Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: A249/2019

Before: The Hon. Mr Justice Bozalek
The Hon. Ms Acting Justice Gibson

Hearing: 7 February 2020
Judgment: 4 June 2020

In the matter between:

CB ***Appellant***

and

THE STATE ***Respondent***

JUDGMENT

BOZALEK J (GIBSON AJ concurring)

[1] The appellant appeared before the Parow Regional Court on charges of rape and sexual assault. He pleaded not guilty to the charges, chose to give no plea explanation, and was legally represented throughout his trial. On 14 March 2019 the appellant was

convicted on both counts and sentenced to 18 years' imprisonment. With the leave of the magistrate, he now appeals against conviction only.

[2] On count 1 it was alleged that between 2013 and October 2014, at Delft, the appellant had committed an act of sexual penetration (contravening sec 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters), 32 of 2007) by penetrating the vagina of his minor step-daughter with his penis *'on several occasions'* without her consent.

[3] On count 2 it was alleged that over the same period the appellant had sexually violated the same complainant (thereby contravening sec 5(1) of the Act) by touching her vagina again *'on several occasions'*.

[4] To prove its case the State led the evidence of five witnesses. These were the complainant herself, whom I shall refer to as EB or as the complainant, her maternal grandmother, Mrs HB, to whom the first report was allegedly made, Constable Vanessa Jeffrey, who interviewed the complainant after the report was made, Ms Nomxolisi Tsatsi, a Provincial social worker who first dealt with the case and Constable Makhi Sukaze, the investigating officer. By agreement a J88 medical examination form was admitted as an exhibit, as well as the report of a social worker, Mrs A Lakey, who was employed by SAPS Forensics Social Works Services. The primary purpose of that report was to support an application for the complainant to testify in camera with the assistance of an intermediary in terms of sec 170 A(1) of the Criminal Procedure Act, 51 of 1977 (the CPA).

[5] The appellant testified on his own behalf and called his wife, (Mrs B), EB's mother, as a witness.

Overview

[6] EB's mother married the appellant in November 2012, when EB, who was born on 11 July 2007, was four years old. EB's biological father appears to have been absent from her life from the outset. The appellant and his wife had their own son, (C), who was one year old when they married. The family moved into a house in Delft where each child had its own bedroom. (Mrs B) worked dayshift whilst the appellant worked alternate weeks on nightshift and dayshift. When he worked dayshift the two children would go to their grandparents after school and crèche as the case might be. When the appellant worked nightshift he looked after the children during the afternoons when they returned from school and crèche. It was common cause that as a result of these arrangements the appellant was often at home during the day, alone with EB and (C).

[7] Over the period covered by the charges i.e. 2013 and 2014, EB was respectively 5 and 6 years of age, whilst (C) would have been only 2 and 3 years, respectively. It eventually became common cause that EB was in grade R in 2013 and in grade 1 in 2014.

[8] EB appears to have had a close relationship with her grandmother, Mrs HB, who would often look after her at her nearby house. EB would also spend weekends sleeping over at her grandmother's house.

[9] On an unspecified occasion during 2013 while EB was bathing at Mrs HB's house, the latter noted that the child's vagina was sore but upon being asked the child would not explain the cause. The same thing happened in 2014 and, on that occasion, after being pressed by Mrs HB, EB eventually disclosed that the appellant had been

sexually molesting her but begged Mrs HB not to tell anyone because the appellant had threatened to hit her. Mrs HB was shocked, confused and disbelieving and took no further steps. This disclosure took place *'some weeks'* before 24 September 2014. On or about that date Mrs HB went to the appellant's house sometime after 11am to collect EB and take her to the public library. She knocked on the door for a long time before it was finally opened by the appellant in circumstances which disturbed her. Inside she found EB in bed under her duvet looking nervous. When Mrs HB pulled down the duvet she found that EB's pyjamas were half way down to her knees although she was still wearing her panties. She took EB from her home and later when she pressed her for an explanation, the child told her that the appellant had again been molesting her. Once again Mrs HB took no action although she remained deeply troubled by what she had heard and witnessed.

[10] Not long afterwards, around mid-October 2014, EB contracted mumps and was recuperating at her grandmother's house. Mrs HB received a call from her daughter saying that the appellant would be taking leave so that he could look after EB. Thoroughly alarmed, Mrs HB decided there and then to take the child to social workers in Delft where she explained matters to a Ms Tsatsi. EB advised Ms Tsatsi in an interview that she was being molested by the appellant. The police were then immediately brought into the matter and EB was taken to Karl Bremer hospital where she was medically examined. She was reluctant to talk to the investigating officer, Constable Sukaze, who arranged for her to be interviewed by female Constable Jeffrey. EB also told Constable Jeffrey that she was being molested by her step-father.

[11] That same evening Mrs HB called her daughter and advised her of EB's allegations against the appellant. Things moved very quickly from this point on with EB

being removed from the custody of her mother and step-father (the appellant) and placed with Mrs HB, with whom she has lived ever since. Not long afterwards the appellant's son, (C), was also removed and placed with Mrs HB. Constable Sukaze, Ms Tsatsi and Constable Jeffrey largely confirmed Mrs HB's evidence insofar as they were involved.

[12] The appellant vehemently denied that he had ever sexually molested or interfered with EB stating that he had always treated her as his own child. He testified further that prior to his arrest he had enjoyed a good relationship with EB and her grandmother. He could offer no explanation as to why EB would make false allegations of molestation against him. In her testimony the appellant's wife, (Mrs B), made it clear that she had never believed that EB had been molested by the appellant. She confirmed that there hitherto had been a very good relationship between EB and the appellant and that she had been shocked when her mother had advised her of EB's allegations on 13 October 2014. She testified that the following day, just before the appellant was arrested, she had been told by Constable Jeffrey that EB had recanted her evidence and said that the appellant had not molested her. (Mrs B) further testified that Constable Jeffrey had told her on the same occasion that EB had told Jeffrey she had been raped by an unknown person in a backyard after returning from school.

The Court's findings

[13] In convicting the appellant, the magistrate found that it had not been placed in dispute that the complainant had been raped nor that she had the injuries as recorded on the J88 form. She recognised that the complainant was a single witness as regards the alleged penetrations and sexual assaults and accordingly that her evidence had to be satisfactory in all material respects. The magistrate found that the complainant had given a meaningful and chronological account of the entire sequence of events and had not

contradicted herself. She found further that there were guarantees for the reliability of the complainant's version, one being the first report made to Mrs HB. The nature of that report was such that it demonstrated the consistency of the version given by EB and as such gave credence to it. A further guarantee for the reliability of EB's evidence was the medical evidence.

