Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. A71/2020

Before:
The Hon. Ms Justice Goliath (Deputy Judge President)
and
The Hon. Mr Justice Binns-Ward

Allocated hearing date: 4 September 2020
Judgment: 2 October 2020

In the matter between:

KANDE KABEJA ERGIE Appellant

and

THE STATE Respondent

JUDGMENT

BINNS-WARD J (GOLIATH DJP concurring):

[1] The appellant was convicted of rape within the meaning of that term in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, in that it was found by the trial court that he had committed an act of 'sexual penetration', as defined in s 1 of the Act, by inserting a finger into the genital organs of the complainant. The prescribed sentence in terms of the Criminal Law Amendment Act 105 of 1997 was life imprisonment because the complainant was under 16 years of age, but the magistrate found that there were substantial and compelling circumstances that justified the imposition of a lower sentence. He was sentenced to 12 years' imprisonment. An application for leave to appeal against his conviction was dismissed by the trial court. The appeal was brought with leave obtained on petition to this court (Fortuin and Cloete JJ). With the consent of the parties' legal representatives, it was disposed of without an oral hearing, on the basis of counsel's written submissions, in terms of s 19(a) of the Superior Courts Act 10 of 2013.

[2] The complainant was 8 years old at the time of the commission of the alleged offence. She was 9 when she testified at the trial. Her evidence was given with the use of an intermediary, in terms of s 170A of the Criminal Procedure Act 51 of 1977. She was a single witness as to the alleged sexual assault. The magistrate correctly assessed that the complainant did not understand the implications of taking the oath, and therefore, as provided in terms of s 164 of the Criminal Procedure Act, her evidence was adduced after she had been admonished to tell the truth.

[3] As counsel for the appellant rightly emphasised, there were two reasons for the complainant's evidence to be evaluated with caution; viz. that she was a young child and also a single witness. It is always useful, especially in difficult cases like the present one, for a court to remind itself of the pertinent principles. Notwithstanding that they are often characterised as trite, expressly reiterating them can help to promote their faithful application in the evaluation of the evidence, which is the most important consideration. The law reports

bear testimony to numerous instances in which appellate courts have criticised trial courts for paying only lip service to the cautionary rules; see e.g. *S v Raghubar* 2013 (1) SACR 398 (SCA) at para 11 and cf. *S v Saban en 'n Ander* 1992 (1) SACR 199 (A). The judgment in *Saban* is an insightful reminder of the importance of the distinction between credibility and reliability in the assessment of a single witness's evidence, and that positive findings on both aspects of the witness's evidence must be made before the evidence can safely be depended on to found a finding of guilt. The judgment also illustrates how an inadequate enquiry into material questions during the trial – for example by failing to pursue obvious lines of enquiry identified in the evidence that is adduced – can thwart a trial court's ability to properly evaluate a single witness's reliability.

[4] In *Rex v Manda* 1951 (3) SA 158 (A), Schreiner JA explained that there is no rule of law that the evidence of a child must be corroborated, but that '[n]*evertheless the principle has properly been acted upon that the evidence of young children should be accepted with great caution*'.[1] The learned judge of appeal proceeded ' ... *the dangers inherent in relying on 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. It seems to me that the proper approach to a consideration of their evidence is to follow the lines adopted in the case of accomplices (Rex v Ncanana 1948 (4) SA 399 (AD)) and in the case of complaints in charges of sexual assault (Rex v W., 1949 (3) SA 772 (AD)). 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*

[1] At p.162 *in fine*.

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.'[2]

[5] This passage has been endorsed and followed on a number of occasions; see, for example, *S v V* 2000 (1) SACR 453 (SCA); [2000] 2 All SA 86 (A) at para 2; *S v Ramulifho* 2013 (1) SACR 388 (SCA) in para 12 at note 16, *S v Pillay* [2016] ZASCA 26 (18 March 2016) at para 8, *S v Baadjies* 2017 (2) SACR 366 (WCC) at para 14 and, most recently, *S v DJ* 2019 (2) SACR 613 (WCC). The reference in it to *R v W* should, however, be read mindful of the rejection, in *S v Jackson* 1998 (1) SACR 470 (SCA) at 474G-477D,[3] of the notion that there should be any reason in the ordinary course to approach the evidence of a complainant in a sexual offence case with caution. However, as the court in *Jackson* acknowledged, factors peculiar to a given sexual offence case might require a court nevertheless to evaluate the evidence with particular caution. In *S v SMM* 2013 (2) SACR 292 (SCA), Majiedt JA remarked that it would not be safe to convict the appellant of rape on the single witness evidence of a 13-year old girl, despite her evidence having been rightly regarded as 'honest, credible and trustworthy'.[4] The dictum might appear to imply that corroboration of a child witness's evidence was an absolute requirement but, if read in that way, it would not be in accord with the prevailing tenor of the authorities. It does serve, however, on any approach, as an illustration of the especially high degree of caution with which courts approach the single witness evidence of children in sexual assault cases.

