordered that appellant's particulars be registered in the National Register for Sex Offenders. The trial court refused an application by the appellant for leave to appeal. The appeal was brought with leave obtained from this court (per Desai ADJP and Papier J) on petition. Leave to appeal was granted in respect of both conviction and sentence, but, as mentioned, the appellant prosecuted the appeal only against the convictions.

[2] The charges brought against the appellant alleged (i) that 'on or about 2015 (*sic*) and at or near Mitchell's Plain …[he] unlawfully and intentionally commit[ted] an act of sexual penetration with (*sic*) the complainant, to wit [K.J.] (4 years old) by forcing his fingers into her vagina several times without the consent of the said complainant' and (ii) that on or about 2015 (*sic*) and at or near Mitchell's Plain …[he] did unlawfully and intentionally sexually violate the complainant to wit [K.J.] (4 years old) by licking her vagina without the consent of the said complainant'.

[3] Despite the appellant having been charged with only *one* count of rape, the prosecutor, without objection from the appellant's legal representative, led the complainant to give evidence that the appellant had inserted his finger into her vagina on *two* separate occasions on separate days, being the 17th and 30th December 2015, respectively. Again, without objection from the appellant's attorney, or any check by the magistrate, much of this questioning was of a leading nature.

[4] At one stage of her evidence, the complainant stated that the alleged licking of her vagina that was the subject of the charge of sexual assault had occurred on a different day to the rape. Then, later in her testimony, she said that it had happened at the same time. She

was not asked by either the prosecutor or the court to elucidate whether this had been on one occasion or twice.

[5] Under cross-examination, her evidence about whether the alleged vaginal penetration had occurred once or twice was wholly haphazard, as evinced in the following exchange with the defence attorney:

> Mr DAVIES: Yes but now you said earlier to us your daddy only did it once to you. Now you are saying it is two times.
> INTERMEDIARY: Earlier you said to us that your daddy did only scratch in your tootie one time but now you are saying he did two times. --- He did it two times … (intervenes)
> Mr DAVIES: Which one is the right one? Excuse me?
> INTERMEDIARY: Say again. --- He did it two times.
> Mr DAVIES: Scratch in your tootie?
> INTERMEDIARY: Did he scratch in your tootie two times? --- Yes, no one time, one time.
> Mr DAVIES: So it is one time now again?
> INTERMEDIARY: So he scratch (*sic*) in your tootie one time? --- Yes.

[6] It has to be said, however, that when the statement that the complainant made to the police was put to her in cross-examination, it emerged that she had mentioned two separate incidences of penetration by the appellant of her vagina with his finger; on the one occasion he was said to have had long fingernails and on the other his nails were described as having been short. The complainant's mother's evidence had it that the complainant had made a report to her about the aforementioned two incidences on 17 December 2015, which, if correct, would suggest that the alleged incident on 30 December would have been the third occasion on which the complainant had been molested. The police statement actually indicated that the complainant had in fact reported that she had been finger raped on four occasions in total. However, in her evidence in court the complainant said this was incorrect, and that she had lied to the police.

[7] This is not to suggest that the complainant was necessarily untruthful – although her concession that she had lied to the police is of concern, coming from a witness found by the magistrate to be able to distinguish truth from falsehood. And it is unfortunate that neither the prosecutor nor the magistrate investigated the admission to ascertain whether or not it might have been qualified. But it does, however, highlight the difficulty that often presents as an inherent problem with the reliability of the evidence of very young children, especially where it is not corroborated or in accord with inherent probability.

[8] It is also on any approach most unsatisfactory that an accused person charged with a single offence is confronted at trial with evidence that the offence in question is in point of fact alleged to have occurred on diverse occasions. Such a situation undoubtedly bears materially on the fairness of the trial. I had cause to address this very issue extensively in a judgment (in which Yekiso J concurred) in *S v Mponda* 2007 (2) SACR 245 (C), especially at paras. 7-16, and it is also discussed in the commentary on s 94 in Du Toit et al., *Commentary on the Criminal Procedure Act*.[1] It is worrying that notwithstanding the admonitions uttered in that judgment, there is evidence of continuing sloppiness in the preparation and presentation of these types of case for prosecution. In the current case it begs the question of just which of the incidents described in the complainant's evidence was the appellant actually convicted? Cf. *Speek v S* [2012] ZAFSHC 69, *W v S* [2014] ZAECGHC 118; 2015 (2) SACR 483 (ECG) at paras. 32-35 and *S v Leopeng and Another* 1966 (4) SA 484 (A).

[9] The state was no doubt in possession of the complainant's police statement when it formulated the charges against the appellant. The unsatisfactory character of the charge sheet was therefore inexcusable in the circumstances. It is perhaps reflective of inexperience or ineptitude on the part of the prosecutor. Certainly, as counsel who represented the state at the hearing of the appeal was constrained to acknowledge, the nature of the prosecutor's examination and cross-examination of the witnesses at the trial gave the impression that she was lacking in experience.

[10] Cases involving the leading of evidence from very young witnesses are invariably difficult, as effectively adducing the evidence of such witnesses often requires considerable skill. [2] This is especially so in cases concerning alleged sexual offences. As Nugent JA observed in *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA) ; 2009 (1) SACR 552; 2012 (6) SA 353, at para. 21, '*The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is*

[1] The history of the provision discussed in A. Kruger, *Hiemstra's Criminal Procedure* at 14-32, 33 suggests that it was originally inspired by the difficulties encountered in cases involving sexual offences allegedly committed repeatedly and in respect of which, for practical reasons, it was not possible for the state to identify precisely the number of occasions on which the offence had been committed or to accurately specify the dates. The decision of this court in *R v Graaff* 1917 CPD 65 highlighted the need for the introduction of the forerunners of s 94 of the current Act. In that case, which involved an allegation of incest between a father and his minor daughter, an objection to the charge sheet was upheld on the grounds that it was too vague. The charge had been framed in the following terms: that '*upon divers dates between the 1st January, 1913, and the 19th January, 1917*,' and at certain places named he did wrongfully and unlawfully solicit his daughter to suffer him to have criminal and carnal connection with her, and did wrongfully and unlawfully carnally know her.

[2] Cf. *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130; 2009 (7) BCLR 637 at para. 104.

young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important.'

