Please note that certain details have been redacted from this judgment to protect the privacy of certain parties involved.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A46/2021
DPP REF NO: 10/2/5/1 – 2012/164

1.REPORTABLE:	NO
2.OF INTEREST TO OTHER JUDGES:	NO
3.REVISED	YES

08 November 2021 **Acting Judge Amm**

In the appeal in the matter between:

K: M Appellant

and

THE STATE Respondent

Summary: Appeal against conviction and sentencing – rape, sexual assault and kidnapping of minors – complainants 10 and 11 years old at the time – unexplained delay

in prosecution of appeal – evaluation of evidence – cautionary rules – splitting of charges / duplication of convictions – appropriateness of mandatory life sentence – absence of substantial and compelling circumstances – competency of a sentence of life imprisonment plus 20 years within the context of section 39(2)(a)(i) of the Correctional Services Act, No. 111 of 1998

JUDGMENT

APPEAL DECIDED ON PAPERS:- The matter was disposed of without an oral hearing on 2 September 2021 and by agreement between the parties.

JUDGMENT ELECTRONICALLY DELIVERED:- This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for the handing-down of this judgment is deemed to be **10h00** on **08 November 2021.**

AMM AJ:

A. INTRODUCTION

1. This is an appeal against: (i) the appellant's convictions for the rape of a minor, the sexual assault of three other minors, and their kidnapping, and (ii) the accompanying sentences imposed by the Regional Court, Soweto.

2. On 5 October 2011, the appellant, a 35-year-old South African male, was arraigned in the Regional Court, Soweto on the following charges (all allegedly committed in Soweto):

    2.1. count no. 1 – kidnapping one B K (B) on or about 8 November 2010 by "locking her under the room";

2.2. count no. 2 – the rape of B (an 11-year-old female[1]) on or about 8 November 2010 by inserting his penis "under her vagina" without her consent;

2.3. count no. 3 – kidnapping one M M (M) on or about November 2010 by "locking her under the room";

2.4. count no. 4 – sexually assaulting M (a 12-year-old female[2]) during 2010 by "placing his penis on her vagina" without her consent;

2.5. count no. 5 – the rape of M during November 2010 by "inserting his penis inside her vagina" without her consent;

2.6. count no. 6 – kidnapping one T M (T) during 2010 by "locking her inside the room";

2.7. count no. 7 – sexually assaulting T (an 11-year-old female[3]) during 2010 by "placing his penis on her vagina" without her consent;

2.8. count no. 8 – kidnapping H M (H) during 2010 by "locking her inside the room";

2.9. count no. 9 – the rape of H (an 11-year-old female[4]) during November 2010 by "inserting his penis inside her vagina" without her consent;

2.10. count no. 10 – the rape of H on or about 15 October 2010 by "inserting his penis into her vagina" without her consent.

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1 B was actually 10 at the time.

2 M was actually 11 at the time.

3 T was actually 10 at the time.

4 H was actually 10 at the time.

3. The rape charges were brought in terms of, inter alia, section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters), 2007 read with the provisions of section 51(1) of the Criminal Law Amendment Act, 1997. Section 3 defines the offence of rape as follows:

> "Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a Complainant ('B'), without the consent of B, is guilty of the offence of rape."

4. The appellant pleaded not guilty to the charges and, in exercising his constitutional right to remain silent, he offered no plea explanation. The State is thus put to the proof of each of the elements of each of the charges except for the issue of consent, which is irrelevant because of the young age of the complainants.

5. The trial commenced on 5 October 2011. The State called the following witnesses: B, M, H and T (being the four complainants) and Ms G M (M's and H's birth mother). The State also called the two nurses (sisters) who conducted the complainants' medical / clinical assessments and who authored and signed the respective complainants' J88 medico-legal reports. The appellant was the only witness to give evidence in his defence in the trial.

6. The appellant was subsequently convicted on 9 of the 10 counts (count nos 1, 2, 3, 4, 5, 6, 7, 8 and 9), albeit the appellant was found guilty on the competent verdict of sexual assault in respect of the count nos 5 and 9 rape charges. The appellant was found not guilty of count no. 10.

7. On 24 November 2011, after hearing the evidence of the parents of the complainants and the appellant, the trial court imposed the following sentences:

7.1. life imprisonment in respect of count no. 2 (i.e., the rape conviction);

7.2. five years in respect of each of the four sexual assault counts (being convictions in respect of count nos 4, 5, 7 and 9); and

7.3. five years in respect of each of the four kidnapping counts (being convictions in respect of count nos 1, 3, 6 and 8).

8. The trial court ordered the kidnapping sentences (cumulatively 20 years) and the sexual assault sentences (cumulatively 20 years) to run concurrently, with the result that the trial court sentenced the appellant to an effective term of life imprisonment plus 20 years.

9. The appellant's name was also entered into the register for sex offenders in terms of section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

10. Because a life sentence was imposed, the appellant has an automatic right to appeal in terms of section 309(1)(a) of the Criminal Procedure Act, 1977. The appellant now appeals against the convictions and the sentences imposed by the trial court.

11. The appellant was legally represented when pleading, throughout the trial and during the sentencing hearing by Mr Bantwini (on the instruction of the Legal Aid Board). The appellant appears however not to have been legally represented when filing his notice of appeal and the accompanying application for condonation for the late filing of his notice of appeal. The import, and timing, of his notice of appeal is dealt with later in this judgment.

12. Finally for purposes of this introduction, **S v Leve**[5] succinctly sets out the approach to be adopted by, and the parameters of, an appeal court in an appeal against a conviction as follows:[6]

> "The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a rehearing, because otherwise the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court's

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5 2011 (1) SACR 87 (ECG) para 8. See also **R v Dlhumayo and Another** 1948 (2) SA 678 (A).

6 An appeal court's parameters on sentencing is dealt with later in this judgment.

findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies."

B. THE EVIDENCE

(a) Introduction

13. Given their respective pre-pubescent ages, each of the complainants gave evidence in camera, via CCTV and qualified intermediaries. No objection was raised on behalf of the appellant in these regards.

14. Whilst the appellant raises no dispute in the appeal regarding the following, the appeal record nevertheless reveals that the trial court satisfactorily assessed and determined the following before each of the complainants gave evidence: (i) the qualifications and independence of the intermediaries, and (ii) the ability of each of the complainants' understanding and appreciation of the difference between lies and the truth and importance of being truthful.