[14] The magistrate noted that the appellant's version was a general denial. She reasoned that EB could not have fabricated the allegations of molestation because the medical evidence revealed that there had indeed been injuries. She found that (Mrs B) had not made a good impression as a witness, observing that her attitude was such that it was quite understandable why her daughter had not confided in her regarding the molestation. The magistrate concluded that the appellant's version was nonsensical (*onsinnig'*) and that the State had proved its case beyond any reasonable doubt.

Grounds of appeal

[15] The magistrate's findings were strenuously contested on appeal. The main ground of appeal relied on was that the magistrate had misdirected herself in failing to apply the necessary caution in her evaluation of the complainant's evidence. It was further contended that there had been no corroboration of EB's evidence and that the magistrate had erred in failing to draw a negative inference from the contradictions between her evidence and that of her grandmother in relation to material factual issues. A further ground was that the Court had erred in not finding that the State's version of events was improbable especially in the light of EB's unclear and unsatisfactory recollection of events. Yet another ground was that the magistrate had also erred in accepting Mrs HB's evidence as corroboration for that of EB, particularly in the light of the former's failure to report the incident at the first available opportunity.

[16] It was further contended that the medical report had not supported the complainant's evidence, particularly inasmuch as it lacked any indication of *'more serious, detailed and fresh injuries'*. It was argued that the magistrate had erred in rejecting the appellant's version as *'nonsensical'* and in drawing adverse inferences against the appellant for not being able to offer any explanation as to why EB might fabricate the rape/molestation allegations against him. The appellant's legal representative also criticised the magistrate's judgment for its failure to deal with many inconsistencies and improbabilities in the version presented by the State, in incorrectly burdening the appellant with an onus of proof, in relying on demeanour findings in relation to (Mrs B) and in paying mere lip service to the rule dealing with the cautionary approach to the evidence of single witness and a child. Generally, it was contended, the magistrate had adopted a piecemeal approach to the evaluation of the evidence.

[17] A number of the grounds of appeal were based on alleged inadequate legal representation by the appellant's initial legal representative. It was alleged that the documentary evidence had been handed in by agreement without proper consultation with the appellant and reliance was placed on the legal representative's alleged failure to put the appellant's and his witness' version to the complainant and other state witnesses during cross-examination. The nett effect, it was averred, was that the defence of the appellant had been improper, ineffective and incompetent thus rendering his trial unfair.

General approach

[18] Cases involving the alleged sexual molestation of minor children by close family members often present considerable difficulties for the judicial system. The complainant is a child, in many cases of tender years, testifying against a family member, often a father or step-father. The allegations frequently surface long after the alleged molestation

has commenced with the result that the still youthful witness is giving evidence as to events which took place years previously. There is generally a dearth of evidence with the complainant being, in most instances, a single witness to events which took place in secret. Where there is medical evidence it is seldom conclusive since it generally does not of itself indicate either the identity of the molester or precisely what caused the injuries. On top of all of this the child is often giving evidence in a situation of fraught family relationships. Should the child complainant's evidence be accepted, lengthy imprisonment can be imposed on the offender, and families and marriages can be broken up. It is for these and other reasons that our courts have repeatedly emphasised the need for such cases to be handled thoroughly and sensitively by all involved. Thus it was that in *S v Vilakazi*[1], Nugent JA observed as follows:

> *'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 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.'*

[19] Before dealing with the appeal grounds and criticisms in greater detail it is appropriate to set out the general principles relating to onus and the evaluation of the evidence in such criminal matters, in particular those involving a very young single witness.

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[1] 2009 (1) SACR 552 (SCA)

[20] Notwithstanding the difficulties presented by cases involving sexual molestation of minors, and the outrage which they can generate, it bears emphasis that the onus of proof which the State must discharge remains the same as in any other criminal prosecution. In *S v DJ* [2], Binns-Ward J stated as follows in this regard:

> *'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.'*

[21] This principle was most recently affirmed in the majority judgment of the Supreme Court of Appeal in *Y v S*[3], also a matter involving the sexual assault and rape of a child complainant. In that matter there were multiple contradictions and inconsistencies in the complainant's evidence and the issue was whether the evidence was sufficient to prove the offences beyond a reasonable doubt. The majority reaffirmed the need for a careful and sensitive approach to such cases and for technical proficiency on the part of the State. It reaffirmed, furthermore, that there was no cautionary rule applicable to sexual assault cases but that the evidence of a child witness had to be approached with caution. It referred in this regard to *Woji v Santam Insurance Company Ltd*[4], where the Court stated that the question which the trial court must ask itself is whether the witness' evidence is trustworthy and further that trustworthiness depends on factors such as *'the child's power of observation, their power of recollection and their power of narration on the specific matter to be testified. In each instance the capacity of the particular child is*

[2] 2019 (2) SACR 613 (WCC)
[3] [2020] ZASCA 42 (21 April 2020)
[4] 1981 (1) SA 1020 (A) at 1021

to be investigated. Their capacity of observation will depend on whether they appear intelligent enough to observe. Whether they have the capacity of recollection will depend again on whether they have sufficient years of discretion to remember what occurs while the capacity of narration or communication raises the question whether the child has the capacity to understand the questions put, and to frame and express intelligent answers. There are other factors as well which the court will take into account in assessing the child's trustworthiness in the witness-box. Do they appear to be honest – is there a consciousness of the duty to speak the truth?'.[5]

[22] In terms of the provisions of sec 208 of the CPA, an accused can be convicted of any crime on the single evidence of a competent witness. Although a cautionary rule applies to the evaluation of single witnesses, as was stated in *S v Sauls and Others* [6] *'... the single witness must still be credible, but there are, as Wigmore points out, "indefinite degrees in this character we call credibility". 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 Rumpff 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.'*

[23] The complainant was a single witness in respect of the charges and therefore her evidence had to be approached with caution. When she testified she was 10 years of age and was testifying about events which for the most part happened when she was 5 or 6 years of age. EB's youth was therefore another reason why EB's evidence had to be

[5] at para 51.
[6] 1981 All SA 182 (A)

approached with a heightened sense of caution. As was stated by Schreiner JA in *Rex v Manda* [7]with regard to the evidence of children:

> *'...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 best indication that there was proper appreciation of the risks is naturally to be found in the reasons furnished by the trial Court.'*

[24] As regards the question of onus, and no less in the case where the accused's defence is a denial and where the charges relate to the alleged sexual molestation of a minor within the accused's family, it is self-evident that the State bears the onus to prove its case against the accused beyond reasonable doubt and that there rests no obligation upon an accused person *'to convince the court'*. Even though the accused's explanation or defence is improbable, if his or her version is reasonably possibly true he/she is entitled to his acquittal. As was pointed out by Zulman JA in *S v V* [8]in a similar matter *'it is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one objectively believes him is not the test'*.