[11] There is no basis in principle to attach a lower standard of proof or a less exacting assessment of the evidence in a case in which a child is the complainant than in any other criminal case. To do so would be to expose accused persons in cases in which the complainants are juveniles to a greater chance of unjust conviction than persons in cases in which the complainants are adults. There can be no warrant for such a regime. The vulnerability of young complainants to the secondary trauma of testifying in court about matters such as sexual molestation is catered for by provisions such as those in s 170A of the Criminal Procedure Act that allow their testimony to be given through an intermediary from a room where they are not confronted face to face with their abusers, and s 153 which allows the protection of *in camera* proceedings; not by applying a different standard of proof in respect of the accused. The courts have, however, frequently stressed the need for the rights of vulnerable people, in particular women and children, to be respected and protected, and especially against sexual violence; see e.g. *S and Another v Acting Regional Magistrate, Boksburg: Venter and Another* [2011] ZACC 22; 2011 (2) SACR 274 (CC); 2012 (1) BCLR 5 at para 23. As pointed out in *Director of Public Prosecutions, Western Cape v Prins and Others* [2012] ZASCA 106; 2012 (2) SACR 183 (SCA); 2012 (10) BCLR 1049; [2012] 3 All SA 245 at para. 2, an important means of doing so is 'by the *effective prosecution* of those who infringe those rights' (emphasis supplied). It is therefore of serious concern that difficult matters involving issues of considerable gravity that require more than just average competence to be properly presented come to be allocated to apparently inexperienced and insufficiently skilled prosecutors.

[12] The complainant was the daughter of the appellant. She was born of the marriage between the appellant and the complainant's mother, C. At the time of the alleged commission of the offences the complainant's parents were in the process of obtaining a divorce and no longer lived together at the same address. It was common ground that the separated parents were not on good terms with each other at the relevant time. It emerged in the evidence that the appellant had had to approach the Family Advocate to obtain periodic

access to the child after his wife had moved out of the common home taking the complainant with her. It also emerged that the appellant had previously applied for a domestic violence interdict against the complainant's mother and grandmother, although the circumstances pertaining to that were not explained in the evidence at the trial. The complainant's mother in turn described the appellant as having been an abusive spouse, although it would seem from the evidence that the nature of the alleged abuse that the witness complained about was psychological rather than physical in character.

[13] The complainant's mother was the child's principal caregiver, but by arrangement the child regularly spent time twice a week at the appellant's house. It was common ground, however, that in December 2015 the complainant had been spending more time at the appellant's house than had been formally regulated between the parents. This was because it was convenient for the mother, who went out to work, to ask her husband to look after the child. This was reportedly due to the unavailability during that period of the child's grandmother who normally took care of the child. The appellant was available to step into the breach because he was unemployed at the time. The offences in respect of which the appellant was convicted were found to have been committed at the appellant's house when the complainant had been spending the day with him there.

[14] Three witnesses testified in support of the state's case and the appellant gave evidence in his defence. The three state witnesses were the complainant, who was five years old when she testified 10 months after the occurrence of the alleged events, the complainant's mother and a surgical registrar at the Red Cross War Memorial Children's Hospital who had conducted a medical examination of the complainant.

[15] Distilled to their essence, the grounds of appeal were that the court a quo erred in finding that the state had discharged the onus on it to prove the appellant's guilt beyond reasonable doubt and that the magistrate had misdirected himself in finding that the complainant was a satisfactory witness having regard to a number of inconsistencies in her evidence and her admitted history of fabricating allegations of abusive conduct by her father. The point was also taken that the trial court had been misdirected in its assessment of the import of the evidence of the medical doctor. It was also contended that the magistrate had erred in finding that the complainant was a competent witness.

[16] The complainant's evidence was led through an intermediary, after the magistrate was satisfied that the young child was astute to the difference between fact and fiction and had

warned her of the importance that she should be truthful in what she told the court and admonished her in terms of s 164(1) of the Criminal Procedure Act 51 of 1977. It is relevant to draw attention to certain aspects of the complainant's responses to the magistrate's questioning of the complainant for the purpose of satisfying himself as to her competence as a witness.

[17] The complainant, who first appeared at court on 27 October 2016, said her birthday was the following day, 28 October, when it is in fact 26 January. (She was born on 26 January 2011.) She also incorrectly stated that she would be turning five on that date, when she had actually turned five nine months earlier. The questioning in this regard went as follows:

> COURT: Okay now [K] you said you are five years old. When is your birthday?
> INTERMEDIARY: When is your birthday?
> WITNESS: My birthday is tomorrow.
> INTERMEDIARY: Tomorrow?
> WITNESS: (No audible answer)
> COURT: So that is the 28th of October, is that right?
> INTERMEDIARY: The 28th of October?
> WITNESS: Yes.
> COURT: Will you be six tomorrow?
> WITNESS: I am going to be five years old.
> COURT: Okay so you are still four years old for one more day, is that right?
> INTERMEDIARY: Okay so you are still four years old for one more day?
> WITNESS: Yes.
> COURT: So it is one more sleep and then you five?
> INTERMEDIARY: One more sleep and then you will be five years old?
> WITNESS: Yes.

[18] When asked by the magistrate where she stayed, she said Mitchell's Plain, and when asked where in Mitchell's Plain, she complained to the intermediary '*in … Ma'am why you always confuse me*?' When pressed for the name of the road in which she lived (apparently […] B. Street, Rocklands, Mitchell's Plain), she said '*Strandfontein*' (which is a neighbouring suburb).

[19] When asked the name of the school she attended, the complainant said '*It is uhm, it is … . I am in … (indistinct)*'. (Heard by the magistrate as '*grade naught*'.) When the magistrate then asked again '*Yes what is the name*' (of the school), the complainant replied '*We live in Mitchells Plain*'. It emerged later from the complainant's mother's evidence that

the complainant was in point of fact not enrolled at any school when she testified in October 2016, having been removed from school in June of that year.

[20] The complainant told the magistrate that she believed in God and that God wanted people to be good rather than bad. When asked '*What do you think where will God send people that are bad?*', she responded '*I think they will sing different kind of song to God*'. The magistrate did not seek any clarification of the import of this enigmatic reply, which was not a cogent response to his question.