(b) That which is common cause, alternatively not in dispute

15. The following is common cause alternatively there is no genuine or real dispute regarding the following:

15.1. the appellant, a 35-year-old male taxi-driver, stays in an outside room in Zola 3, Soweto with his girlfriend and child;

15.2. the appellant is not a sole breadwinner; his girlfriend is employed, albeit in the informal sector;

15.3. at the time of the events in question: (i) the four complainants knew the appellant, and (ii) the four complainants were known to the appellant (the

appellant knew, at least on his version, B and T by sight and, as mentioned immediately below, the appellant is the paternal uncle of M and H);

15.4. M's and H's mother, Ms M, was previously in a relationship with their (late) father who was the brother of the appellant – Ms M and the appellant's late brother were however never married;

15.5. the appellant's brother passed away in 2007;

15.6. at the time of the alleged offences, the four complainants were substantially below the age of 16 years and pre-menarche[7] – more particularly B was 10, M was 11, H was 10, and T was 10 years old;[8]

15.7. M and H, on occasion, slept overnight in the appellant's room;

15.8. the qualifications and experience of the two nursing witnesses who interviewed and assessed the complainants on 9 November 2010;

15.9. that medically and clinically recorded in the respective complainants' J88 medico-legal-reports;[9]

15.10. B showed "recent" injuries, bruising and clefts to her vaginal area indicative of and consistent with "recent medical penetration"; and

15.11. there is no DNA evidence[10] linking the appellant with any of the alleged offences.

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7 That portion of a pre-adolescent female's life before her first menstrual period.

8 If not younger.

9 A J88 is a pro-forma legal document used to document and identify a victim's injuries (providing written and/or pictorial evidence of the injuries). It is completed: (i) by a medical doctor or registered nurse, and (ii) in circumstance where a police or legal investigation is to follow.

(c) B's evidence

16. B was the first of the complainants to give evidence. She gave evidence through an intermediatory. At the time of the trial, she was 11 years old, being born on 8 November 2000. She was in grade 4. She was 10 at the time of the events in question. She is the complainant in count no. 1 (kidnapping) and count no. 2 (rape). Both offences are alleged in the charge sheet to have taken place on 8 November 2010. This is a significant date. It was B's 10th birthday.

17. Her evidence in chief was that, on 8 November 2010, she was walking together with M (her friend since crèche) when they meet with the appellant. B's spontaneous evidence thereafter, when asked about what happened "on 8 November, last year in the afternoon", was:

> "… he pulled me. Your worship after that he pulled me into his house. He undressed me my panties your worship. He inserted his penis your worship into my vagina. After that your worship he even told me that I should tell him if I am feeling pains. I told him your worship at the time when I was feeling pains that is when he said he was not going to do it too much. He is going to take it slowly. He even told me not to tell anyone your worship at home. M came back I told her your worship. M kept quiet. She just look at me your worship. From there your worship we left myself and M. We ate bunny chows."

18. When subsequently taken through her evidence in chief, the pertinent portions of B's evidence, in amplifying her aforesaid initial evidence, is the following: She knew the accused. She knew and referred to him as M's uncle.[11] She had previously seen him walking in the street and at M's house. She had also previously watched movies at his house. When the appellant pulled her inside his room, M had left to buy bunny chows.[12] M did not see her being pulled into his room and there was no one else present. She was wearing a skirt at the time. The appellant said that he "loved" her when he was "pulling

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10 A distinction must be drawn between DNA evidence and medical / clinical / physical evidence.

11 She also referred to the appellant on occasion as "M's father".

12 A take-away fast-food dish consisting of a hollowed-out loaf of bread filled with vegetable or meat curry. The transcript alternates between bunny chow and "quarters". The latter is also a reference to bunny chow albeit via a reference to the quarter loaf of bread usually used to encase the curry.

her panty". After he had "undressed" her panty and he had undressed himself, "he inserted his penis". The appellant was lying on top of her as he inserted his penis "in front of [her] in [her] vagina". She stated that "as he inserted his penis it was sore". At the time that he did so, she was lying on the bed. She (physically) demonstrated how she was lying by: (i) stretching her thighs, and (ii) showing her arms facing upwards. The appellant then informed her that she must tell him if she feels pain when "he was starting to insert". She said that it was painful "in front" of her and on her "tummy". She told the appellant it was painful and this is when he said he was "going to do it a little bit". The appellant only inserted his penis once. He stopped on his own saying that M was going to return (from buying bunny chows). When M did return, she (B) was sitting on the bed. The appellant went to buy beer. B told M that she was "going to lay charges" against the appellant because: (i) he threatened her life, and (ii) he inserted his penis into her vagina. M then told B what the appellant "used to do to them" (albeit M did not explain to B what he "used to do", alternatively this issue was not explored any further in her evidence). M and B then left and, at or near a shopping mall, met with L, B's cousin[13] (L was 13 years old). B told L what the appellant had done to her. They then saw police officers, whereafter they went together with the police officers to M's mother's house and then the police station and subsequently the clinic (albeit the visit to the clinic was the following morning, 9 November 2010).

19. In cross-examination, B's evidence was that M and her met the appellant on the day in question "if it was not around 13:00, it was around 14:00". She stated that she was "not sure" if M saw her being pulled into the appellant's room. When it was put to her that the accused was not there, B replied sharply: "He was present". The trial court's judgment records that when it was put to B that she was lying in her evidence in chief and that the appellant will deny that he met her on the day that he is alleged to have dragged her into his room she answered in a very loud voice and said "it was my birthday – he raped me". When asked why she never left, or ran away, after the appellant "finished doing silly things"[14] to her, she said she was waiting for M and she could not "cross the tarred road". When asked why she did not immediately inform M's mother when they got near to M's house, she stated that M feared being shouted at because her mother had told her that she should not go to the appellant's house. The appellant's legal representative then put

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13 L is referred to in the B's evidence as "the child to my sister" and in M's evidence as B's sister.