[25] In the present matter, as in many matters of a similar nature, the question of corroboration of the single witness' evidence is important. Here it must be borne in mind that a witness cannot corroborate himself or herself, that repetition of a story cannot furnish corroboration but can at most prove consistency and proof of consistency is not the equivalent of corroboration (Principles of Evidence, 3rd ed, Schwikkard, page 530).

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[7] 1951 (3) SA 158 (A) at page 163
[8] 2000 (1) SACR 453

[26] The evidence must be holistically evaluated in determining whether the State has discharged its onus or not. As was stated in *S v Trainor* [9], the correct approach is that a conspectus of all the evidence is required. Evidence that is reliable must be weighed alongside any such evidence as may found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence has of necessity to be evaluated, as has to be corroborative evidence, if any. Evidence has to be evaluated against the onus on any particular issue or in respect of the case in its entirety[10]. However, as was emphasised in *S v Shilakwe*[11], once a detailed and critical examination of all the components of evidence has been done, a court must step back and observe the evidence as a whole. In that matter the Court quoted with approval from the matter of *Mosephi and Others v R* [12]where the following was stated:

> *'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the applicant was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding in an evaluation of it. But, in doing so, one must guard against tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together will all the other available evidence. That is not to say that a broad and indulgent approach is appropriate in evaluating evidence. Far from it. There is no substitute for a*

[9] 2003 (1) SACR 35 (SCA)
[10] See also in this regard *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at para 8 endorsing *S v Van Der Meyden* 1999 (2) SA 79 at 82 C – E.
[11] 2012 (1) SACR 16 (SCA) para 11
[12] (1980 – 1984) LAC 57 at 59 F – H

detailed and critical examination of each and every component in the body of evidence. But, once that has done it is necessary to step back a pace and consider the mosaic as a whole. If that is not done one may fail to see the wood for the trees'.

[27] Finally, it is as well to remind oneself that an appeal court will only interfere with a conviction by a lower court if the latter has misdirected itself in making a finding on fact and another court will come to a different decision. As was restated in *S v Hadebe*[13]:

'... there are well established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.'

[28] In the present matter the State's evidence was, regrettably, not as thoroughly prepared and presented as one would expect. Nor was the evidence analysed with sufficient care by the magistrate.

[29] A specific problem with the State's presentation of its case was the lack of attention paid to detail. The evidence of all the State witnesses, save for that of Mrs HB, was led somewhat briefly and without attempting to elicit the kind of detail which often provides an indication as to the veracity of the evidence or not. I also find it perplexing that the evidence of the medical examination of the complainant was simply presented by placing the J88 report form in front of the Court without leading the evidence of the examining doctor. Another problem was the prosecutor's occasional leading questions to the complainant and the magistrate's failure to intervene to correct this.

[13] 1997 (2) SACR 641 at 645 e –f

[30] The magistrate's judgment was superficial in certain important respects. No attempt was made by her to deal with contradictions or improbabilities in the evidence, apparent or real. The State's evidence was not carefully analysed and certain of the findings made by the Court were unwarranted or were generalisations, a prime example being the magistrate's finding that the appellant's version was nonsensical (*onsinnig'*). Similarly, the magistrate's broad finding that EB gave a meaningful, chronological account of her molestation and that she never contradicted herself is incorrect. Given these flaws, a careful consideration of the evidence at this stage is all the more necessary.

The Evidence

EB's evidence

[31] In order to assess EB's evidence it is appropriate to consider some extracts therefrom. In examination in chief, EB was first asked to explain her understanding of the word rape. Her evidence proceeded as follows:

'*Ms Soars:*	*Why did the social worker let you stay with your grandma?*
Ms (EB):	*Because (the appellant) raped me.*
Prosecutor:	*Okay. Now (EB), do you know that the word rape means?*
Ms Soars:	*(EB), what does the word rape means?*
Ms (EB):	*When someone hurt you*
Prosecutor:	*Okay. And how does the person hurt you?*
Ms Soars:	*How does the person hurt you, (EB)?*
Ms (EB):	*By touching your vagina or putting his penis in your vagina.*
Prosecutor:	*Now who taught you that word?*
Ms Soars:	*Who taught you that word, (EB)?*
Ms (EB):	*When I went to my grandmother for the weekend and then I said my vagina was sore and my grandmother asked why and*

then I told her what happened and then she told me, then she asked me if I know what he was doing to me?

Court: *What did you tell your grandma?*

Ms Soars: *What did you tell your grandma when she asked you?*

Ms (EB): *I said I don't know.*

Prosecutor: *Did you tell your grandmother, you told your grandmother your vagina was sore, is that right?*

Ms Soars: *(EB), so you told your grandmother that your vagina is sore, is that right so?*

Ms (EB): *Yes.*

Prosecutor: *Is that the only thing you told your grandmother?*

Ms Soars: *Is that all that you told her that day?*

Ms (EB): *No, I told her the whole story what happened and then when we came home from there then my grandma told me I should tell my mommy.*

Prosecutor: *Okay. Now you said you told your grandmother the whole story. Would you tell us also the whole story?*

Ms Soars: *(EB), would you tell us also the whole story as you told your grandmother?*

Ms (EB): *Yes.*

Prosecutor: *Okay, now tell us the whole story, what is the whole story?*

Ms Soars: *(EB), please tell us the whole story, ne?*

Ms (EB): *I told my grandmother to come and fetch me to take me to the library and then (the appellant) came to my room and he pulled my panties down. And then he put his penis in my vagina and he touched it. And he did not hear my grandmother coming in by the gate, but when my grandma knocked, then he heard and he dressed himself quickly to open the door for my grandma. So he made like he was sleeping.*

[32] It will be recalled that Mrs HB testified that EB disclosed twice to her that the appellant was molesting her. The first occasion was some weeks before 24 September 2014 and the second was the day of what I shall call the *'library incident'* i.e. on 24 September 2014. According to Mrs HB on neither of those occasions were these disclosures or allegations conveyed to EB's mother, (Mrs B). That only took place on or about 13 October 2014 after Mrs HB took EB to a social worker and the police were drawn in.