[21] Asked '*If you tell a lie to your teacher and your teacher tell (sic) your mommy that you did lie to her, what will your mommy do*?', she replied '*My ma did went school but my mommy didn't take me to school only my ma. My teacher don't hit me only when is sleep …(indistinct) only when I don't sleep she don't hit me only when I don't sleep she hits me.*'

[22] I have some doubt in the circumstances as to whether the magistrate could be properly satisfied as to the competence of the witness to give evidence. As indicated in the examples given in the preceding paragraphs, some of her answers to the questions he directed during the exercise that he had to undertake into her competence were complete non-sequiturs and others demonstrably false. I accept that the object of the questioning was to determine her competence (described in *S v L* 1973 (1) SA 344 (C) at p. 349 as being possessed of the intelligence to be able to distinguish the import of truth from that of falsehood [3] - as to which I am willing, with some hesitancy, to defer to the trial court's assessment), not her credibility. But even if her competence as a witness were to be accepted, her performance under the initial questioning remained something that the magistrate was bound to take into account in his assessment of the reliability of the evidence that she gave. It was undoubtedly a pointer towards the necessity for it to be approached with a heightened sense of caution; cf *S v Raghubar* [2012] ZASCA 188; 2013 (1) SACR 398 (SCA) at para. 5, where Tshiqi JA held that testimony heard to determine a witness' competence to give evidence could also bear on 'the weight (value) to be attached to that evidence'.

[23] It was very evident on the record that whilst the complainant's evidence was generally coherent when she was being asked leading questions, she did not do well when answering non-leading questions. For example, under cross-examination the complainant gave an

[3] See also *DPP, Transvaal v Minister for Justice and Constitutional Development* supra, at para. 164-166; *S v Matshivha* 2014 (1) SACR 29 (SCA) at paras 10 and 11; *Macinezela v S* [2018] ZASCA 32; (and as *S v SM*) 2018 (2) SACR 573 (SCA) at para. 17-19, and *S v Swartz* [2008] ZAWCHC 103; 2009 (1) SACR 452 (C) at para 18-19.

affirmative answer when asked whether she was familiar with the concept of weeks and months, but when asked what month it was at that time she was unable to say.

[24] Of particular concern in this case is that it became apparent that the complainant had a recent history of telling dreamt up stories about being mistreated by the appellant. She admitted that she had previously made a false report to her mother that she had been assaulted by the appellant with a hockey stick. Her evidence in that regard under cross-examination went as follows:

> INTERMEDIARY: There was a mark on you, then you told your mommy that your daddy did hit you with a hockey stick while he was practising. ---Yes.
> Mr DAVIES: Now why were you lying about it?
> INTERMEDIARY: Why did you lie to your mommy? --- Because I want to.
> COURT: Can you say that again. Why did you lie to your mommy about the hockey?
> INTERMEDIARY: Why did you lie? --- I don't know.

The complainant also acknowledged that she had lied in making a report to her mother that the appellant had left her alone in a motor vehicle.

[25] There were also indications in the complainant's evidence that it had been influenced by external input. A salient example was her use of the word '*ougat*', which in her evidence in chief she attributed to the appellant, but which under cross-examination admitted was a word that she had learned from her mother. Under re-examination by the prosecution the complainant said that had been told by her '*mommy and her ma* (? grandmother)' what to say in court about her father. In answer to the question '*Did your mommy and your ma say what you must say about your daddy?*', the complainant replied '*Yes. They said I must say that my daddy scratch my tootie. (Indistinct) can you tell … (indistinct) so we can make quick because me I want to go home because I want you guys to make quick, quick, quick. You make quick, quick, quick.*'

[26] The magistrate asked the complainant about her attribution of the word '*ougat*' in questioning directed at the witness after the prosecutor and the appellant's legal representative had completed their questioning. By means of leading questions he got the complainant to confirm her initial evidence attributing the use of the word to her father. He refused, however, to allow the defence attorney to ask any questions arising on that point.

[27] The complainant was extraordinarily assertive in certain respects in the witness box. There were occasions on which she told the intermediary not to confuse her, commanded the cross-examiner to hurry up, and pressed the magistrate to have done with his questions. I

have to say that I found her precociousness in these respects strikingly unnatural, and to some extent disturbing.

[28] On a reading of her evidence I am left with a strong feeling of disquiet that while it may have had a germ of truth, it was demonstrably unreliable to the extent of leaving me in doubt. This is material because the appellant's conviction was founded on the direct evidence of not only a single witness, but also a very young child; giving strong reason for the evidence to be treated with especial caution.

[29] The complainant's mother testified that she had received a report from the complainant on 17 December 2015 that the appellant had inserted his finger into her vagina and licked her private parts. The complainant told her that this had occurred on two occasions; one when the appellant's fingernails were long and the other when they were short. The report was forthcoming after the child had complained of a stinging feeling in her private parts while her mother was bathing her. The mother did say, however, that this had not been the first time that the complainant had complained about discomfort in her private parts. She had made a similar report in June that year, when the presence of an infection had been diagnosed and medically treated. The mother testified that when she heard the report she had physically examined the child's private parts, but had not found any visible evidence that the child had been interfered with.

[30] Despite receiving a report on 17 December of two instances of grave impropriety by the child's father, the complainant's mother did nothing about it until 2 January, when she took the child to a doctor. Her initial explanation for her inaction was that she had been 'shocked', and had not known what to do. The doctor concerned, who was not identified (other than as '*the GP in our area*') and did not testify at the trial, apparently referred the child to be examined at the Red Cross War Memorial Children's Hospital, where she was seen by Dr Mohammad Etalleb, who completed a J88 medical examination report in respect of which he later testified at the instance of the state.

[31] The complainant's mother did say that she sent the appellant a message on 18 December that she wanted to speak to him about something ('*ek wil met jou praat*'). She said that the appellant did not respond to the message. She thereafter allowed the child to visit her father on Sunday, the 27th December and Wednesday, the 30th December. The appellant had collected the child on these occasions, but despite the message that she had sent on the 18th, the mother did not speak to him about the complainant's report. She explained

that she had not confronted the appellant on either of these occasions or refused to allow him to take the complainant because she felt she could not do that '*until I don't know for sure that is what he did to her*'. The complainant had actually asked if she could visit her father on the 27th instead of on the 26th, which would have been his usual day of access.

[32] The complainant's mother explained her eventual decision to take the child to be examined as being due to a report the child made to her after the visit to her father on 30 December that the appellant had done it again. As already touched upon, on the mother's evidence, this would therefore be the third occasion on which the appellant had behaved indecently with his daughter.[4] She did not take the complainant to be examined immediately, however, because, so she said, she had various church commitments and then New Year's Day intervened.