14 An unfortunate, if not insensitive, phraseology; possibly (hopefully) due to a loss in translation.

to B that the relationship between the appellant and M's mother "was not good". B agreed, albeit she stated that she was not told why. (The reasons for this claimed poor relationship were moreover not put to B.) When told that the appellant will state that he was working as a taxi driver "during that period", B's response was that the appellant fetched her that very same afternoon with Mr Simonyo's car and took them to a place "next to our place of residence" (on the evidence of M, M's mother's house is "at the back of Multi-Serve"). Thereafter, they met L and then the police. B never mentioned this string of evidence pertaining to Mr Simonyo in her evidence in chief and, whilst this was identified by the appellant's legal representative and the court, no attempt was made at clarification except for the appellant's representative to ask B if the accused "was not there", and to state that he was a taxi driver. This solicited her already mentioned staccato reply: "He was present". In closing the cross-examination, it was again put to B that the only reason for her to lay a charge against the appellant was because she was "influenced by M's mom which [sic] is not in good terms with the accused". B denied that she was influenced by M's mother.

20. In answer to the trial court's questions, B stated that she saw the appellant's "private part". She gave the following description: "Your worship it was thick on the front part your worship and it was reddish."

(d) M's evidence

21. As foreshadowed above, M gave evidence through an intermediatory. She was 11 at the time of the incidents.[15] She was 12 and in grade 7 when giving evidence in the trial.[16] She is the complainant in count no. 3 (kidnapping), count no. 4 (sexual assault) and count no. 5 (rape). The charge sheet alleges that the kidnapping and the sexual assault occurred on an unspecified date "during 2010" and the rape "during November 2010".

22. The record reveals that M cried at various times during her evidence, particularly when probed about her experience with the appellant. When asked by the trial court why she was crying, she answered "It is because it hurts me a lot your worship". In its judgment,

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15 The charge sheets in respect of count nos 4 and 5 incorrectly list her age as 12.

16 Her J88 form lists her date of birth as 18 March 1999.

the trial court, on at least two separate occasions, records that M was “overwhelmed” and in one instance that “we had to adjourn the proceedings to let her compose”. M was initially a reluctant, or hesitant, witness. (This does not however mean she was an unreliable or untruthful witness.)

23. A conspectus of M’s evidence, in chief and cross-examination, is the following: She was introduced to the appellant by her late father. She generally referred to the appellant as “uncle”. She also referred to him as “Daddy” in her evidence. On 8 November 2010, she was at her home playing with B. They met the appellant on their street and then left for the appellant’s house (room) to borrow CDs. Once at or near the appellant’s house (room), the appellant sent M to buy bunny chows. The appellant said B must stay. M then left and B stayed behind. On M’s return, the appellant and B were in the appellant’s room. B informed her that the appellant had closed the door and raped her. B further explained that there were “sperms”, and she had used a face cloth to “wipe the sperms”. M did not see the “sperms” but B showed her the face cloth, and M stated that it was damp. When M was asked if she knew what “sperms” were, she answered no. She proceeded by stating: “As I was there with B the accused person hide the key”. The appellant left the room first and advised that he was going to the “taxi rank”. (B’s evidence was that he left to fetch beer.) M and B then left together, and, after meeting B’s cousin, L, behind a Multi-Serve, they approached police officers present at a nearby coal yard. They explained to the police officers what had happened. They were then taken by the officers to M’s mother’s house, and, together with her mother, they were then taken by the police officers to the Jabulani Police Station, and subsequently to Zola Clinic (albeit the evidence similarly establishes that the clinic visit was the following morning, 9 November 2010).

24. In response to being told by B what the appellant had done to her; M’s evidence was that she told B about what had happened to her (M) when she had slept over at the appellant’s house. M’s evidence is that on an unknown date, subsequently stated to be during November (2010), H (her sister) and she slept at the appellant’s house. It was the first time that M had slept there. The appellant had asked her mother if they can sleep over. She had agreed because she did not know “he was a rapist at that stage”. The appellant and an aunt slept on the floor. M slept on the bed together with H, another of the aunts and the baby of the aunt who slept on the floor. They all slept in same room. In

the morning at around 09h00, after the aunts had already left, the appellant climbed onto the bed and "touched" B. The appellant, whilst undressing or already undressed to the stage of his underwear, took off M's clothes and placed his penis on her "top" her "front" and "private parts". They were both lying on their sides. He did not penetrate her but he was "moving it around there on top". M described the appellant's penis as pink and long. She then observed him place his "private part" on H, who was asleep and still clothed. This caused H to wake up. He did not penetrate H. With both girls awake and standing on the bed, the appellant instructed that one of M or H should "take a bath". An exchange took place between the appellant and M with the appellant stating that he wanted to "sleep" with them but that they were "denying" him. M told the appellant that she would tell her mother. The appellant, in response, initially promised them a hiding. M then stated that he "promised us an axe". M understood this to be a deadly threat. He attempted to prevent them from leaving, but they walked out "forcefully". M and H then left the appellant's room without taking a bath. This was at approximately 10h00.

25. During cross-examination, the appellant's counsel put to M that the appellant denied that he placed his private parts on top of her private parts. M's short reply was: "He did it". The trial court stated the following on this score in its judgment: "When it was denied by Mr Bantwini that he even did this she loudly shouted and said yes he did". It was also put to M that M falsely implicated the appellant because he was not on good terms with M's mother and that this had been ever since M's father had passed away and that the appellant was "banned" from attending at M's mother's home, where M's mother runs a shebeen, selling alcohol. M denied the versions put by the appellant's counsel. M stated that the appellant "will be lying" if he said that his mother and the appellant are not on good terms. M's evidence was that the appellant leaves his child with her mother, her mother buys food and disposable nappies for the appellant's child and her mother carries the appellant's child "at her back". M did however contextualise her answers by stating that her mother "only hates him now" because of the "painful things" he has done to M and H.

26. The appellant's counsel also put to M that on 8 November 2020 he was at the taxi rank and that he never met with B and M on that day. M's response, whilst admitting that the appellant is a taxi driver, was that the appellant did meet with them and that he met with them at "our street". Late in M's cross-examination, it was reiterated that the appellant's

version was that M was "influenced" by her mother to "falsely implicate" the accused. M's reply was: "No, my mother did not tell me anything".

27. In answering the trial court's questions, M stated that she saw the appellant's "private part … when he placed his private part on mine".