[33] The question of precisely when the incidents of molestation took place and EB's recollection thereof was not clarified when the prosecutor again addressed that issue directly with her. He referred EB to the library incident which she had described and the following exchange took place:

'Prosecutor:	*Now when this happened, in what grade were you?*
Ms Soars:	*Now (EB), when that happened to you, in what grade were you?*
Ms (EB):	*I was in grade R.*
Prosecutor:	*Okay. Is this the very first time that something like this happened to you, the day that your grandmother came to get you to go to the library?*
Ms Soars:	*Is that the first time that this happened to you?*
Ms (EB):	*Yes.*
Prosecutor:	*Now, on this day did you go to school on this day or not?*
Ms Soars:	*Now (EB), on that day that you told us about now, did you go to school that day?*
Ms (EB):	*Yes.*

A little later the evidence resumes.

Prosecutor:	*Now, when your grandmother got there, did you tell your grandmother what happened to you on that day?*

Ms Soars: *Now, when your grandmother came to your house, did you tell her that same day what happened to you?*

Ms (EB): *Yes.*

Prosecutor: *What did you tell your grandmother?*

Ms Soars: *What did you tell her?*

Ms (EB): *I told her that (the appellant) pulled my panties off and that he was laying on me and he put his penis in my vagina.*

Prosecutor: *And what did your grandmother do then?*

Ms Soars: *And what did your grandmother do when you told her that?*

Ms (EB): *She told me that when my mommy comes from work, I must tell my mommy the whole story.*

Prosecutor: *And did you tell your mommy the whole story?*

Ms Soars: *And when your mommy came from work, did you tell her the whole story?*

Ms (EB): *Yes, I went to the room and tell her.*

Six lines later the evidence resumes.

Prosecutor: *Okay. Did you go back home with your mommy on that day or not?*

Ms Soars: *Did you go back home with your mommy that day?*

Ms (EB): *No, I went to sleep with Gran for the weekend and then my mommy told (the appellant).*

Prosecutor: *And then what happened?*

Ms Soars: *And then what happened after that?*

Ms (EB): *And then (the appellant) told my mommy that he did not do it and my mommy came to my grandma's house and told my grandma that.*

[34] These passages reveal further discrepancies when measured against Mrs HB's evidence. The library incident took place in September 2014 and therefore EB could not

have been in grade R at the time. According to Mrs HB the library incident was not the first occasion on which EB disclosed to her that she was being molested by the appellant and thus it could not have been the first incident of molestation. According to Mrs HB EB did not go to school on the day of the library incident and nor was there any disclosure to EB's mother on that day and nor, by definition, to the appellant.

[35] At a later stage in EB's examination in chief the prosecutor returned to the issues of precisely when any molestation took place, how many incidents there were and the details thereof. The following passage is relevant:

'Prosecutor:	*Okay. Now when did the social worker say that you cannot stay in the same house as (the appellant) anymore?*
Ms Soars:	*So when did the social worker say that you must go and live by your grandmother?*
Ms (EB):	*I do not know.*
Court:	*Okay. Were you still in Grade R or were you in Grade 1?*
Ms Soars:	*Were you in Grade R that time or in Grade 1?*
Ms (EB):	*I think I was in Grade 1 that time.*
Court:	*Now, did anything happen to you while you were in Grade 1?*
Ms Soars:	*Did anything happen to you when you were in Grade 1?*
Ms (EB):	*No, it stopped that time.*
Prosecutor:	*So are you saying it stopped when you were in Grade 1?*
Ms Soars:	*Did it stop when you were in Grade 1?*
Ms (EB):	*Yes.*
Prosecutor:	*And how many times did it happen?*
Ms Soars:	*And how many times did it happen?*
Ms (EB):	*Between 5 or 13 times.*

Prosecutor: *Now can you say how many times did it happen when you were in Grade 1, in Grade1, ja?*

Ms Soars: *How many times did it happen when you were in Grade 1?*

Ms (EB): *I think twice.*

Prosecutor: *Okay. So all the other times were that when you were in Grade R?*

Ms Soars: *So (EB), the other times when it happened, were you in Grade R that time?*

Ms (EB): *Yes.*

Prosecutor: *Now can you tell us, if you can, more about the other times when it happened?*

Ms Soars: *Now (EB), can you tell us more about the other times when that happened. Can you tell?*

Ms (EB): *I do not think I can remember.*

Prosecutor: *Now you told us now the day that grandmother took you to the library. Was that the very first time?*

Ms Soars: *Now (EB), so the day when your grandma took you to the library, was that the first time it happened?*

Ms (EB): *I am not sure.*

Prosecutor: *Now you are saying that between 5 and 13 times. Now that times that it happened, where was your mommy?*

Ms Soars: *Now (EB), you said that it happened between 5 and 13 times, so where was your mommy that times when that happened to you?*

Ms (EB): *My mommy goes in the morning to work and then by the time, the time she goes to work then he comes from work and then he goes to work.*

[36] From this passage, and again using Mrs HB's evidence as a benchmark, it would appear that EB corrected herself stating, albeit hesitantly, that she was in grade 1 i.e. it was 2014 when she was placed in her grandmother's care which would have been in

October 2014. She limited the incidents of molestation, which in total she estimated to have been between 5 and 13, to one or two in that year with the balance having taken place the previous year when she was in grade R. EB could supply no detail of these previous molestations stating that she did not think that she could remember. The prosecutor appeared satisfied not to probe that answer any further. By clear implication EB in effect corrected her earlier evidence that the molestation on the day of the library incident was the first occasion on which she was molested.

[37] The issues of how many incidents of molestations had taken place, their detail and their timing was not taken much further in EB's cross-examination by the appellant's attorney. To the extent that he dealt with any specific incidents he concentrated on the library incident with the result that the contradictions within EB's evidence and its vagueness in certain important respects was simply not dealt with.