[6] A conviction on the basis of the evidence of a single witness is competent in terms of s 208 of the Criminal Procedure Act, 1977. In *R v Mokoena* 1932 OPD 79 at 80, De Villiers JP stated of the equivalent provision in the 1917 Act that '*the uncorroborated*

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[2] At p. 163C-F.

[3] Also reported in the SALR as *S v J* 1998 (2) SA 984 (SCA).

[4] At para 9.

evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction ..., but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect'. That statement gave rise to considerable jurisprudential debate in the succeeding decades, with the position eventually being settled by Appellate Division in *S v Sauls* 1981 (3) SA 172 (A), in which Diemont JA held '*There is no rule of thumb test or formula to apply when it comes to the evidence of a single witness ... . 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. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' (sic) evidence were well founded" ... . It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.*'[5] In this context too, the best indication of whether appropriate caution was applied by the trial court to the evaluation of the evidence is to be found in its reasons for judgment.

[7] In *S v Dyira* 2010 (1) SACR 78 (ECG), a case in which both of the cautionary rules applicable in the current case also pertained, Jones J stated '*The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness, as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity ... . Here more than one cautionary rule applies to the*

[5] At p. 180E-H.

complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of both a single witness and a child witness (Schmidt Law of Evidence 4-7).'[6]

[8] In the current matter the magistrate made reference in her judgment to the applicable cautionary rules, and to the judgment in *Sauls*, in the following terms:

'Regarding the point in dispute [V] is not only a single witness but also a young child. The Court must therefore approach her evidence with caution to determine if it is not only credible but also reliable.
But as it was stated in S v Sauls ...

"The exercise of caution must not be allowed to displace the exercise of common sense."

[V] is an innocent little girl with no apparent hidden motives. She gave a simple account about a single incident that occurred in the accused's house where she and her mother also stayed at the time.
She made a very good impression on the Court. She appeared to be credible and convincing and there is no reason to doubt her version of the events. During cross-examination she reiterated her version of the facts. Her version was not discredited by any material inconsistencies or ambiguities on her part. The double barrel cross-examination by two different attorneys did not damage her credibility, nor did it raise any serious concerns about the reliability of her evidence.'

[9] With respect, those words do not convey or give assurance that the magistrate evaluated the complainant's evidence with anything approaching the carefully critical scrutiny enjoined in *Manda,* and the other authoritative judgments that reiterated the principles therein enunciated. Indeed, it is striking that the magistrate did not refer at all to any of the authorities on the application of the cautionary rule to child witnesses. And it is significant that in referring to the judgment in *Sauls* case, which it will be recalled addressed only the cautionary rule in respect of single witness evidence, the magistrate appears to have regarded the observation that the application of the cautionary rule should not displace the exercise of common sense as the most significant part of the dictum. Her statement gives the unfortunate impression that she may have failed to appreciate that the exercise of common sense applies only to *the product* of an evaluation of the evidence broadly in accordance with

[6] In para 6.

the demanding approach implied in *R v Mokoena* supra; common sense does not displace the cautionary rule itself.

[10] It is not only the very superficial reference in the trial court's judgment to the applicable principles on the evaluation of the complainant's evidence that is cause for concern, however. As I shall illustrate presently, the paucity of critical analysis in the court's reasoning was also worrying. The evidence adduced at the trial was summarised in the judgment in acceptable detail, but an analysis of it by the court consistent with the exercise of 'great caution' was sadly lacking. This calls to mind the remarks of Mbatha JA in the recently reported case of *S v Oosthuizen and Another* 2020 (1) SA 561 (SCA): '*It was incumbent upon the trial court to show that it took into account the necessary caution. The trial court set out the evidence in great detail, but nothing suggests that it was properly evaluated. Regard must be had at all times to the fact that the onus to prove the case beyond a reasonable doubt rests on the state.*'[7]