[33] The complainant's mother said that the complainant had to stay at the hospital until 4 January, although the reason for that was unclear. When Dr Etalleb gave evidence he indicated that if there were 'high suspicion' of sexual assault the child would be admitted to the ward so that he or she could be interviewed by a social worker later. It did become apparent from an incidental reference in the course of the doctor's evidence that the complainant was indeed interviewed by a social worker at the hospital. The complainant's mother said that she did not make a report to the police, but was contacted by a police officer on the 5th of January and told to bring the child to the police offices to make a statement.

[34] The complainant's mother said that she believed her child. She denied that the complainant had ever made up stories against her father. Her denial was contradicted by the evidence of both the complainant and the appellant. When it was put to the complainant's mother that the appellant considered that the child had been put up by her mother and grandmother into making a false report, she declaimed that she would never have put her child through a court case if she did not believe her. In my view it is telling in this regard that the mother took the child to a doctor to see if the child's reports might be corroborated. That is hardly the conduct of someone who is intent on falsely incriminating someone else. Had she intended to falsely incriminate, one would expect her to have gone straight to the police.

[35] The mother was then taxed on the fact that she had taken so long to do anything about the reports. I am sceptical about the veracity of the mother's evidence that she did not do

[4] It will be recalled that the report made on 17 December had involved two previous incidents; one in which the appellant's nails were long, and the other when they were short.

anything about the report for more than two weeks because she was 'shocked'. One would expect a parent receiving such a report to be outraged at the serious abuse of their child, and to be moved to do something about it immediately – more especially in the circumstances of this case where the parents were estranged, as there would not have been any complicating feelings of conflict of loyalty. Furthermore, the mother also had her own mother to turn to for moral support if she needed it. It is clear that in point of fact the mother had other priorities. She put her church commitments, for example, before any concern to take the child for medical examination.

[36] A more probable reason for the mother's delay about reacting to the report was her uncertainty about its truth. In my view, the mother's statement that she felt she could not do anything about the reports '*until I don't know for sure that is what he did to her*' is confirmatory of my assessment of the inherent probabilities in this regard. It is apparent from the evidence that the mother, notwithstanding her equivocation on the subject, was by that time aware of the complainant's propensity to spin yarns about her father abusing her. The magistrate did not deal with the effect of that propensity at all in his judgment, other than, somewhat counter-intuitively, to treat the complainant's admission to it as confirmatory of her honesty.

[37] Dr Etalleb found an irregularity ('suspected old vaginal tear') on the complainant's hymen. He said that this could have been caused by an old injury, but did not give any indication of how historic. He said it could not have been recent ('*so no reason* (*sic*, an obvious misrendering of 'recent') *thing happened*'). The events testified to by the complainant had happened in the preceding two weeks. It was not clarified with the doctor whether that would count as 'recent' or not.

[38] The doctor said that the irregularity could have been the after-effect of a healed injury caused by the insertion of a finger into the complainant's vagina. It could also have been caused by scratching if the complainant had 'an old' skin or vaginal infection. As mentioned, the complainant had had such an infection about six months previously. The doctor pointed out that the child did not have an infection at the time he examined her, but his point must have been that the old lesion could have been related to an infection in the past, for it would not make sense to relate a *current* infection - unless it were chronic - as causative of a lesion of *historic* origin. The medical evidence was therefore neutral and inconclusive.

[39] As the magistrate noted, the doctor also conceded under cross-examination that if there had been a history of repeated vaginal penetration with a finger he would expect to find more extensive symptoms of irregularity on the complainant's hymen, including what were referred to as 'clefts and bumps'. He found no such symptoms. That was a factor that should have been recognised as calling into doubt the complainant's evidence.[5] There is no indication, however, that it was appropriately taken into account.

[40] Whilst on the subject of the medical evidence, I find it unsatisfactory that the likelihood or not of there being visible evidence of the vaginal penetration of a four year-old child by an adult male's finger shortly after the occurrence of the incident was not explored with the doctor either by the prosecutor or the magistrate. The evidence that he gave concerning one of the possible causes of the hymenal irregularity was predicated on the child having scratched herself because of an infection. As already discussed, the irregularity was on any approach not considered to be the result of a recent occurrence. And the dimensions of a very young child's finger are considerably smaller than those of an adult male. In the context of the mother's evidence that she had physically examined the complainant on 17 December and found no visible signs of interference, I would have thought it to be an important detail to ascertain from the doctor how feasible it would have been for penetration of the child's vagina by an adult male's finger to leave no visible symptoms so soon after the event. The consequences in respect of the issue of reasonable doubt of such failures to explore obvious lines of enquiry with expert witnesses when they are available are illustrated in the matter of *R v Manda* 1951 (3) SA 158 (A), to which I shall return in another connection later in this judgment.

[41] The appellant denied the allegations against him. He described the history of his fraught relationship with his wife, including allegations by her that that he had assaulted the child. He also described how, unhappy with the condition in which he had found the child while in the custody of her mother in the latter part of 2015, he had reported the matter to the social welfare office for it to investigate. He said that he had always had a good relationship with the child. He also testified that he shared his accommodation with two other persons and it was rarely that the complainant was alone with him in the house when she visited.

---

[5] Cf. *S v Ramulifho* [2012] ZASCA 202; 2013 (1) SACR 388 (SCA) at para. 11, in which the importance of medical evidence in rape cases was highlighted, and the observation was made that '[i]*f the results of the examination are inconsistent with the complainant's description of a sexual assault the accused's denial of intercourse will usually be accepted as reasonably possibly true*.'

[42] Asked by his attorney where he thought the allegations against him came from, the appellant responded '*I have no idea. I think it is … I can only think it is hatred or it is probably because of the divorce situation with the house story and the money story. That is all I can think of. I have no idea where she* [the complainant's mother] *coughs this up*'.

[43] The cross-examination of the appellant took the matter no further. The prosecutor had nothing to work on other than the word of the complainant against that of the appellant.

[44] The magistrate taxed the appellant with the child's mother's evidence about how the initial report came out as a result of the child complaining about a burning feeling in her private parts when she was being bathed on the night of 17 December 2015. The appellant responded '*According to my knowledge she always had a urine problem from small age already and she was constantly taken to the doctor for the urine problem because the mother and me couldn't wash her with soap and in her private parts because whenever she was washed the private parts it was burning. That is to my knowledge Your Honour.*' As mentioned, there was indeed evidence that the complainant had been treated for a urinary tract infection earlier in 2015, but the matter was not explored in any detail when the complainant's mother gave evidence.