[38] At one point the appellant's legal representative did raise the issue of the incidents of molestation other than the library incident but, as the following exchange illustrates, he was stopped from doing so by the magistrate:

> *'Mr Van Der Schyff:* *Now the 5, the 13 times when it happened, did it happen whilst you were in Grade R or did it happened when you just got to Grade 1?*
>
> *Court:* *Asked and answered.*
>
> *Mr Van Der Schyff:* *As the court pleases. Thank you. Now, (EB), I must put to you what (the appellant) is going to tell the court. …'*

[39] Notwithstanding the lack of any objection from the appellant's legal representative, there was no basis for this ruling by the magistrate. The appellant's attorney had not asked any questions on these issues previously and was certainly not bound by EB's answers to the prosecutor in her examination in chief. The question of

when the balance of the incidents of sexual molestation took place and their extent cried out for closer examination. In my view the magistrate committed a material irregularity when she blocked this line of cross-examination.

[40] As I have indicated, the magistrate's finding that EB gave a meaningful and chronological account of events and that she never contradicted herself is not borne out on an examination of the evidence. EB testified that she had been molested *'between 5 or 13 times'* but how she arrived at this figure was not explored by the prosecutor in examination in chief nor was it dealt with in cross-examination. Nor could EB give much detail of the circumstances surrounding her molestation by the appellant other than on the occasion of the library incident. All this has implications for the factual matrix upon which the appellant was eventually convicted, a matter to which I shall return.

[41] Apart from those listed above there were further discrepancies, albeit minor ones, between the evidence of EB and that of Mrs HB. Dealing with the library incident, EB stated that when her grandmother had fetched her it had been in a friend's vehicle. Mrs HB testified that she had walked to her daughter's house and there was no question of a friend accompanying her. EB said that the incident took place on a day when she had gone to school, but according to Mrs HB it had been a public holiday.

[42] When the evidence is looked at as a whole it is clear that EB had an imperfect recollection of the alleged acts of sexual molestation and that it was the library incident which loomed large in her mind. It deserves to be emphasised that it would be unrealistic to expect of a five year old child that, some five years later, she would have a clear recollection of precisely when multiple incidents of sexual molestation took place over a prolonged period. Furthermore, EB's evidence should not be considered in isolation. In

this regard Mrs HB's evidence is vitally important since she was the person to whom EB made the first report and who played a vital role in the revelations of sexual molestation. When account is taken of Mrs HB's evidence it seems quite clear, furthermore, that EB had conflated the library incident with the incident some weeks later when Mrs HB took her to the social worker and on which occasion EB's mother was told of EB's allegations that she was being molested by the appellant. The evidence of Mrs HB, the grandmother, is critical in determining not only whether EB's evidence is credible but also whether the alleged sexual molestation was a single incident or involved more numerous incidents.

Mrs HB's evidence

[43] It is significant that Mrs HB traced difficulties back to 2013 when, according to her, EB's mother herself reported that the child had a vaginal discharge (as opposed to a rash) which had been raised with a doctor. Even at that time, Mrs HB testified, she and her daughter began to think of who EB might be playing with. (Mrs B) later denied in her testimony that EB ever had a vaginal discharge.

[44] In 2013 Mrs HB noted that EB did not want her to wash her private parts in the bath because it was sore but when she pointedly asked EB how she got hurt or who hurt her she did not want to talk. A similar occurrence took place in 2014, but on that occasion Mrs HB pressed EB saying that she could not be sore *'every time'*. The core of her evidence about this first disclosure was as follows:

> *'Mrs HB:* *And then in 2014 when she came to me again one weekend and again with the bathing that she did not want me to wash her private parts, I then, when I dried her I took her to my room and I said to her, but you cannot be sore every time, what happened. And then I said to her but if you not going to*

tell me, then I will have to take you to the police or somebody that you will then talk to. And then she grabbed my face and started to cry. And eventually then she said to me, but it is (the appellant), but ma, please, please, please, pinkie promise please do not tell anyone, because he said he is going to hit me.'

Mrs HB: *I then asked her, did he just touch you, because if he just touch you how come that you are sore. And then she said that he put his penis in her vagina, but for her to say that, there was a lot of tears and emotion'.*

[45] The next incident was 24 September 2014 when Mrs HB went to fetch EB in the late morning to go to the library. Mrs HB emphasised how different things had been that day in that EB had not come excitedly to the window after hearing the gate open as she normally did when her grandmother arrived. She had to knock on the door for a *'very, very long time'* and had a sense of uneasiness. Eventually, dressed in his wife's nightgown, the appellant came to the door and directed her to EB's room where she found EB lying under a duvet but looking nervous and not showing the excitement which she normally did when her grandmother arrived. Mrs HB removed the duvet to find EB's pyjamas pulled down to her knees. According to her EB's brother was in crèche that morning and therefore the appellant and the complainant had been alone in the house. Mrs HB sensed something was not right and later questioned EB as to why her pyjama pants had been pulled down. EB cried and told her that the appellant had come to lie next to her in her bed and had touched her and put his penis in her vagina again. It was a few

weeks later when EB was recovering from mumps that Mrs HB finally took action by contacting a social worker regarding EB's alleged molestation.

[46] Although Mrs HB did not confront the appellant at the time of the library incident it is of some significance that when Mrs HB was cross-examined her experience and observations at the appellant's house on the day of the incident were not challenged on behalf of the appellant. There was accordingly no explanation proffered by the appellant why the child was still in bed at 11am or partially undressed in the manner that she was found by Mrs HB.

[47] In my view, Mrs HB's evidence is vitally important in that it establishes, firstly, consistency on the part of EB in reporting that the appellant was responsible for her sexual molestation. It also strongly suggests that EB's molestation must have begun as early as 2013 but in any event was ongoing in 2014 and was not limited to a single incident.

[48] The magistrate made no specific finding on Mrs HB's credibility as a witness but it seems clear that her evidence was accepted in full. On appeal an argument mustered against Mrs HB's evidence was that it should be rejected because her explanation for failing to report the alleged sexual molestation at the first available opportunity was unconvincing. In my view this criticism is unjustified. Mrs HB testified of her shock when EB first told her in 2014 that the appellant was sexually molesting her. She testified that her mind was blank and she did not know what to do or where to go and that she could not really believe the allegations. She explained further that there were many things going through her mind. She was thinking of her daughter, of the appellant and about their marriage. Again after the library incident and the further disclosures by EB, Mrs HB

testified that she was numb and did not know what to do. She contacted her brother for advice and he told that she would have to do something. She was too afraid to tell her daughter, thinking that whatever she said would have consequences and that she needed to be one hundred percent certain. She testified that what eventually drove her to action was when EB was recovering from mumps and EB's mother asked for her to be sent home so that the appellant, who had taken leave, could look after her. This appeared to be the last straw for Mrs HB who could not understand why the appellant wanted to look after EB when she was perfectly willing and able to do so. She then took EB to Ms Tsatsi, the social worker. When EB confirmed the allegations to Ms Tsatsi, the police were immediately drawn in.