(e) H's evidence

28. H similarly gave evidence through an intermediary. She was born in 27 November 2000. At the time of giving evidence, she was 11 years old. She was 10 at the time of the events in question. She confirmed that she is known as both Z and H, but prefers to be called H. H is the complainant in count no. 8 (kidnapping) and count no. 9 (rape). The charge sheet alleges that both offences took place "during 2010". She stated that the appellant was her "uncle".

29. When asked if she knew why she was in court, her response was: "I am here because of the matter of rape". She said she that it was the appellant, her uncle, who had "raped us" (being M and H). H's evidence was that the appellant walked with them to his room from their home. (There is some uncertainty in the record whether their mother allowed the appellant to take them to his room.) M and her slept at the appellant's house. Her evidence on the sleeping arrangements differed to M's. She stated that they slept on the floor and the accused, and his child slept on the bed. The appellant's "wife", R,[17] was also present but it is not clear from the evidence where she slept. She left at 05h00 for work and took the baby with her. H says she knows this because the appellant woke them up and they asked the appellant why he was waking them up at 05h00. She knew it was 05h00 because she looked at "the watch". The appellant said they could sleep on the bed because R had left for work.[18] The appellant then placed M and H against the wall and instructed them to take off their clothes. The appellant sat on the bed. M and H

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17 Or spelt Rejoyce.

18 Initially in her evidence in chief, H said that when they first awoke in the morning the appellant gave M money to buy bunny chows and juice. M presumably left to purchase these because H's evidence then was that they "ate those things". It appears however that there were several interactions between M and the appellant. This is possibly why later and during her evidence in chief, the following exchange took place: "You said that [M] was given money to buy quarters and juice at which stage was she given this money - In the afternoon".

were only wearing their underwear. The appellant then asked who he must "start with". The appellant said that he had undressed himself and was "waiting". He then "pretended as if he was putting on his clothes". M and H then climbed on the bed and fell asleep, albeit there appears to have been a disagreement of sorts between them about not sleeping in front of the appellant.

30. H's evidence in chief regarding the subsequent events – albeit understandably disjointed in some respects given her age, but pieced together – is the following:

> "As we were sleeping like that we then heard someone pulling down our panties. Our panties were now already pulled down. After that he raped us. …
>
> What did you do when he raped you? -- He undressed our panties. Afterwards he inserted his penis inside.
>
> Where did he insert his penis? -- On the private part.
>
> Do you have another name for the private part? -- Yes.
>
> What is that name? – Vagina
>
> INTERPRETER: She is saying Koekoe in Zulu and it might be referred as vagina.
>
> PROSECUTOR: What was the position when he inserted his penis into your koekoe? – We were sleeping on the side. When we woke up we were facing upwards.
>
> Who was first to be raped? – M.
>
> Did you see M being raped? – Yes.
>
> What did he do at that stage when you saw M being raped? – I had covered myself or closed myself but I was peeping a little bit.
>
> Besides only peeping did you do anything else? – No.
>
> Did he say anything to M at that stage when he raped her? – Yes he said this matter must not involve our parents because he will shoot us.
>
> COURT: This matter.
>
> INTERPRETER: Yes your worship.
>
> PROSECUTOR: Did M say anything at that stage when he was raping her? – There is nothing she was busy pushing him.
>
> Now whilst she is busy pushing him what did he do? – M was busy saying please move away from me please move away from me.
>
> Did he then move away? – No.

Did he stop on his own or was he interrupted?

INTERPRETER: I beg yours.

PROSECUTOR: Did he stop on his own or was he interrupted? – Mshasazi knocked.[19]

Did he then respond to Mshasazi? – He said we must keep quiet.

And did you keep quiet? – Yes."

…

"PROSECUTOR: … Remember when you started testifying this morning you said that yourself and M was raped and you told the court how M was raped. –Yes.

Now what happened to you? – After he was finished with M he then raped me.

At which stage? Did it happen simultaneously or did it happen after some time? – He raped M and afterwards he pretended to be asleep; and then after a while he then raped me.

How did he pretend to be asleep? – Afterwards he was finished with M he went back to his place and then clothed himself and then fell asleep.

And then. – He woke up. When he woke up he raped me. He shaked me; and when I woke up I found him or a person on top of me.

Who was this person on top of you? – M.[20]

What happened then when he was on top of you? – After finding a person being on top of me I inserted my hands into the blanket and then shook M.

Your worship can the court just bear with me? You then said that you inserted your hands and then? – I patted on M she could not wake up but after she woke up she asked what is it what is it.

And then. – After I patted on M and she was asking what is it what is it what is it I then said to M, M let us leave.

Okay I am still at the stage when this person is now on top of you.

What happened while this person was on top of you? – He raped me.

Can you tell the court exactly how did that happen[ed]? – I was wearing a skirt. He removed my panties and he lifted my skirt and also my T-shirt. He undressed my panties up until on the legs. After he undressed me he inserted his penis into my vagina.

What was the position at that stage? – I was facing upwards.

And M? – He was on top of me.

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19 This is apparently a friend of the appellant, Mshasazi, who works at the taxi rank.

20 I.e., the appellant.

You said that he inserted his penis into your vagina did you see his penis? – Yes.

Can you describe it?

INTERPRETER: I beg yours.

PROSECUTOR: Can you describe it? – Yes.

Please do so. – Outside it is black and there is this round thing that is also black inside it is oh it is as if it is red.

Did you feel anything when he inserted his penis into your vagina? –

Yes.

What did you feel? – Pain.

Where was the pain? – Inside.

Can you point where inside? – Inside my vagina.

Did you say anything to him at that stage? – Yes.

What did you say? – I said let go of me because you are making me feel pain.

Did he comply? – He said no, I am enjoying.

Besides saying that I am enjoying did he say anything to you? – No.

Did he stop on his own or was he interrupted? – He stopped on his own.

What was M doing at that stage when he busy raping you? – M was asleep.

Now after he stopped what happened then? – He lied down or fell asleep and faced upwards. From there he took my hand and made it touch his penis and made up and; made it to make up and down movements.

What happened then while he was doing this? – Afterwards I moved away my hand he then took M's hand and made it to do the same movement.

What was the position regarding M was she awake or was she still asleep at that stage? – She was asleep and afterwards I … (intervenes)

COURT: Pinched. – Pinched on her and then she removed her hand.

PROSECUTOR: What happened after she removed the hand? – Then M woke up removed the blankets she then dressed up I also dressed up.