[11] The complainant was born out of wedlock of a relationship between her mother and a Congolese national. She lived with her mother, who was employed as a nursing assistant at an old age home in Kenilworth. In July 2014, the complainant's mother was a sub-tenant in a two-bedroomed apartment in Elsies River that was rented by the appellant and his wife. The complainant and her mother had come there after the mother responded to an advertisement posted by the appellant and his wife on a notice board at a nearby shop. The advertised accommodation, which was in the second bedroom in the apartment, had already been taken when the complainant's mother arrived to ask if she could rent it. It would seem, however, that the mother was desperate to find accommodation at the time, and she prevailed on the appellant and his wife to allow her to occupy a space in the kitchen on a temporary basis while she looked for a more suitable place to live. A small part of the kitchen was curtained

[7] At para 17.

off for that purpose. It accommodated only a single bed. The complainant's mother worked nightshifts, and the complainant was therefore on her own with some of the other occupants of the apartment on most evenings. The appellant's wife, who worked dayshifts, appears to have helped out with taking care of the complainant in the evenings and before she went for school in the mornings.

[12] The appellant and his wife, who are Congolese nationals, slept in the main bedroom of the apartment together with their twin daughters, who were about 4 years old at the time. Three young Congolese men rented the other smaller bedroom.

[13] The charge sheet did not specify a date, and alleged merely that the offence had been committed '*in July 2014*'. It emerged in the evidence that the alleged incident that gave rise to the charge against the appellant happened on the evening of Saturday, 19 July 2014. It would seem that it was only during the complainant's evidence in the trial that the appellant was first informed of the precise date of the alleged incident.

[14] The complainant testified that on the evening of 19 July 2014 she and the appellant were watching television together in the living room of the apartment. It was about 10:00 p.m., and the other occupants of the apartment at the time, being the appellant's wife and children and the three young Congolese men, were asleep in their respective bedrooms. She said that the appellant invited her to come and sit on his lap. According to her, she had often done this before when they watched television together. (By the date in issue the complainant and her mother had been residing in the flat for about two months.) On this occasion the appellant slipped his hand into the front of the tights that she was wearing and felt under her underwear. She said that he had 'rubbed her vagina'. She related to the court that her mother had taught her the term 'vagina', but it was not canvased with her precisely to which part of her genital organs she understood it to refer. She testified that what the appellant was doing made her feel uncomfortable and she told him that she wanted to go

sleep. The appellant then let her go to her bed. She made a first report about the incident to her mother two days later. I shall consider the report in some detail presently.

[15] It is clear from the record that there was a lack of clarity in the complainant's evidence as to precisely what the appellant was said to have done in rubbing her vagina, as she had put it. This is understandable in the testimony of such a young child. It was a manifestation of the sort of situation that has caused judges to remark in a number of reported cases on the difficulty, even for experienced practitioners, in leading the evidence of child witnesses in sexual cases, and the desirability that this should be done by appropriately trained and competent forensic examiners if justice is to be properly served.[8] Regrettably, as all too often the case, this did not happen in the current matter. The quality of the examination and cross-examination of witnesses by both the prosecutor and the defence attorneys was poor, sometimes excruciatingly so.

[16] The critical need for clarity in respect of this part of the complainant's evidence bore on the question whether there had been 'sexual penetration', as defined. Proving that there had been was central to the state's ability to obtain a conviction on the charge of rape. There was no alternative charge of 'sexual assault', and the charge sheet did not draw attention to the competent verdicts in terms of s 261 of the Criminal Procedure Act 51 of 1977. The magistrate also had not confirmed with the appellant or his attorney at the commencement of the trial that the appellant was aware of the competent verdicts.[9]

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[8] See, for example, *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 and *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552; 2012 (6) SA 353, at para. 21.

[9] In *S v Mashinni & another* 2012 (1) SACR 604 (SCA) at para 11, Mhlantla JA observed '*Section 35(3)(a) of the Constitution provides that very accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This section appears to me to be central to the notion of a fair trial. It requires in clear terms that, before a trial can start, every accused person must be fully and clearly informed of the specific charge(s) which he or she faces. Evidently, this would include all competent verdicts. The clear objective is to ensure that the charge is sufficiently detailed and clear to an extent*

[17] The prosecutor sought to deal with the lack of clarity in the complainant's evidence on this crucial question, albeit only in re-examination. The prosecutor asked the complainant to demonstrate with the use of dolls what she alleged the appellant had done. This is a method that is frequently used in cases of this type when the complainant is a young child. The difficulty, however, is that neither the magistrate nor the prosecutor placed on record precisely what the witness demonstrated using the doll. The relevant part of the transcript reads as follows:

PROSECUTOR: OK. [V], can you show us what you mean when you say that [the appellant] touched between your legs?
--- (indistinct. Mumbling) and he put his finger in.
OK. Before you put your finger in there, what did you mean when you say that he touched you between your legs? Where did he touch you? Show on the doll ... (intervention)
COURT: So did he put his finger in? ---Yes.
PROSECUTOR: OK. Then I have no further questions.
COURT: Thank you, [V]. Then we're finished with your evidence. --- OK.