[49] Mrs HB's explanation for not raising the matter immediately with the appellant makes complete sense. She obviously realised the far-reaching repercussions for her daughter and her family if she raised the molestation allegations or confronted the appellant and her fears in this regard were indeed borne out. Mrs HB's account of how she was eventually compelled to act by a combination of the library incident, the advice of her brother and the final incident, when she was asked to send EB back to be placed in the care of the appellant while she recovered from mumps, is entirely credible. In any event, even if Mrs HB can be criticised for her tardiness in taking action this does not necessarily reflect upon her credibility as a witness.

[50] In my view, the magistrate's acceptance of Mrs HB's evidence cannot be faulted. Her evidence reads well and she appears to have been an intelligent and observant person who was able to articulate her experiences and her emotions well. Her evidence forms a solid and reliable account against which the complainant's evidence can be evaluated.

The appellant's case

[51] The appellant's evidence constituted a denial of any molestation of EB. It did not, by its nature, admit of much scope for cross-examination. The appellant was not able to offer any explanation as to why the complainant would make false allegations against him but clearly this cannot be held against him nor can any adverse inference be drawn against him. His evidence did establish was that his working hours were such that he was often alone in the house during the daytime with EB and with his son, then only either 2 or 3 years old.

[52] Apart from the appellant's general denials and his insistence that he had always treated EB as his own daughter, the only evidence which he gave suggesting that EB's allegations against him were false was his recounting that his wife had told him that EB had allegedly said at the police station exonerating him. This requires an evaluation of (Mrs B)'s evidence which sought to cast doubt on the veracity of EB's evidence that she was molested by the appellant.

(Mrs B)'s evidence

[53] (Mrs B) testified that she had been shocked and surprised when her mother had advised her of EB's allegations of molestation by the appellant because she never expected to hear anything like that and she had not suspected that anything was happening. She had immediately asked EB about the allegations but the child had started crying and did not want to speak. This latter evidence was directly at odds with that of EB and Mrs HB.

[54] (Mrs B) testified that the day after first hearing of the allegations, and after hearing from the social worker, she had again asked EB about the allegations who then had told

her that it was not the appellant and that nothing had happened. Her evidence was further that later that same day at the police station Constable Sukaze had asked Constable Jeffrey to interview the complainant. When Jeffrey emerged from interviewing EB she told her (Mrs B) and Constable Sukaze that EB had told her that it was not the appellant who had molested her and therefore that she (Mrs B) should not worry. On the same occasion, Constable Jeffrey had also told her and Constable Sukaze that EB had told her that she had come from school one afternoon to find no one at home. EB had gone to the back yard of a neighbour's house where she had been raped and molested by '*some guy'*. This was the first occasion on which (Mrs B) had heard these allegations. However, (Mrs B)'s evidence continued, Constable Sukaze had responded to Jeffrey by saying that he did not believe that story. Nonetheless (Mrs B) had shortly afterwards told the appellant that he need not worry since EB had apparently said it was not him who had molested her. Despite all this Constable Sukaze proceeded to question the appellant and then arrested him. Under cross-examination (Mrs B) was forthright in stating that she did not believe EB's allegations regarding the appellant.

Analysis of the evidence

[55] On appeal, EB's evidence regarding the library incident was challenged as being improbable. In particular, it was suggested that it was improbable that the appellant would have molested EB immediately before her grandmother arrived at the house or, having done so, would have allowed her to go to the library; furthermore; that it would have been expected that EB would be bleeding and in severe pain. In my view, none of these alleged improbabilities is borne out by the evidence.

[56] Firstly, Mrs HB's evidence was that her calling at the appellant's house that day had not been pre-planned. Secondly, assuming that the appellant had just molested EB, it

would have excited Mrs HB's suspicions more had the appellant not allowed her to take EB to the library. Thirdly, it does not follow that had a molestation just taken place EB would have been bleeding and in severe pain. That would depend on the degree of molestation or penetration, how far the act had progressed and how frequently such molestation had taken place in the past. Similarly, the argument that the medical examination findings (made some three weeks later) did not support EB's version for want of detailed and fresh injuries is without merit. On neither EB's nor Mrs HB's evidence had there been an incident of molestation in the weeks prior to EB being examined at Karl Bremer hospital.

[57] On behalf of the appellant reliance was also placed on other discrepancies between the evidence of EB, Mrs HB and other State witnesses. Many of these dealt with who exactly had been present when EB spoke in turn to Ms Tsatsi and Constables Jeffrey and Sukaze. It is unnecessary to go into detail regarding these discrepancies since in my view they are not material. It was not disputed that, apart from Constable Sukaze to whom she would not open up, EB had directly advised both of the other independent officials that the appellant had sexually molested her. To the extent that there were differing versions of whether Mrs HB was with EB when she was interviewed by one or more police officials and when Ms Tsatsi first interviewed the child, these are not material differences. There was never any suggestion that Mrs HB had encouraged EB to make allegations of molestation against the appellant.

[58] I have already dealt with the evidence of EB and Mrs HB in some detail.

[59] The evidence of the appellant's principal witness, (Mrs B) calls for closer scrutiny. Her evidence that EB had started crying and would not speak to her when she first asked

her about the allegations that the appellant had molested her was contradicted by Mrs HB's evidence. Furthermore, this was put to neither EB nor Mrs HB. The latter testified that immediately after she had told her daughter about the allegations EB had confirmed to her ((Mrs B)) that she had been molested by the appellant. That evidence was not challenged at the time on behalf of the appellant.

[60] As previously mentioned, on the day after EB's initial disclosures to Mrs Tsatsi and the police, (Mrs B) testified that she attended upon the social workers to obtain an explanation as to what EB had told them regarding the medical examination. Her evidence was she again asked EB about the matter who told now her that it was not her step-father and added that nothing had happened. This was put to EB in cross-examination and her response was that it was not true and that she thought her mother was lying in this regard.