What happened then after you dressed up? – After we got dressed up then M said [Z] I am leaving I said also that I am leaving. He then said I am finished you can leave."

…

"We put on our panties we decided to run away. When we got to the door the door was locked and there was no key. We went back to stand [against] the wall where we stood before. At that stage we already realize that he was in possession of the key."

> Did you see the key in his possession? -- Yes
>
> Where was it ? -- The key was underneath the pillow.
>
> Did you see it beneath the pillow? -- Yes
>
> How did you see it? – At the stage where he saying to us we must take off our clothes he locked the door."

31. H's evidence additionally included that the appellant had licked their ears; Mshasazi, a friend of the accused, had knocked on the door and was calling out to the appellant saying that they had to go to work. The appellant told M and H that they had to keep quiet and pretend that there was no one inside the room. The appellant showed M and H a gun, told them that their parents were not supposed to know "anything about the matter if so he will shoot us." The appellant also showed them "sex movies" (late in the afternoon) and told him that they have to keep quiet and not tell anyone. The appellant also told them: "when you come here you must bring your friends". Regrettably, no enquiry was made in the trial to assess and understand what H understood to be "sex movies".

32. H and M subsequently left the appellant's room after M grabbed a knife and telling the appellant that if they did not get home their mother would scold them. H said the first person she spoke to about the incident was her "father", S.

33. During H's cross-examination, it was put to H that M did not mention her having touched the appellant's penis. H's reply, consistent with her aforesaid evidence, was at the time that M was made to touch it, she was asleep. She was additionally adamant in her cross-examination that it was true that M and H were penetrated by the accused and further that the appellant forced her to touch his private parts.

34. In answer to a question from the trial court, H said that she had slept at the appellant's room on four occasions.

(f) T's evidence

35. T M gave evidence next. She similarly gave evidence through an intermediary. There is some uncertainty regarding her age. T's mother's evidence (in the sentencing hearing) was that T was born on 22 February 2000. Her J88 form however lists her date of birth as 2002. She was 10, using a 2000 birth year, at the time of the events in issue and was 11 years old and in grade 6 when giving evidence. T is the complainant in count no. 6 (kidnapping) and count no. 7 (sexual assault), both offences alleged to have taken place "during 2010". She stated that she already knew the appellant as M's and H's "uncle" and had seen him before.

36. T's evidence was that at about 14h00 on a Saturday during October 2010, the appellant approached M and her in Bram Fischer and offered them a lift home in his taxi. He however never took them home. Despite their protestations, he instead took them to his room. It was the first time she had been to his room. He then threw them on the bed.

37. T's evidence thereafter proceeds as follows:

> "PROSECUTOR: … Right you said that you arrived at his place and then he said that you must enter then you entered and then what did he then do? – He then told us to undress.
>
> What were you wearing at that stage? – I was wearing my blue pair of trousers and a peach T-shirt.
>
> And M. – She was wearing a jean skirt or denim skirt.
>
> Did you then comply with the instruction to remove your clothing? – Yes, he then threatened to beat us or assault us if we do not undress.
>
> What happened then? – He then first slept with M.
>
> What do you mean when you say that he first slept with M? – He undressed her and then inserted his penis.
>
> Where did he, did you see him inserting his penis? – Inside a hole he wanted to insert it inside a hole and M did not allow him. He then placed it on top.
>
> On top of where? – On top inside the vagina.
>
> Is it now on top or inside the vagina? – On top.
>
> Did you see his penis? – Yes.
>
> Can you describe his penis? – It was brown. Yes that is what I saw.
>
> You can only remember that it was brown. – Yes.
>
> What was the position when he placed his penis on top of the vagina? – He was lying or sleeping on top of M.

Did he say anything at that stage? – No.

Did she say anything at that stage?

COURT: You mean M.

PROSECUTOR: M yes your worship. – Yes.

What did she say? – She then said please leave me I am going to tell me mother and then he said if you even tell your mother you will see yourselves dead.

At that stage when he was now lying on top of M what were you doing? – He had placed me in a corner.

And what were you doing in that corner? – I was sitting I was busy saying leave her leave her and he did not want to.

COURT: Who are saying leave me she? – Myself I was the one who was saying that.

PROSECUTOR: Did he then listen to your pleas that he must leave her? – No, he left M and then came to me.

What did he then do? – He undressed my trousers and my panty and licked me; and then moved his penis on top.

Where did he lick you? – On my vagina.

What was your position at that stage?

INTERPRETER: What was?

PROSECUTOR: Her position at that stage. – I was lying and he was opening my thighs.

How was he opening your thighs?

INTERPRETER: Demonstrating with her hands that he stretched thighs and made them to be in a V-shape.

PROSECUTOR: What was M doing at that stage when he was now licking your vagina? – I did not see M she was dressing but at the end I did not see her.

Do you know what happened to M? – No.

You said now after he licked your vagina what did he then do. – He said we must leave.

You said that he licked your vagina first; and then after licking your vagina what did he then do? – He inserted his penis.

Where did he insert his penis? – He made it move on top.

Was it now on top or was it inside? – On top.

On top of what? – On top of my vagina.

What was he then doing when he placed his penis on top of your vagina? – He was standing.

When was he standing? – He had placed it he was still placing it.

And what happened then? – He then said I must dress up we must leave.

… Now you said that you dress up and then what happened after you were dressed? – He took out a key from his pocket. We then left."

38. T's evidence in chief further included that: (i) the door to the appellant's room was locked and that whilst the appellant was engaged with T, M was unable to leave because of the locked door and the appellant was required to take the key from his pocket in order to unlock the door, and (ii) she was afraid to tell her mother about what had transpired because the appellant had threatened to kill M and her.

39. Under cross-examination, T stated she accepted a lift from the appellant because "we trusted him because he is M and Z's uncle". T's evidence was furthermore consistent about being given a lift by the appellant, being taken to his room, being told to undress, and the order in which he assaulted M and T. She stated however that she could not see clearly if M was penetrated. She agreed that the appellant did not penetrate her. She was however insistent that the appellant placed his penis on top of her private parts, and "he just moved it on top". She was also adamant that the appellant did meet them "when we were coming from Bram Fisher" on the day in question. The trial court's judgment notes that it was put to T in cross-examination that the accused denies placing his private parts on her that "[s]he lashed back in a very angry mood saying indeed he placed it [sic]".