[18] Apart from the complainant's answer to the magistrate's leading question, one is left none the wiser as to whether the demonstration established that there had been sexual penetration. And, if the demonstration had established the point, why did the court put its question? When demonstrations and physical gestures are used in the course of evidence in a trial, the presiding officer should be astute to ensure that they are properly described for the record for the purposes of a possible appeal. It is unfortunate that that was not done in the current case. Any doubt to which the omission gives rise has to redound to the advantage of the appellant.

[19] The appellant's attorney should also have been afforded the opportunity to further cross-examine the complainant on what was new evidence led by the prosecutor in re-examination. That might have remedied the ambiguity on the record. Unfortunately, he was

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where an accused person is able to respond and, importantly, to defend himself or herself. In my view, this is intended to avoid trials by ambush.'

not invited to put any questions on the demonstration, and his evident ineptness in other respects that is manifest on the record[10] means that we cannot safely infer from his silence that the demonstration had established the allegation of penetration.

[20] It was hardly cause for surprise in the circumstances that, on appeal, counsel argued, with reference to a number of passages in the complainant's evidence, '*that her repeated references to rubbing, suggest that she is referring to the external sexual organs – the vulva, including the labia – not to the vagina, though she uses that word. One would not talk about rubbing "in the middle of" a vagina, but one would do so in reference to the vulva. It is pretty plain that when she talks about the accused putting his finger "in", she means "between the legs" or in her underclothes*'. In my view there is something in the argument; certainly, the lack of clarity in the complainant's evidence means that the argument cannot be rejected as unfounded.

[21] A court does not examine the evidence compartmentally and, if all things had been equal, the medical evidence that established that the complainant's hymen had been perforated might plausibly have served to assuage any doubts arising out of the lack of clarity in her evidence on the issue under consideration. It is therefore convenient at this stage to move on to that.

[22] The complainant was medically examined by a district surgeon at the Karl Bremer Hospital on the afternoon of 24 July 2014, approximately four and a half days after the alleged sexual assault. The only finding of note was that there were '*old tears*' in her hymen.

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[10] The appellant's counsel (who did not appear in the trial and was instructed pro bono by a different attorney in the appeal) did not challenge the fairness of the appellant's trial on account of the ineptitude of the legal aid funded representation that he had been afforded at the trial. This was understandable because the bar for success in such challenges is set very high. But counsel did make several references to the attorney's ineptitude in his address to the magistrate in support of the application for leave to appeal. I am inclined to the view that there was some substance to his observation in replying argument to the magistrate that '[t]*his accused did not have a fair share when it comes to legal representation. It was not a good job done here. And he was understandably reluctant to go the Legal Aid route again. It is not easy to find people to do pro bono matters. Mr van Eeden is doing a pro bono, I am doing a pro bono. It is not easy to find people willing to do it*.'

The examining doctor noted the following conclusions on the J88 medical report form: '*Findings consistent with vaginal penetration in the past*'.

[23] As to be expected, the doctor was questioned at the trial about the chronological import of his conclusions. He said healing occurred quickly in a young child and that the tears in the complainant's hymen could have healed within a period of between six and 12 days. He described the tears as having completely healed. When the doctor gave that evidence, he was unaware that the offence was alleged to have been committed on 19 July. When he was alerted to the fact, he then said in answer to an inappropriately leading question: '*It's five days, but it is still possible. Children tend to heal very rapidly.*' I think it would be fair to say that the doctor's surprise at learning that the alleged incident had occurred so shortly before his examination is nevertheless discernible in his answer. That impression is confirmed if regard is had to his evidence under cross-examination when he reiterated *'... it takes approximately six to twelve days for injuries to heal in the hymen ... of course it could be more than twelve days*'. As every lawyer knows, there is a material difference between 'possibility' and 'probability'. That which might be possible, might also be improbable.

[24] The effect of the district surgeon's evidence was that it was less than certain, indeed almost improbable, that the historic perforation of the complainant's hymen could have been related to the incident described by the complainant as having occurred on the late evening of 19 July.