[61] (Mrs B) testified in some detail about what she had been first told at the police station all of which caused her to disbelieve that EB had been molested by the appellant. Despite (Mrs B) allegedly being told by Constable Jeffrey in the presence of Constable Sukaze that EB had recanted her allegations that the appellant had molested her and that she had been raped by a stranger, her evidence was that Constable Sukaze had nonetheless proceeded to question the appellant and then arrest him. (Mrs B) could offer no explanation why Constables Sukaze and Jeffrey had testified that there was never any mention of any other person who had raped or molested EB. Furthermore, the allegation that EB had said that she had been raped by a stranger in a neighbour's backyard was never put to EB, or any other State witness for that matter. A further difficulty with this evidence by (Mrs B) is that a different version was put to EB by the appellant's legal representative, namely, that at the police station in the presence of her mother and her

grandmother she had told the police that it was not the appellant who had molested her. As mentioned EB denied ever recanting her statement that it was the appellant who had molested her or saying that no one had done so. For her part Mrs HB testified that she had not even been present on 14 October 2014 when EB was taken to the police station by (Mrs B) and interviewed there by the police. She too testified that the appellant was the only name that EB ever mentioned, time after time, as being the person who molested her.

[62] Central to (Mrs B)'s evidence of EB recanting in her allegations were Constables Jeffrey and Sukaze. However, both witnesses testified that the only person identified by EB as a molester was the appellant and neither ever heard of anyone else being identified by EB or that she had recanted in her allegations against the appellant. The unchallenged evidence of Ms Tsatsi that when she interviewed EB the latter identified the appellant as her molester must also be taken into account.

[63] Accordingly, the only evidence that EB ever recanted or wavered in her identification of the appellant as her molester comes from (Mrs B), with hearsay support from the appellant.

[64] On appeal the magistrate was criticised for relying unduly on demeanour findings in her evaluation of (Mrs B). The magistrate stated that having regard to (Mrs B)'s attitude in court it was not surprising that EB did not confide in her. Seen in context this observation appears to relate principally to (Mrs B)'s evidence that she had never believed that the appellant had molested her daughter and not to her demeanour as such. Accordingly, I do not consider that such criticism is well founded.

[65] The magistrate was, however, correctly criticised by the appellant's legal representative as having misconstrued one aspect of (Mrs B)'s evidence, namely, that EB had allegedly told Constable Jeffrey that she had been raped in a backyard by a stranger. The magistrate stated as follows: *'(Mrs B) glo die kind was verkrag na skool eendag. As (Mrs B) dit geweet het, hoekom het sy op daardie stadium niks daar omtrent gedoen nie'*. This reasoning lost sight of the fact that according to (Mrs B) this alleged revelation only came to light after the appellant had already been identified by EB as her molester and very shortly before he was arrested, thus removing much of the force in the magistrate's criticism of (Mrs B)'s credibility based on this ground.

[66] The shortcomings in (Mrs B)'s evidence seeking to cast doubt on EB's identification of the appellant raise serious doubts as to (Mrs B)'s own credibility in this regard. That credibility problem is exacerbated by the fact that (Mrs B) was interviewed by the social worker, Mrs Lakey, not long after the whole matter came to light, as was confirmed in Mrs Lakey's report dated 15 December 2014. Under the heading *'Collateral Information obtained from (Mrs B)'*, Mrs Lakey wrote that (Mrs B) *'does not believe (EB). She based her disbelief on the way (EB) disclosed to her. Furthermore, she doubts (EB)'s disclosure as (EB) always complained of a sore vagina and she frequently had a vaginal rash'*. If at that stage (Mrs B) had indeed been told that EB had said that she had been raped by an unknown person in a neighbour's backyard, and also that it was not the appellant who had molested her, one would expect that she would have mentioned these to Mrs Lakey as reasons why she disbelieved EB's allegations implicating the appellant.

[67] When regard is had to all these factors, I consider that (Mrs B)'s evidence did not weaken the State's case and lends no support to the appellant's case. In fact, her evidence

strongly suggests that her mind was closed to the possibility that the appellant could have sexually molested his step-daughter.

Overall conclusions

[68] Notwithstanding the errors and any misdirections in the manner in which the magistrate dealt with the evidence and in her judgment, it remains this Court's duty to determine whether these were material and whether, on a balanced and holistic evaluation of the evidence, the State succeeded in discharging its onus.

[69] Central to this question is the credibility of EB's evidence as a single witness. In argument before us the State conceded that EB was not a *'spectacular witness'*. This euphemistic description was an appropriate concession. As has been demonstrated, portions of EB's evidence were flawed by internal contradictions and a lack of detail. The magistrate found that her evidence was meaningful and chronological but that broad finding is not justified. This does not mean, however, that all of EB's evidence should be rejected out of hand. When considering the discrepancies and apparent contradictions in the complainant's evidence it must also be borne in mind, that she was testifying at the age of 10 regarding events which took place when she was 5 or 6 years of age. As Mrs Lakey noted in her initial report EB had *'difficulty to relate information in complete chronological order'* but *'the core elements remained consistent'*. What is more, the events described by EB, if true, would have been very traumatic for any child. She stood firm in her evidence that it was the appellant alone who molested her and that this took place on several occasions and, as far as she could remember, over the period 2013/2014 when she was in grade R or grade 1. Her account of what happened during the library incident was consistent and, in material aspects, tallied with the independent account given by Mrs HB. Crucially then, EB's evidence was partially corroborated by the

evidence of Mrs HB regarding the library incident and by the undisputed medical evidence.

[70] EB fared well in cross-examination and no inherent improbabilities were exposed in her evidence. It was common cause in the evidence of the State witnesses and that of the appellant and his wife that there were no pre-existing tensions within the family relationships which might have pre-disposed EB to make false allegations against her step-father. The same considerations applies to Mrs HB, the grandmother. Prior to the disclosure of the incidents the relationships between her, her daughter and the appellant were altogether harmonious.

[71] As mentioned, further evidence which at least partially corroborates that of EB's was the medical evidence that on examination on 13 October 2014 the examining doctor found that there were multiple old tears in EB's hymen, consistent with vaginal penetration in the past. It is unfortunate that the State did not call the examining doctor to further explain his report and the implications of his findings. It would have been of value had he been called to give body and context to his report and to be available for cross-examination and questions from the Court. That said, the J88 report was admitted with the agreement and consent of the appellant's legal representative and was uncontroverted. No one offered any explanation, other than what has already been discussed in this judgment, how the then five year old complainant could have sustained the vaginal injuries which were found on examination.