(g) Ms M's evidence

40. Ms G M, the biological mother of M and H, gave evidence for the State next. She stated that she was on good terms with the appellant, that there were no problems with "bad blood" between them, and that she regarded him as her children's "uncle". She gave evidence about the complainants being brought to her home by the police on the afternoon in question and then proceeding to the Jabulani police station. It was only the next morning that they went to the clinic. She was advised by the nurses that her two children were "not injured on their private parts", but that blood tests still needed to be taken. She stated that the respective parents were not present when the complainants provided the statements.

41. It was put to Ms M in cross-examination that ever since the appellant's brother had passed away, i.e., the father of her children (M and H), that:

41.1. the appellant and her were not on good terms – to which she replied that “there is no such thing”;

41.2. the appellant was supposed to marry her on the passing of her husband, but he had declined[21] – again she replied that “there is no such thing”, adding that she could not marry the appellant because: (i) they “were not in a love relationship”, and (ii) custom / tradition did not compel him to marry her because she was never married to his brother;

41.3. she had banned the appellant from attending her shebeen, because there was a fight at the shebeen – similarly she replied that “there is no such thing”;

41.4. she accused the appellant’s family of being murderers – she answered that she “did not know of that”;

41.5. the accused had informed her that she was the one who had requested people to kill her brother – again she answered that she “did not know of that”;

41.6. she wished to gain possession of the house – to which she answered that she could not gain possession of the house because it was a parental home and belonged to her mother; and

41.7. the accused would inform the court that she wanted her children to falsely implicate the appellant of rape – to which she replied that “there is no such thing”.

42. In answer to the trial court’s questions, Ms M, stated that, despite H’s evidence, she only allowed her children to sleep at the appellant’s room twice. She also stated she was not married to the appellant’s brother and he had not paid labola.

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[21] Ukungenwa (or Ukungena), a traditional custom whereby a widowed woman becomes her brother-in-law’s wife.

(h) The J88 evidence and the laboratory specimen record

43. Sister Sibongele Nsibande is a qualified nurse with several healthcare nursing diplomas obtained during 2003 to 2016. These include amongst other things, sexual assault care. She was the next witness to give evidence on behalf of the State. She stated that she joined the medical profession in 2007, is currently employed by the Gauteng Department of Health and is based at the Zola Clinic, Soweto. Zola Clinic is primarily a child abuse clinic. She confirmed that she was the author and signatory to the J88 for B. The J88 is dated 9 November 2010 (also being the date of the clinical findings – she saw B at 09h00). The importance of that recorded in B's J88 is the following:

43.1. B accompanied M and met M's uncle, who sent M to go and buy something, and dragged B into his room, took off her panty and put his penis inside her vagina. He threatened her that if she told anyone he will kill her with the gun;

43.2. the child was pre-menarche;

43.3. the child had already washed, urinated and changed clothes;

43.4. she had (recently caused) bruises on her posterior fourchette[22] and fossa navicularis[23] but there was no bleeding;

43.5. her hymen was torn (a recent injury) and she had clefts at 1 o'clock and 4 o'clock; and

43.6. the findings were suggestive of recent medical penetration (which, in response to a question from the court, was explained to be a "penetration beyond the hymen").

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[22] The posterior fourchette is a thin fork-shaped fold of skin designed to stretch at the bottom of the entrance to the vagina.

[23] The fossa of vestibule of vagina or fossa navicularis is a boat-shaped depression between the vagina / hymen and the frenulum labiorum pudenda (i.e., the fourchette).

44. When asked in chief what she thought had caused the bruises on B's posterior fourchette and fossa navicularis, Sister Nsibande stated that they could have been caused by the friction caused by a penis and that the clefts are indicative of an injury "caused by any blunt object trying to push into the hymen".

45. Sister Nsibande's expertise and qualifications were not challenged during cross-examination. Sister Nsibande confirmed, whilst being cross-examined, that the clefts to B's hymen was a recent injury but added that the injury was of not more than a week, "maybe two or three days old" as an estimation.

46. Sister Nsibande was then led, on behalf of the State, on T's J88 (dated 9 November 2010, time 10h00). The importance of that recorded in T's J88 is the following:

46.1. her date of birth is 22 February 2000[24] (meaning she 10 at the time of the events in question);

46.2. they met the appellant at 15h00 on 30 October 2010 when he offered them a lift home and they agreed since he is M's uncle;

46.3. at the appellant's "place he threatened them with the gun and raped them";

46.4. the child is pre-menarche;

46.5. she had no consensual sexual partners during the past seven days;

46.6. the child had already washed, urinated and changed clothes;

46.7. there is no sperm tester bleeding on the posterior fourchette and the perineum was intact;

[24] However, T's year of birth is listed on the J88 form as 2002.

46.8. a forensic specimen was not taken due to the time frame, the incident occurred a few weeks ago (a statement inconsistent with the 30 October 2010 event); and

46.9. the absence of genital injuries does not exclude sexual abuse.

47. During her cross-examination on T's J88 and in response to the only question put to her, Sister Nsibande confirmed that T had not been penetrated.

48. The State then called Sister Buyiswe Kubeka. She confirmed that she obtained a diploma in general nursing in 1987, a diploma in clinical nursing science in 1992 and a certificate, obtained in 2000, in sexual assault from the Chris Hani Baragwanath Nursing College. She was presently stationed at Zola Clinic. She confirmed that she is the author of and signatory to M's J88 (dated 9 November 2010, time 10h49). The import of M's J88 is the following:

48.1. she was born on 18 March 1999 and as such was 11 years old at the time of the events in question;

48.2. at around 09h00 in October 2010 (she is not sure of the date), M and her cousin, T, "went to her paternal uncle's place" (being a back room);

48.3. on arrival, her paternal uncle put her on the bed and inserted his penis on her private part;

48.4. after finishing, he put M on the bed and inserted his penis on her private part;

48.5. since the alleged offence took place, the child has washed, urinated and changed her clothing;

48.6. the child was pre-menarche;

48.7. fraenulum of the clitoris is normal;

48.8. the urethral orifice looks red;

48.9. there was no posterior fourchette scaring, tearing or bleeding;

48.10. the fossa navicularis was normal; and

48.11. the hymen was intact.