[45] In his judgment, the magistrate said that the state's case was that the appellant had penetrated the complainant's vagina with his finger on two occasions and on the second of those occasions had also licked her private parts. The charge sheet did not convey as much, and nor did the evidence with any clarity. Indeed, it was perhaps not surprising therefore that the magistrate proceeded to relate the evidence as having been that the alleged licking incident was reported as having attended the first, not the second incident of fingered penetration. The evidence of the complainant was that the licking had happened on the second occasion (on the 30th December), but the complainant's mother testified that it had been reported to her to have happened on the first occasion (on the 17th December). As the magistrate's muddled recital of the complainant's evidence ironically reflects, confusion reigned.

[46] The magistrate was astute to the fact that there were two mutually conflicting versions before the trial court. Early in his reasons he noted that the medical evidence was that the lesion on the complainant's hymen could have been '*caused by anything*'; in other words that it was inconclusive. But during the course of a somewhat rambling judgment that gives the impression that he was grappling with some difficulty to arrive at a coherently reasoned

conclusion, the magistrate graduated from his original correctly stated assessment of the effect of the medical evidence to the completely unwarranted conclusion later on that '[t]*he medical evidence suggests that the complainant was in some form sexually violated …*'. In something of a non-sequitur, he completed the sentence by saying '*… and even though when the Court sits with two conflicting versions, it is expected or rather the honesty and the openness and the trustworthiness, reliability of a witness is of cardinal importance*'. The magistrate did not explain how he could reject the appellant's evidence as 'dishonest' in the face of the difficulties with the complainant's evidence and the issues in the case that were not properly explored and left cause for reasonable doubt.

[47] It is trite that a compartmentalised assessment of the evidence in a criminal trial is misdirected; cf. e.g. *S v Van Aswegen* [2001] ZASCA 61; 2001 (2) SACR 97 (SCA) at para. 8, endorsing *S v van der Meyden* 1999 (1) SACR 447 (W); 1999 (2) SA 79 at 82C-E, and see also *S v Trainor* [2002] ZASCA 125; [2003] 1 All SA 435 (SCA), 2003 (1) SACR 35 at paras. 8-9. In the current case the only basis upon which the trial court could be justified in rejecting the appellant's evidence as not reasonably possibly true was if it could hold, on the basis of an assessment of all the evidence, that the testimony of the complainant could be accepted as factually correct beyond reasonable doubt. Majiedt AJA's dictum in *Damgazela v The State* [2010] ZASCA 69 (26 May 2010) at para. 12 illustrates the position in which the trial court found itself in this matter:

> *The trial court was faced with two mutually destructive versions of the events on the night in question. One of them must be false. In such circumstances, apart from considering the credibility and reliability of the witnesses, it was justified in assessing the probabilities of the two versions and to reach a finding as to which one is true and which one is not. <u>It could, of course, only dismiss the defence version as false in the event that it reached that conclusion beyond reasonable doubt. And it had to do so after giving consideration to the evidence before it as a whole</u>.* (Underlining supplied for emphasis.)

[48] The magistrate rehearsed the trite principal by which he was bound to judge the case, namely that the state had to prove the appellant's guilt beyond reasonable doubt. He quoted in this regard from the judgment of Plasket J in *S v T* 2005 (2) SACR 318 (E) at para 37, at which the learned judge, expressing well-entrenched principle, observed '*When a court finds the guilt of an accused has not been proved beyond reasonable doubt that accused is entitled*

to an acquittal, even if there may be suspicions that he or she was indeed the perpetrator of the crime in question.'

[49] The magistrate also recorded that he was conscious that proof of the offence in the current matter was dependent on the evidence of a single witness and '*a child of a very, very young age*'. He quoted extensively in this respect from the judgment of the appeal court in *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) which, as Diemont JA remarked in the introductory paragraph, addressed the question of 'the weight to be given to testimony of children in a civil action'. Obviously, a more exacting assessment is required in the context of the standard of proof required in a criminal case; cf. *Woji* at 1028A-B. In *Woji*, the court made the trite point that, just as with the evidence of any witness, a child's evidence must be assessed with regard to the witness's evident powers of observation, capacity of narration and trustworthiness (which I understand to denote reliability). The learned judge of appeal added (at 1028E), however, that '*At the same time the danger of believing a child where evidence stands alone must not be underrated.*'[6] (The latter remark was recognisably predicated on the seminal observation by Schreiner JA in *R v Manda* supra, at p. 163, that ' *... the dangers inherent in reliance upon the uncorroborated evidence of a young child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps, to suspicion. ... The trial court must fully appreciate the dangers inherent in the acceptance of such evidence and where there is reason to suppose that such appreciation was absent a court of appeal may hold that the conviction should not be sustained. The best indication that there was proper appreciation of the risks is naturally to be found in the reasons furnished by the trial Court*.')

[50] In holding that the trial judge had erred in not accepting the probative value of the children's evidence in *Woji* because it had not been independently corroborated, the appeal court noted in that case there was nothing in their demeanour or credibility that detracted from its value. Unfortunately, the same cannot be said in the current matter. In *Woji*'s case, furthermore, the young witnesses' evidence was supported by the probabilities. By contrast, there are no inherent probabilities in favour of the state's case in the current matter, and there is nothing outside the evidence of the complainant and her father that determinatively supports the version of the one over that of the other.

---

[6] See also *S v V* 2000 (1) SACR 453 (SCA) at para. 2; also reported as *S v Viveiros* [2000] ZASCA 95; and *Viveiros v S* [2000] 2 All SA 86 (A).

[51] While on the subject of the complainant's tender age, in his discussion of the caution with which he was enjoined to assess her evidence the magistrate made no reference to the non-sequitur answers to his questions when he had sought to determine her competence to give evidence other than under oath or affirmation. Instead, the magistrate plainly predicated his assessment of the complainant's evidence on the approach that Diemont JA applied to the witnesses in *Woji*. That was unconvincing in the very different circumstances of the current case. The inconsistences and discrepancies in the complainant's evidence in the current case were numerous and material, and they fell to be seen against the background of a history of admittedly false allegations. The value of a report by a child who has a history of giving false reports is seriously undermined.