[25] The questionability of the connection between the old tears found on the complainant's hymen and any incident on 19 July 2014 did not arise on the doctor's evidence judged alone. There was an indication, after the close of the state's case and before the appellant gave evidence in his defence, that the appellant's attorney had obtained instructions that the complainant had previously received medical treatment for a condition that could

explain what the district surgeon had found when he examined her on 24 July 2014. The defendant's attorney asked for the state's assistance to investigate the records at hospitals in the southern Peninsula at which the complainant may have been treated. The magistrate appeared somewhat bemused by the request; the prosecutor distinctly unreceptive. The manner in which the defendant's attorney dealt with the issue showed quite clearly that he was out of his depth. It emerged only later, after the appellant had been convicted, when evidence was being adduced in mitigation of sentence, that the appellant's wife had ascertained from the wife of the complainant's biological father that the complainant, who used to spend time at her father's place of residence in Kenilworth, had suffered from a vaginal infection a year or so before the date of the alleged sexual assault.

[26] In leading the complainant's stepmother's evidence after the appellant's conviction, the defence attorney clearly appreciated its significance, but it was equally apparent that he did not understand how he should have dealt with the belatedly obtained evidence bearing on the merits of the charge at the stage when the appellant had already been convicted. The magistrate should also have been concerned about the import of the evidence of the stepmother in relation to the medical evidence that had been tendered during the trial; but if she was, she gave no sign of it. The record gives the impression that the magistrate considered that the ship had sailed on and that her only remaining responsibility was the imposition of sentence. That was true in a sense because it was not open to the trial court to revisit the conviction, but that did not relieve it of its overriding duty, at all stages of the trial, including an application for leave to appeal, to strive to see to it that justice was done.

[27] It seems clear to us that the proper course for the defence to have adopted when it became apparent that evidence was available that might reinforce the doubtfulness of the old tears on the complainant's hymen being associated with a sexual assault on 19 July was to have signalled its intention to apply for leave for appeal and to have brought such an

application immediately after the imposition of sentence, coupled with an application for the new evidence to be heard in terms of s 309B(5) of the Criminal Procedure Act. If that had been done, a proper investigation of the issue would probably have followed; and the resulting evidence on the merits would have been put before this court on appeal, together with the magistrate's impressions.

[28] In the context of the defending attorney's manifest inadequacies, we consider that the magistrate was under a duty to have assisted by pointing out that that was a course to be considered in the circumstances. It has long been established that judges and magistrates are under a duty to ensure that justice is done by providing appropriately judicious assistance to unrepresented accused persons in the presentation of their cases. The principle expresses an aspect of an unrepresented accused person's fair trial rights, now entrenched by s 35(3) of the Constitution. In our view, the same applies when it is apparent that the quality of an accused person's legal representation is obviously lacking. The magistrate might also have considered stopping the trial at that stage and sending the matter on special review in terms of s 304A(a) of the Criminal Procedure Act.[11]

[29] The problem arises as to how this court should deal with the situation at this stage of the proceedings. It seems to us that the apparent impingement on the appellant's fair trial rights is a factor to be taken into account, together with other features of the case to which I shall refer, in assessing whether we can be satisfied that the appellant's conviction was safe or not. Before the insertion of s 309B(5) and (6) into the Criminal Procedure Act, the appellate court would, when it was apparent that evidence first made available after

[11] Section 304A(a) provides: '*If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as is practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303*'.

conviction might, had it been taken into account, have led to a different result, set aside the conviction and sentence and remit the matter to the trial court to hear the additional evidence and revisit the merits. Counsel for the state submitted that if we were concerned about the effect of the stepmother's evidence on the safeness of the conviction, that was the course we should follow. The appellant has already been in detention for more than six years, however. I therefore think that we should not too readily take that course without first earnestly considering whether the appeal should not succeed on any of the other grounds primarily urged by the appellant's counsel.

[30] I quoted earlier from the magistrate's judgment concerning her impression of the complainant as a very good witness who gave a simple and unshaken account of the relevant events. The magistrate found that there were no material discrepancies in the child's evidence, and indeed did not identify any discrepancies or contradictions in the complainant's evidence whatsoever. These findings give rise for concern in my view, for they suggest that the magistrate cannot have subjected the complainant's evidence to the critical scrutiny that the proper application of the cautionary rules required. There were certainly features of the complainant's evidence that were troubling, and that I would have expected the magistrate to acknowledge and take into account in weighing the evidence as a whole. The judgment makes no mention of them, which suggests that they were overlooked. Overlooking them would constitute a material misdirection by the trial court.