49. Sister Kubeka, in chief, further stated that her findings were that it was inconclusive whether M had been abused and added that no specimens were collected.

50. Under cross-examination, Sister Kubeka stated that she did not observe any gynecological injury to M and she confirmed that could she not conclude whether M had been abused or not.

51. In answer to a question from the court, Sister Kubeka stated that the redness of the urethral orifice could be due to poor hygiene or irritation, but she could not say what (specifically) caused the redness.

52. Sister Kubeka was then led on H's J88 (dated 9 November 2010, time 11h30). The import of H's J88 is the following:

52.1. H was 10 years old, born on 27 November 2000;

52.2. the child reports that she was with her sister M at her paternal uncle's place (a backroom), where the paternal uncle inserted his penis on M's private parts;

52.3. the child is not sure of the date and the time but says it happened in 2010;

52.4. the child is pre-menarche;

52.5. since the alleged offence took place, the child has washed, urinated and has changed clothing;

52.6. fraenulum of the clitoris is normal;

52.7. the urethral orifice is normal;

52.8. there was no posterior fourchette scaring, tearing or bleeding;

52.9. the fossa navicularis was normal; and

52.10. the hymen configuration was intact.

53. As was her further evidence in chief in respect of M, Sister Kubeka stated that her findings were that it was inconlusive whether H had been abused and added that no specimens were collected.

54. In response to an identical line of cross-examination, Sister Kubeka stated that she did not observe any gynecological injury to H.

55. Sister Kubeka answered “no” to a question from the court whether injuries would be observed if the appellant’s “privates were brushed on their privates”.

56. The State closed its case after the admission of a laboratory specimen record[25] which records that no semen was detected and therefore “no DNA comparison will be carried out”.

(i) The appellant’s evidence

[25] It appears to be in respect of M, albeit the transcript is unclear – referencing only the “first child”.

57. The appellant was the only witness to give evidence in his defence. His evidence in chief was brief. He stated that he knew nothing of the sexual abuse on 8 November 2010, because he is a taxi driver, and he was at the taxi rank working the Zola to Lenasia route. When he was asked about the complainants testifying that "they were sexually abused, they were raped" by the appellant, the appellant's (initial) answer is somewhat curious. It is the following: "I do not know where they got that information from and I do not remember coming across them or raping them".

58. In answer to the question why they would so accuse him, the appellant stated that there is a "long history". The milestones and features of this history is the following:

58.1. his brother was in a relationship with the mother of two of the complainants, M and H, (being Ms G M) but not married to her;

58.2. his brother passed away in 2007 and his brother and Ms M were separated at the time of his passing;

58.3. he was called by his father, who was fond of Ms M, after the funeral and asked to start a relationship with Ms M and raise his brother's children;

58.4. there was an "pre-agreement" between his father and Ms M's mother that Ms M and he would "start a relationship";

58.5. he was not prepared to do so because: (i) he did not have feelings for Ms M, (ii) she was older than him, (iii) he was already living with somebody, (iv) he knew her "secrets", (v) he was not prepared to undergo the custom of marrying his brother's widow, and (vi) she had banned him from attending at her shebeen because of a fight at the shebeen involving his brother and in respect of which harsh words and sentiments had been exchanged between the two of them;

58.6. Ms M was "angry" and "hated" the appellant because he was not prepared to start a relationship with her; and

58.7. he only let his child play with her children, rather than him allowing her to look after his child.

59. He stated that he "knows nothing" about the allegations on 8 November 2010, and that he was at the taxi rank. He states that he drives the Zola to Lenasia route and does not operate near Dobsonville.[26] He states, in answer to a broad and unspecific question by his legal representative, that the complainants' testimony is "they were sexually abused they were raped by you" that he did "not know where they got that information from" and that he does "not remember coming across them or raping them".

60. It is in the aforesaid circumstances that the appellant's evidence was the following in respect of the complainants' motive:

> "… These children are my family and the person whom we do not see eye to eye [sic] which is the mother of these kids and maybe this is a way for her to punish me and to the fact that we have got a difference or we are not we do not see eye to eye me and her [sic]. I do not know."

61. That was the evidence in chief of the appellant.

62. The evidence of the appellant, whilst being cross-examined, was the following:

62.1. the relationship between him and Ms M was "not bad" between December 2017 and April/May 2010;

62.2. the "hatred" between Ms M and him started again in April/May 2010 after the fight at the shebeen involving his brother;

62.3. M's and H's evidence against him is due to his "bad relationship" with their mother, being Ms M;

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[26] Bram Fischer is a suburb of Dobsonville. Dobsonville does not form part, so was the appellant's evidence, of the STS Taxi Association route.

62.4. whilst they were not Ms M's children, he knew T and B by sight but that he did not molest them or sexually assault them;

62.5. he was at the taxi rank on 8 November 2010 from 04h00 to 19h00;

62.6. if the complainants used the same route that he was operating as a taxi driver, and if they did not have taxi fare, he would "give them a lift and drop them wherever they were heading to" – but he also stated that he "never gave them a lift";

62.7. "they" had slept over in his room albeit in the presence of the woman he is living with (his girlfriend) and that "they did not visit in her absence" and that "she was around the whole time" – however neither the prosecutor nor he identified who specifically was the "they" referred to;

62.8. his girlfriend leaves home around 08h00, because she starts work at around 09h00 and finishes work at 21h00 and that his girlfriend's sister looks after his child who lives in the "next street from where we reside and is dropped off there by his girlfriend"; and

62.9. T and B had never visited his "place of residence".

63. It must be pointed out for purposes of this judgment that the alleged "pre-agreement" purportedly between Ms M's mother and the appellant's father was not put to Ms M during her cross-examination. Neither was it put to her that she was "angry" and "hated" the appellant because he declined to be in a relationship with her.

C. THE JUDGMENT OF THE TRIAL COURT

64. Whilst the arguments presented on behalf of the State and the appellant on 23 November 2011 after the closing of the appellant's case were brief; they were regrettably neither particularly illuminating nor pithy. The judgment of the trial court stands in stark

contrast, however. It runs to 38 pages. The trial court's judgment comprises an extensive restatement, and analysis, of the relevant and material evidence in the trial, including the medial / clinical evidence.