[52] The court below proceeded to find that the evidence of the complainant was '*very clear*' that incidents of vaginal penetration had occurred '*on two occasions as far as she can remember*'. I think it is evident from what I have related of the complainant's evidence above that that was not a justified observation. The complainant was less than clear, and she in fact contradicted herself more than once on the matter. I am conscious that inconsistency is not always reason enough to reject a witness' evidence. The effect of it has to be adjudged in the context of the total picture. But in the current matter there were troubling features that in my view made it difficult for the trial court to be able to convincingly downplay the effect of the inconsistencies on its ability to find the state's case proven beyond reasonable doubt.

[53] As already noted, the magistrate recorded the complainant's admission that she had fabricated stories of abuse against her father in other situations, but failed to reason what effect these admissions had in his assessment of the reliability of her evidence in connection with the charges. On the face of it the complainant's demonstrated conduct of making up stories about how her father had mistreated her should have been very troubling to the trial court in the circumstances. One of the difficulties the magistrate had in this regard is that neither he nor the prosecutor explored with the complainant why she had lied against her father on those occasions. The magistrate also recorded the complainant's admission that people had told her to come to court and '*say these things against her father*', but in that regard too, he said nothing to indicate how he treated of that admission in deciding to accept her incriminating evidence. He also did not explore or deal with the complainant's admission that she had lied to the police about the number of times the appellant had sexually abused her. He was also misdirected in his apparent understanding and treatment of the medical doctor's evidence.

[54] The magistrate justifiably identified the complainant's evidence about the difference in the length of the appellant's fingernails at the times that he had inserted his finger into her vagina as a detail that was unlikely to have been invented and therefore added verisimilitude to her allegations. This was a factor that could not, however, be regarded as, by itself, decisive of whether her evidence could be accepted and that of the appellant rejected. It had to be taken into account and weighed with regard to the evidence as a whole, including the complainant's demonstrated inclination to imaginativeness and fantasy.

[55] As is evident from the discussion, there are a number of factors in the matter both in favour of and against the state's case. That is what makes this a particularly difficult and troubling case. The question at the end of the day remains whether the appellant's guilt was proved beyond reasonable doubt.

[56] The magistrate said that he could not '*find upon a conspectus of all the evidence that the version by the complainant is a fabrication*'. That was to misstate the nature of the enquiry he had to undertake, which was to determine whether the state had proved its case beyond reasonable doubt –a positive test, not a negative one.[7] On the other hand he dismissed the appellant's evidence as a 'bare denial'. It is difficult to see what else an innocent person in the appellant's position could have said. And in any event the magistrate's characterisation of the denial as '*bare*' was not altogether justified. The appellant did establish that he had been the subject of relevant falsehoods by the complainant on recent previous occasions and also that the child's interaction with him took place in the context of acrimony between her parents in the context of their pending divorce and reports made by the appellant to the social welfare authorities about how the complainant was being cared for by her mother and grandmother. Those were facts. His suggestion as to what might have inspired the complainant to fabricate the allegations in issue against him could of necessity only be speculation. But that could not be held against him unless there was sufficient reason to hold the complainant's evidence was true beyond reasonable doubt, and his evidence, equally clearly, false.

[57] The judgment in *Manda,* mentioned earlier,[8] illustrates that it does not suffice for the purposes of convicting an accused person if the evidence establishes 'a case of suspicion, even of strong suspicion', but still leaves room for reasonable doubt. In *Manda,* in which the

[7] Whether one subjectively believes or disbelieves the accused is *not* the test; cf. e.g. *S v V* supra, at para. 3.

[8] At paragraphs [40]and [49] above.

evidence directly implicating the accused was also that of young children, even the fact that the accused had been found to have been dishonest in his defence was not enough in the circumstances of that case to extinguish the doubt that the Appellate Division had about the safety of a conviction based on the uncorroborated evidence of young children that was not consistent in all respects. I appreciate that comparisons can be odious, but in my assessment the scope for reasonable doubt in the light of the uncorroborated evidence of the very young complainant in the current matter is actually greater than it was in *Manda*'s case. Not only was the complainant's evidence uncorroborated, it was given by a witness of at best borderline competence and with a history of manufacturing false reports of abusive conduct by the appellant. It was also inconsistent in material respects. As was the case in *Manda*, some of the causes for concern about the quality of the state's case might have been addressed had the prosecutor or the court enquired further into them during the trial. I think especially in this respect of the absence of any enquiry as to why the complainant had made up stories about the appellant's conduct on previous occasions or into the import of her admission that she had lied to the police. At the end of the day, because they were not, the reasonable doubts to which they gave rise were not allayed, with the result that although there are grounds for suspicion the appellant was entitled to an acquittal.

[58] In the result, for all the aforegoing reasons, I would uphold the appellant's appeal against his convictions and set the convictions and sentence aside.

[59] I do not think that we can let the matter rest there, however. I consider that it would not be appropriate for the outcome of the appeal to be misconstrued so as to entitle the appellant to resume his previous access to his young daughter without proper enquiry into the best interests of the child in the circumstances. His acquittal on appeal is not a warrant of innocence, it is a finding that his guilt was not established beyond reasonable doubt. I therefore think we are duty bound in the circumstances to include in the court's order directions towards protecting the child's rights. See s 28 of the Constitution and *DPP, Transvaal v Minister for Justice and Constitutional Development* supra, at para 74. In my judgment this would be effectively achieved by directing that the appellant shall be forbidden from resuming contact with the complainant until the desirability of and appropriate attendant conditions for any such resumption have been investigated and reported on by a social worker, and that any resumption of contact shall thereafter occur in accordance with the social worker's recommendations, alternatively in accordance with an order obtained from a court.

[60] The following order will issue:

1. The appellant's appeal against his convictions is upheld and the convictions and sentence, including the order that the appellant's particulars be registered in the National Register for Sex Offenders, are set aside.
2. It is directed, however, that the appellant shall be forbidden from resuming contact with the complainant until the desirability of and appropriate attendant conditions for any such resumption have been investigated and reported on by a social worker, and that any resumption of contact shall thereafter occur only in accordance with the social worker's recommendations, alternatively in accordance with an order obtained from a court.

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

FORTUIN J:

[61] I have read the judgment of my brother Binns-Ward J and I agree with the order that he proposes. I herewith incorporate paragraphs [59] and [60] of his judgment into mine. I am in particular in agreement with his criticism of the manner in which the prosecution dealt with the case. However I wish to differ with the weight attached to the competence of the complainant as a witness. In my view the prosecution's failure should be the deciding factor in this appeal. Accordingly, here follows my judgment.