[31] There was an issue at the trial as to whether, and if so, to what extent, the complainant's evidence had been influenced by coaching or rehearsal. This is frequently an important consideration when a young child gives evidence. The suggestibility of young children is notorious. It is a characteristic commonly referred to in the discussions in the reported cases on the cautionary rule in respect of the evidence of child witnesses. In this regard it was striking that the complainant's evidence concerning the content of her report to

her mother did not correspond with the mother's evidence on the point. The complainant described the content of her report in terms that faithfully rehearsed, almost word for word, her evidence in chief in respect of the commission of the alleged offence – a straightforward relation of the relevant events. The mother's evidence on the report suggested that the complainant had been most reluctant to say what had happened and that the mother had had to coax the information out of her, including the identity of the assailant. The child's evidence of the report gave no indication of this. It suggested that she had reported the matter to her mother in exactly the same way and in virtually the same words as she narrated the events in her evidence in chief. The disparity between the two witnesses' evidence on the point was a feature of the evidence that could support the appellant's contention that the complainant had been coached in respect of the evidence that she gave against him. At the very least, it was something that deserved notice and evaluation in the trial court's judgment if the cautionary rules were assiduously applied, as they needed to be.

[32] The mother's evidence concerning the manner and content of the report by the complainant suggested that the complainant had initially not been forthcoming about who her abuser had been. I do not think that that is at all unusual in such cases. Its significance in a holistic consideration of all of the evidence in the current case is its tendency to lend credence to the testimony of the appellant and one of the other subtenants in the flat, one C[....], that when the mother initially alleged that the complainant had been indecently interfered with, she did not identify the culprit, which she surely would have done if she had known who it was at that stage.

[33] On this subject, it was also significant, in my view, that C[....] testified that the complainant's mother complained on a Sunday, presumably Sunday, 20 July 2014, that her daughter had been molested. He remembered the day because on the relevant occasion the complainant's mother had encountered him and his two friends outside the apartment

building when they were returning from church. The appellant's evidence was that the mother had first made a report to him some time on Monday, 21 July. Both witnesses testified that it was only later on 21 July 2014 that the complainant's mother first alleged that the appellant was the person responsible.

[34] The magistrate gave no consideration to this aspect of the evidence, which cast doubt on the state's evidence on the circumstances in which the complainant had identified her alleged assailant.

[35] There was no reason to believe that C[....] was mistaken in his evidence that he had received the report on the Sunday. The reliability of his evidence in this regard derives support from his detailed contextualisation of the event. It was not suggested that C[....] had any reason to give a fabricated account. By all accounts, other than being a fellow Congolese national, he had no connection with the appellant or his wife other than being one of their subtenants for a short period. There was nothing to suggest that they were friends. C[....] and his two roommates had come to the apartment in response to an advertisement of accommodation. They stayed there only for two or three months, and were about to move out at the time when the complaint was ventilated.

[36] There was another aspect of the evidence concerning the complainant's report to her mother that exposed inconsistency that merited notice and consideration but was notably overlooked in the trial court's judgment. During her evidence in chief the complainant testified as follows in answer to the prosecutor's questions: '*Q. OK. Did you ever tell your mommy what Uncle Didi did to you? – A. Yes. Q. Can you remember when you told your mommy what Didi did to you? – A. I told her two days after.*' Yet, when the mother was cross-examined about the time between the alleged incidence and the child's report to her concerning it, she testified '*She told me she can't remember which day was it, but it was*

during the school holidays when I was working night shift. She can't remember which night was it'.

[37] The contradictory versions begged the obvious question - if the mother's evidence was to be accepted - just when, and in what circumstances, did the complainant then subsequently come to claim, with apparent certainty, that the incident happened two days before she reported it to her mother? On any approach, the mother's evidence undermined the validity of the magistrate's finding that the complainant's evidence, which could not be evaluated properly other than in the context of all of the other evidence, had been simple and consistent. Furthermore, if the child's relation of the events had consistently put the date of the offence as Saturday, 19 July 2014, why was that date not specified in the charge sheet, as is ordinarily done in compliance with s 84(1) of the Criminal Procedure Act?