[72] In her judgment, the magistrate stated *'die beserings wat aangedui is op die J88 is nie in geskil geplaas nie. Wat wel in geskil geplaas is, is dat die beskuldigde die person is wie die klagster verkrag het'* and further *'daar is ook mediese getuienis vir die stawing*

vir wat die klagster vir die hof vertel het wat gebeur het'. The magistrate may have somewhat overstated the implications of the medical evidence to in suggesting that she suggested that the clinical findings equated to a finding that EB was raped since the injuries could, for example, conceivably have been self or accidentally inflicted. However, in the absence of any such explanation, on the overwhelming probabilities the medical evidence confirmed that EB had been sexually penetrated by someone in the past.

[73] A further factor which I regard as material to the complainant's credibility is that EB's disclosures that she had been molested by the appellant were very reluctantly made and only following a process of cajoling and pressure from her grandmother. This does not strike one as the response of a child eager to make false allegations of sexual molestation against anyone. That some form of sexual activity had indeed taken place is borne out by the unchallenged medical evidence which scotches any suggestion that the molestation allegations were a figment of EB's imagination. The substance of EB's evidence was consistent and corroborated by the medical evidence and, perhaps to a lesser degree, by Mrs HB's account of the library incident. EB persisted in her allegations and evidence up to and throughout the case notwithstanding that she was immediately removed from the care and custody of her mother and step-father and placed in that of her grandmother. It is also clear that (Mrs B), EB's mother, never believed EB's allegations regarding the appellant. The fact that EB maintained her version of events in the face of this hostile emotional climate gives her evidence added credence.

[74] The appellant bears no onus of disproving any part of the State's case nor of furnishing reasons why EB would make false allegations against him. It must however be taken into account that, as far as the evidence shows, there was no apparent reason for EB

to make false allegations against the appellant. To the extent that he relied on the evidence of his wife that EB recanted her allegations in her presence and that of the police or withdrew them at any stage, such evidence was not fully put to witnesses and finds no support whatsoever from any independent parties directly involved, namely, the two police officials and the social workers. This reflects adversely on the credibility of (Mrs B), the only witness called by the appellant.

[75] I turn now to those grounds of appeal and submissions on behalf of the appellant to the effect that he was not adequately legally represented. The principal difficulty with these arguments are that they are not substantiated by the record of proceedings and in effect amount to the appellant's new legal representatives giving evidence through the Notice of Appeal and heads of argument. Nowhere in the record is there any suggestion by the appellant or his witness that instructions given to the legal representative were not put to State witnesses or were incorrectly put. Nor is there any indication on the record that admissions were made other than on the appellant's instructions as, for example, when the J88 form and Mrs Lakey's report were handed in by agreement. To give credence to these grounds of appeal would mean the acceptance at face value of any unsubstantiated submissions by an appellant who avers in a notice of appeal or in argument that he/she was not properly represented during trial. In my view, these grounds of appeal cannot be sustained.

[76] For all the reasons I have mentioned, I find that EB's evidence as a single witness notwithstanding its flaws, was trustworthy and can be relied upon. This finding is, however, subject to an important limitation relating to those parts of her evidence which were so vague or lacking in detail that it would be unsafe to rely on them. It will be recalled that EB's evidence was that the incidents of molestation numbered between 5

and 13, most of them taking place while she was in grade R with the balance, one or two incidents, taking place when she was in grade 1. EB was not able to give any detail at all regarding any incidents in 2013 i.e. when she was in grade R, stating that she could not remember them. Furthermore, as mentioned earlier, the magistrate disallowed cross-examination on that point. The only other evidence of EB being sexually molested during 2013 was Mrs HB's evidence that EB had suffered from a vaginal discharge that year and that on one occasion she had not let her wash her private parts complaining that they were sore. This evidence, seen in the greater picture, suggests that EB was being molested as early as 2013, but given its lack of specificity I do not consider it safe to found any conviction on such scant evidence.

[77] EB did give clear evidence, however, regarding the incident which took place on the day of the library incident. Furthermore, when her evidence is read together with that of Mrs HB then it is clear that there must have been at least one prior incident of molestation during 2014 since on two occasions before the library incident she had complained of a sore vagina. On the first such occasion EB would make no disclosure but on the second occasion she eventually disclosed to Mrs HB that the appellant had been molesting her and had put his penis in her vagina. Apart from these two penetrations, however, there is no clear evidence of other acts of sexual molestation during 2014. This picture ties in however with EB's evidence that there were only a few incidents of molestation during 2014 i.e. when she was in Grade 1.

[78] The ultimate issue is whether the State discharged the onus of proof which it bore in this matter. In considering this question, I take into account what Malan JA stated regarding the level of proof in *R v Mlambo*[14]:

> *'In my opinion there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused'.*

[79] On a critical assessment of the evidence I consider that the State has succeeded in meeting its onus of proof only in respects of incidents which took place in 2014 and, furthermore, that these comprised two sexual penetrations which took place on or about 24 September (the library incident) and an earlier penetration some weeks before that date. It follows from this that the State failed to prove its case on count 2 which charged the appellant with sexual violations on several occasions in 2013 and 2014 and that on count 1 it proved only the two penetrations in 2014.

[80] The magistrate not only found the appellant guilty on counts 1 and 2 but did not stipulate in terms whether she accepted EB's evidence that there had been between 5 and 13 incidents of sexual molestation all told. This was a matter which required clarification not least because of its importance for sentencing purposes.

[81] There was no appeal against sentence in this matter, the appeal against conviction having been argued on an all or nothing basis. The finding which we have arrived at

[14] 1957 (4) SA 727 (AD) at 738 A – C

means a confirmation of the appellant's conviction on count 1 and on a different factual basis to that impliedly found by the magistrate. Our finding thus necessarily involves a reconsideration of the sentence imposed by the magistrate. Since no submissions were heard on sentence I consider that the appellant and the State must be given an opportunity to make such submissions in light of the findings made by this Court. These can either be in written form or, should either party consider that oral submissions are necessary, such a request can be directed to the Court for our consideration.

[82] In the result the following order is made:

1. The appeal against conviction is partly upheld in that the conviction on count 2 is set aside;

2. The appeal against the conviction on count 1 is dismissed and that conviction is confirmed but on the basis set out in paragraph 79 of this judgment;

3. The parties are afforded an opportunity to make written submissions regarding sentence and, if so advised, also motivate in writing for an oral hearing, within 15 days of this judgment being handed down.

4. The consequent further proceedings for the reconsideration of sentence pursuant to the order made in paragraphs 1 and 2 are postponed sine die.

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BOZALEK J

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GIBSON AJ

For the Appellant : Mr M Stevens

As Instructed

For the Respondent	:	Adv E Cecil
As Instructed	:	The Director of Public Prosecutions