A. INTRODUCTION

[62] The appellant, D J, was convicted in the Mitchell's Plain Regional Court of one count of rape and one count of sexual assault after pleading not guilty. The appellant was sentenced to 15 (fifteen) years' imprisonment of which 5 (five) years were suspended on certain conditions.

[63] This is an appeal against both convictions, after leave was initially refused by the court *a quo*, and was only obtained on petition to this court.

B. GROUNDS OF APPEAL

[64] The grounds of appeal can be summarised as follows:

- The complainant was not a competent witness, as she was only 4 years old;
- The magistrate did not properly apply the cautionary rule in respect of single and child witnesses;
- The magistrate incorrectly evaluated Dr Etalleb's evidence as corroborating the evidence of the complainant; and
- The magistrate erred in not accepting the appellant's version of a collusion against him by the complainant's mother.

C. COMMON CAUSE BACKGROUND FACTS

[65] The appellant is the biological father of the complainant who was 4 years old at the time of the alleged incident and 5 years old at the time of her testimony. The complainant's mother was separated from the appellant and divorce proceedings were in progress. The complainant was in the care of her mother and maternal grandmother.

[66] By agreement between the appellant and the mother, the complainant spent every Wednesday and Saturday with him at his house. During December 2014, the complainant spent almost every day with the appellant, because he was not working at the time.

[67] On return from one of her visits with the appellant, the complainant complained to her mother during a bathing session of a burning sensation in her private parts. The complainant visited the appellant one more time after this. Her mother took her to a doctor approximately 6 days later and was then referred to Red Cross Children Hospital ("Red Cross"), where she was seen by Dr Etalleb, who reported and testified in court that there was an irregularity in the complainant's hymen, but that it was old. Further, that such an irregularity could be caused by scratching a skin infection in the vaginal area. He was clear about the fact that there was no infection at the time of the examination.

E. THE APPELLANT'S VERSION

[68] The **appellant** was the only witness for the defence. It is his version that he did not sexually assault his daughter, and that this idea was a fabrication by his estranged wife. Further, that his daughter at her tender age did not have the necessary vocabulary to articulate the alleged incident, e.g. "*scratch in my koekie*" and "*lick my koekie*".

[69] It is further the appellant's version that the mother used the complainant and these charges to get at him because of the messy divorce they were involved in. The appellant admitted to washing the complainant before she returned home after each visit, but denied sexually assaulting the complainant in any way.

[70] It is his version that a few months before that alleged incident, he complained to a social worker about the way the mother took care of the complainant and intimated that he was able to take better care of the complainant. It is, according to him, therefore, improbable that he would have hurt his daughter.

RESPONDENT'S VERSION

[71] It is the **complainant's** version that on 27 December 2014, when she visited her father (the appellant), he removed her pants and scratched in her private parts with his fingers. She recalls that this happened before and that his finger nails were long on one occasion, and cut short on the next occasion. She could not specify the dates, but was clear that it happened on more than 1 occasion. She also testified that on one occasion he licked her private parts and wiped her with a black facecloth.

[72] She went home to her mother after the last incident and complained about a burning sensation in her private parts while her mother was busy washing her. She showed her mother where her father touched her and also explained the licking by indicating with her tongue.

[73] This part of the complainant's evidence was corroborated by her mother, except for the dates which only the mother was able to give.

[74] In addition to these pieces of corroboration, her **mother** testified as follows:

- The complainant complained about a burning sensation when she tried to bath her.
- She reported the complainant's story to her own mother.
- She sent the appellant a WhatsApp message to ask him about the incident, but sent the child to him again for her regular visit after this.
- She finally took the complainant to her private doctor a few days later and this doctor referred her to Red Cross.
- At Red Cross the complainant was examined by Dr Etalleb, who also testified.

[75] The mother denies that she colluded with anyone to falsely implicate the appellant. She testified that she did not report the incident immediately as she was too shocked to do anything, and that she did not really know what to do about these shocking allegations.

[76] **Dr Etalleb** testified that he examined the complainant on 5 January 2015. He was new at the Red Cross Hospital and did not have much gynaecological experience. In fact, he was a general practitioner. He reported an irregularity in the hymen at 5 o' clock. According to him it was an old irregularity. He was not asked by the defence nor the state what an "old" irregularity means. He did concede that this type of irregularity can be caused by an infection, but was certain that the complainant did not suffer from an infection at the time.

APPLICABLE LEGAL PRINCIPLES

[77] It is trite that a court of appeal will only interfere with a conviction by a lower court if it is satisfied that the trial court made wrong factual findings. In this regard see **S v Monyane and Others**[9]**.** It is further trite that the State bears the burden of proof beyond reasonable doubt. See **S v Phallo and others**[10]. In *casu* the competence of the complainant is one of the grounds of appeal. In terms of s164(1) of the Criminal Procedure Act 51 of 1977 (CPA), the court must enquire whether a witness is able to distinguish between truth and lies. In this regards see the decision in **S v SM**[11].

[78] A further aspect is the cautionary rule in respect of single and child witnesses. The law in respect of child witnesses is trite. The law, with regard to the fact that a single witness must be credible, was laid down in **S v Sauls and Others**[12]

> **"***... the single witness must still be credible, but there are, as* Wigmore *points out, 'indefinite degrees in this character we call credibility'. (Wigmore on* Evidence *vol III para 2034 at 262.) There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPF JA in* S v Webber *1971 (3) SA 754 (A) at 758.) The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told."*

[9] 2008 (1) SACR 543 (SCA) at 547.

[10] 1999 (2) SACR 558 (SCA).

[11] 2018 (2) SACR 578 (SCA).

[12] 1981 (3) SA 172 at 180 D-F.

[79] Of particular importance in *casu* is the law in respect of a First Report in sexual crimes. The evidence of a First Report in a sexual crime is used to show the consistency of the complainant's evidence. This was at issue in **S v Hammond**[13]:

> "*It is often said that the fact that a complainant in a sexual misconduct case made a complaint soon after the alleged offence, and the terms of that complaint, are admissible for two purposes, namely, to show the consistency of the complainant's evidence, and to negative consent: …"*

[80] In *casu*, the complainant is indeed a single witness in respect of the charges, with the result that the evidence had to be approached with caution. When the court considerers the evidence of a single witness, the court has to consider whether their evidence is reliable, irrespective of the shortcomings or contradictions in the evidence of such a single witness.