[38] In the context of the unresolved inconsistency, it is also striking that the examining doctor was not asked what he had been told as to the date of the alleged vaginal penetration. One would imagine, as a matter of inherent probability, in the context of the medical evidence that the vestiges of the tears seen on the complainant's hymen originated at least six days before the date of examination, and probably more, that the doctor would have enquired of the child or her mother when the sexual assault in issue had happened. A failure to have done so in the circumstances would suggest a startling degree of indifference by any medical forensic examiner.

[39] The J88 report completed by the district surgeon at the time of his examination was silent on the point, but that did not necessarily mean that he had not in fact asked the obvious questions that I would have expected. He met the defence attorney's attempts to elicit detail concerning what he had been told when he examined the complainant by saying that he could not independently recall but that he may have made some notes of relevance in the hospital

folder, which he offered to retrieve and return to testify further on a later occasion if requested.

[40] It was an aspect of the defence attorney's ineptitude that he did not accept the doctor's offer, but in the circumstances the court should have been just as keen to ascertain clarity on the issue if it could be obtained. The magistrate or the prosecutor should have pursued the point. They did not.

[41] The failure of anyone concerned to do so meant that doubt remained on a material question in the case; viz. the date of the alleged commission of the offence. The question was material because it related to the corroborative weight, if any, of the medical findings, the reliability of the complainant's evidence, and the appellant's ability to say where he was and what he was doing at the time.

[42] This was not the only feature of the evidence that called into question the complainant's reliability. The complainant gave evidence in chief that she had been taken to see the examining doctor two days after her report to her mother. Under cross-examination, when she was recalled at the instance of the appellant's new attorney,[12] she said that she had gone to the doctor on the same day. The magistrate, apparently astute to the contradiction, intervened by asking '*Did you go to the doctor on the same day?*' The question elicited yet a further inconsistent answer from the complainant: '*I don't remember*'. The magistrate then made the following remark, inappropriately signalling that no further questions should be put on the point: '*And this question was asked and answered previously. She said it was not on the same day.*' To which the attorney responded '*OK, Your Worship. I'm going to leave that question.*' The fact that a question was asked and answered previously is no bar to it being asked again. A valid reason to repeat a question is to see if it elicits a consistent answer; and

[12] The mandate of the appellant's first attorney was terminated after the complainant's mother, who was the second witness for the state after the complainant, had completed her evidence in chief.

if it does not, a court is bound to consider the significance of the inconsistency. The appellant's attorney may have been ill-advised to have left the question; and the magistrate was certainly wrong to have put him under pressure to do so.

[43] As mentioned, the evidence identifying the date upon which the sexual assault is alleged to have occurred emerged only during the complainant's testimony at the trial. I find it significant that as soon as it did, the appellant thought that his work records might provide him with an alibi. He had been employed until sometime in July 2014 as a guard working nightshifts. An adjournment was requested for the records to be checked. It turned out that they were of no assistance because he had already been retrenched by the date in question. It has to be borne in mind that the appellant had already been in custody for more than eight months by this stage, and it is quite feasible that he would no longer recall exactly which date in July had been his last in employment. But the very fact that, when given the date of the offence for the first time, he wanted to have it checked against his work records does not impress as likely conduct by a guilty person. A guilty person, obviously therefore knowing what had happened and when, is unlikely to have thought that there could be any profit in the exercise.

[44] It is an aspect of the case that does not appear to have made an impression on the magistrate. On the contrary, the magistrate seemed to regard the appellant's uncertainty about the date of the alleged commission as factor that counted against him. Thus, at one point of the judgment she said '*The accused and his wife Ruth denied that he had ever watched television alone with* [V] *at night, but it is clear from their evidence that they did not know to which specific night* [V] *referred.* [V] *or* [the complainant's mother] *never testified that it was the night before the school opened as the accused and his wife apparently assumed*.' An incorrect assumption as to the night concerned is surely more likely to be

made by someone who had not been involved than by someone who knew what had happened. That clearly escaped the magistrate.

[45] It does seem probable that the complainant's mother genuinely believed that her daughter had been sexually abused. That perception is borne out by the fact that she went to the police with the complainant on 21 July and returned there three days later on 24 July when there had been no follow up by the police. However, in the context of the uncertainty about precisely when, and in what circumstances, the complainant had identified the appellant as her abuser, it was relevant for the trial court to have regard to the history of interpersonal problems between the complainant's mother and the appellant. That there had been problems was borne out by the evidence of the complainant, the appellant, the latter's wife and C[....]. The complainant's mother, on the other hand, denied that there had been anything untoward in relations between herself and the appellant.

[46] C[....]'s evidence bore out the appellant's testimony that the complainant's mother initially did not claim to know who had interfered with her daughter. C[....]'s evidence, which could not be rejected out of hand, indicated that that had been the case since some time on the Sunday. The evidence of both C[....] and the appellant indicated that it was only late on the Monday that the mother accused the appellant of being the culprit. All of that, taken together with the inconsistencies between the evidence of the complainant and her mother about the nature and content of the report allegedly first made by the complainant after school on the Monday, raises question marks about how the appellant came to be identified as the assailant.

[47] It is not farfetched, if she had been uncertain who was involved, that the tense relations between the complainant's mother and the appellant could possibly have influenced the former to suggest to the complainant who her abuser might have been, or determine, herself, that it was the appellant who should be blamed. Notwithstanding that these were

issues in the trial, the magistrate did not deal in her judgment with these evidential considerations and the bearing they had on the possibility of a false or unjustified accusation. Without any consideration of the factors to which I have drawn attention, she merely dismissed the possibility as 'highly improbable'.

[48] The magistrate also did not consider the implications arising from the evidence that the complainant's mother had suggested that she would withdraw the charge if the appellant gave her his television, cell phone and some money. C[....] confirmed that he had been asked to convey the proposal to the appellant. The complainant's mother denied any such conduct, but there must have been something in it because the mother admitted that she had told the appellant's wife '*nothing what your husband did to my daughter will make a difference, because he did something wrong and the TV is your daughter's pleasure. They're watching every day TV. Why will I take the TV from your daughter?*'

[49] The complainant's mother alleged that the appellant's friends had recommended that he should put up the extortion story to the police to 'confuse the case'. But the police were not yet involved at the time the proposal was conveyed. They had not yet acted on the report made on 21 July, and only did so when the complainant's mother further pursued the matter on 24 July. And if the idea came as a suggestion from the appellant's unidentified friends, how did the appellant's wife come to understand that the proposal had in fact been made by the complainant's mother? It could only be in response to an accusation by the appellant's wife that she was trying to extort the handing over of the television set that the complainant's mother could have said what she said that she did to the appellant's wife; '*why will I take the TV from your daughter?*'. If there was a reasonable possibility that the evidence concerning the extortion was true, the possibility, discussed above, that the mother may have falsely identified the appellant becomes stronger; and so also the scope for reasonable doubt.

[50] Having recorded her satisfaction with the complainant's evidence, the magistrate proceeded to refer to a number of aspects in which she found the evidence of the appellant and the defence witnesses to be unsatisfactory. My impression is that the trial court's approach in this regard was misdirectedly compartmentalised, and not even-handed.

[51] There were inconsistencies and internal contradictions in both the state's and the defence's cases. Whereas an explanation for some of the weaknesses in the complainant's evidence might justifiably have been found in her tender age, so might some of the apparent contradictions and inconsistencies in the defence case be explicable due to the passage of time and the different perspectives obtained by virtue of each of the three defence witnesses' quite discrete involvements in, and exposures to, the factual events. C[....], for example, gave evidence on 1 March 2016, approaching two years after the relevant events. That the defence witnesses' versions should not be entirely consistent was understandable in the circumstances and even gave a measure of assurance that the defence case was not a choreographed fabrication.

[52] What is notable about the trial court's judgment, however, is that whilst the magistrate was at pains to point to the inconsistencies in the defence evidence, she turned a blind eye to those in the state's case.

[53] As I have sought to illustrate, the magistrate was wrong in her assessment that the complainant's evidence was consistent in all material respects. She also failed to recognise the very tenuous corroborative significance of the medical evidence tendered by the prosecution. And she did not give a persuasive explanation of how she could reject the appellant's denial of guilt as not being reasonably possibly true.

[54] In my judgment, the combined effect of the trial court's failure to properly apply the applicable cautionary rules, the demonstrated unreliability of the complainant's evidence in

certain material respects, the tenuous nature of the corroborative medical evidence, the failure to deal appropriately with the point of enquiry concerning the complainant's medical history raised by the belatedly given evidence of the complainant's stepmother, and the reasonable possibility of there having been a false accusation raises a reasonable doubt as to the appellant's guilt and the safeness of his conviction. Having regard to the incidence of the onus, the appellant is entitled to the benefit of that doubt.

[55] In the result, the following order is made:

1. The appeal is upheld.
2. The appellant's conviction and sentence are set aside and the trial court's orders in those respects are substituted with an order that the appellant is acquitted and discharged.

BINNS-WARD, J

GOLIATH, DJP

APPEARANCES

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