[81] Finally, it is trite that the evidence by the appellant should be evaluated together with that of the state so as to get an overview of all the evidence as a whole. In this regards see **S v Trainor**[14]**.**

DISCUSSION

[82] In respect of the first ground of appeal, I am of the view that the magistrate correctly enquired into the competency of the complainant in terms of sec 164(1) of the CPA. There were, however, a few doubtful portions, e.g. where the complainant did not answer the questions asked by the court during this exercise.

[83] I am further satisfied that the magistrate applied the cautionary rule in respect of a single witness. When embarking on this enquiry, it is imperative to focus on the aspects of the complainant's evidence that were corroborated. The corroborated portions are as follows:

- The fact that the complainant complained about a burning sensation on return from the appellant was corroborated by her mother.
- The fact that this gave rise to the mother consulting a medical practitioner.
- The medical practitioner, in turn, considered the injury serious enough to justify a referral to a children's hospital.

In my view, this serves as sufficient corroboration for the evidence that the complainant came home with that injury on that particular day.

---

[13] 2004 (2) SACR 303 at para 12.

[14] 2003 (1) SACR 35 (SCA).

[84] The magistrate attempted to deal with the discrepancies in the complainant's evidence where necessary. These discrepancies, in my view, are not material and do not nullify the corroborated portions of the complainant's version that she reported an incident to her mother on that particular day.

[85] The report to the mother during bath time, in my view, counts as a First Report. It is by now accepted that, even though a First Report is not corroboration *per se*, it serves as proof of the consistency of a complainant's version. It is indeed so that the mother did not report the incident immediately and even allowed the complainant to visit the appellant again after this report was made to her. I am of the view that she gives a perfectly reasonable explanation for her actions, i.e., that she was too shocked and did not know what to do.

[86] On behalf of the appellant the court was asked to frown upon the fact that the mother decided to take the complainant to a doctor rather than to the police. This court considers this action to be perfectly reasonable. A mother's first concern should be for the health and well-being of her child. In fact, this behaviour by the mother points to her true concern for her child instead of proof of the allegation that she is a vindictive ex-wife whose aim it is to implicate her estranged husband in a criminal case, at all costs.

[87] The First Report is a useful aid in matters of rape or sexual assault where the complainant is, by the mere nature of the offence, almost always a single witness. Not giving the First Report the proper weight it deserves in this and similar matters, would amount to an injustice in my view. In matters like this, the nature of the crime and the age of the complainant are inherent obstacles to successful prosecutions. They are many a time the only tool at the disposal of these vulnerable complainants. Accordingly, where First Reports are present, it should be accorded the necessary weight.

[88] In *casu*, the complainant's version of her relating the story to her mother, and her mother's evidence of how she got to know of the alleged incident, in my view, is a valid First Report account, and speaks of the consistency of the complainant's version that she had a burning sensation when her mother bathed her on that particular day.

[89] The enquiry does, however, not end here. The state further have to prove that the appellant sexually assaulted the complainant. As stated earlier, Dr Etalleb was not able to clarify many of the questions. Sadly, many questions of clarification were not asked, for example, what he meant by an old irregularity. It would have been easy to clear this up as the window within which the examination was done was approximately 6 days. The state did not

clear this up. Moreover, the state could have clarified the medical evidence by calling the referring doctor, but this was also not done. What we are therefore faced with is inconclusive medical evidence.

[90] The grandmother could also have been called to testify to corroborate the mother's version of events. No evidence was also led as to the opportunity that the father may have had at his residence to sexually assault the complainant in the way that she explained. In my view, the prosecution failed also on this score.

[91] In respect of the appellant's version of collusion by the complainant's mother, the magistrate did deal with both of their versions. As stated earlier, the mother's behaviour, after she received the report, points to that of a concerned mother, and not to a vindictive estranged wife, who would use her minor child to fabricate evidence against to the appellant. The detail in the complainant's evidence also points to the credibility of her version and, against the possibility of a fabricated story, e.g. the nails of the appellant that were long on one occasion and cut short on the next occasion.

[92] The appellant's evidence on his concern about the welfare of the complainant whilst in the care of her mother, was also not dealt with by the prosecution. Evidence by the social worker who dealt with that complaint 6 months earlier, would have cleared this aspect up. The prosecution also did not make any attempt to clear up the appellant's version that the complainant was suffering from regular infections in her virginal area since a very young age.

[93] I find it extremely unlikely that the mother of a minor child would fabricate an allegation of sexual assault on a 4-year old and put this child through the trauma of a trial in order to falsely implicate the father. I am of the view that the now accepted traumatic nature of a rape trial for sexual assault survivors extends to that of the mother of a minor sexual survivor. The sentiments expressed in **S v J**[15], in respect of rape survivors, are equally applicable here:

> *"Few things may be more difficult and humiliating for a woman than to cry rape: she is often, within certain communities, considered to have lost her credibility; …*
>
> *In my view, the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law the burden*

[15] 1998(4) BCLR 424 (A).

is on the state to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."[16]

[94] In addition, the version by the appellant that the mother fabricated evidence against him is also not reasonably, possibly true, as there is no indication on his own version that the mother tried to alienate the child from him during the separation. It is common cause that she allowed the child to go to him twice a week, and during the time he was not working, even on a daily basis. The surrounding circumstantial evidence therefore, does not point to a mother whose aim it was to alienate the child from him. Whether the appellant sexually assaulted the complainant is actually the question that should be answered. If that question cannot be answered affirmatively, then the appellant is entitled to an acquittal. In *casu*, the prosecution did not prove that the appellant's version that he regularly washed the complainant before she went back to her mother and that she regularly suffered from an infection in her vaginal area, was not reasonably possibly true. The cause of the injury to the complainant's hymen remains unanswered.

[95] Considering the evidence as a whole, and in particular the manner in which the prosecution dealt with this case, I am of the view that the state did not cross all the proverbial t's and dotted all the i's, and therefore did not prove the guilt of the appellant beyond reasonable doubt.

[96] In the circumstances, I would uphold the appeal against the conviction, and set aside both convictions and sentence and make the same order as stated in paras [59] and [60] of the judgment of Binns-Ward J.

C.M. FORTUIN
Judge of the High Court

[16] **S v J** *supra*, 429G and 430G-H