65. The trial court was unhesitant in pointing out its difficulties with certain of the evidence led or where the evidence was not forthcoming, and it did so fairly. By way of example:

65.1. The trial court noted M's demeanor in the witness box. It held that it: "… was a bit difficult to get something from this child. She did not want to speak about what happened typical of children her age".

65.2. The trial court also did not ignore the discrepancy / conflicts / confusing portions of M's evidence. At the same time it pointed out, on several occasions, those respects on which M was adamant in her evidence – being the evidence directly pertinent to, at least one, of the appellant's assaults on her.

65.3. The trial court noted that H was reluctant to talk about what happened "on the bed", and that this had to be coaxed out of her by the prosecutor.

65.4. In respect of T, the trial court, as foreshadowed above, noted T's angry denial when it was put to her during the cross-examination that the appellant denies that he placed his private parts on hers.

66. The trial court additionally noted the evidence of H that the appellant told them that they should "bring friends" with them the next time they came to his room. The import of this is addressed below.

67. After dealing with the relevant evidence and whilst not referring to any relevant or specific case law, the trial court nevertheless set out the burden of proof and applicable tests in a criminal trial, and then pertinently within the context of the trial before it. It did so by stating the following:

> "The State has a duty to prove the accused's guilt beyond doubt. The accused has got no duty. If he brings about a version which is reasonably possibly true, the court ought to acquit him. Everything is in dispute. The accused denies ever meeting the children and doing things alleged by the state."

68. In analysing their evidence, the trial court paid particular attention to the fact that the complainants were children and the accompanying approach to be adopted because of this. The trial court held that they "testified in a childlike manner" and that this was to be expected because of their respective ages. It stated that it had "been sitting in the child's rape court" for ten years. The trial court proceeds in its judgment to state:

> "Child witnesses are different from adult witnesses especially when it comes to issues of sex and sexuality. And one must not think that when there are contradictions in the evidence about how events unfolded then they are lying because their way of disclosure is not the same as that of an adult. … But with a child you have to treat that situation very, very differently. But with a child it is a different scenario. Children can disclose gradually they can disclose by accident especially when they come to court and have to talk about what they did they think they are going to be assaulted by their mother and they think this is so wrong we cannot speak about these things and one must look at the evidence thoroughly and find or seek guarantees about whether they are telling the truth or not. And for fear of rejection by their friends… ."

69. The trial court additionally, but critically, warned that "… when it comes to children one has to have a guarantee that things really happened ...". As such, it is clear that the trial court fully appreciated the dangers inherent in a child's evidence, and that it was alive to it being required to treat the evidence of a child with caution.[27]

70. In respect of the B, the trial court held that – whilst it did not "add up about how she landed at the accused" – it stated that if regard is had to the evidence of M, put together with the evidence of B: "it adds up because it is very clear that the two met with the accused on 8 November 2010". The trial court furthermore assessed B's evidence within the context of: (i) her recent unchallenged clinical / medical injuries to her vaginal area, (ii) her not knowing "about sex and sexuality", (iii) her vociferous denial that "nothing was done to her", and (iv) 8 November 2010 being her birthday.

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[27] See **S v Manda** 1951 (3) SA 158 (A) at 163E-F.

71. The trial court was exceedingly cautious when evaluating M's evidence and in fact found, on a particular aspect of her evidence, that she was "not telling the truth". The trial court nevertheless found that M had been "sexualised by the accused". A reading of the appeal record leaves one with the strong, if not overwhelming, impression that the trial court's assessment is indubitably correct on this score. The appeal record reveals that M suffered at the hands of the appellant on possibly at least three occasions, albeit M only gave evidence regarding one occasion. M's evidence dealt with the first time that H and she slept in the accused's room. The second instance is in respect of H's evidence of the sexual assault on M and her. This assault, by all accounts, pertains to a different occasion than the one about which M gave evidence. Third, is the evidence of T about M and her being picked up by the appellant in his taxi and taken to his room, whereafter they were both assaulted by the accused. On an assessment of the evidence in the trial, the trial court is undoubtedly correct in finding that M may have been assaulted "even more than twice" by the appellant. The trial court additionally proceeded to find that "things which were improper happened to the children on different dates".

72. Whilst the trial court acknowledged that the appellant would play "sexual movies", it nevertheless found that the children's evidence as to the appellant's conduct and sexual handling and treatment of them was too advanced for children of their age. H's evidence was that she was shown these movies and, by inference, so too M. There is however no evidence that the accused showed either B or T these "sexual movies".

73. In concluding its assessment of the evidence of the complainants, the trial court found:

> "It is not denied that today's age of sexuality has been reduced children we know that children start having sex at the age of 13 maybe 12 but these children are different. When I listen to the evidence and how they presented themselves during the evidence without really charging [sic] demeanor, I am convinced beyond doubt that what happened to them is what happened to them."

74. The trial court also assessed, as it was enjoined to do, the appellant's evidence and version. Within the context of the trial court's above quoted conclusionary finding on the complainants evidence, the trial court proceeds to immediately thereafter state in its judgment that: "The same cannot be said of the accused version". The trial court's assessment of the appellant's evidence was holistic and took place within the context of

an assessment of the complainants' and Ms M's evidence. The trial court found that the complainants' evidence about their molestation would have had to have been taught to them over an extended period, yet their answers for the most part were "spontaneous". (The appeal record confirms that the evidence of B and T was particularly spontaneous, forthright and freely given. They did not require any coaxing or gentle probing by the prosecutor.) Accordingly, the trial court found "the accused version is far-fetched and not easy to be believe" and it is on this basis that the trial court rejected "his version as being far-fetched".

75. The trial court thus convicted the appellant as set out in paragraph 7 above. More particularly, the trial court found that it was "satisfied beyond doubt", or that "the state had proven" that the accused had committed, or that the appellant was guilty of, each of the offences with which he was convicted.

76. As already mentioned, the trial court handed down competent verdicts of sexual assault in respect of count no. 5 (the rape of M) and count no. 9 (the rape of H).[28] This is because the trial court was not satisfied that the penetration had taken place and, as such, rape was not proven.

77. The trial court found that whilst the defendant was charged with the rape of H (count no. 9) it was not satisfied that H was able to distinguish between rape being "putting on top" or "putting inside". The trial court moreover specifically held that due to her age and sexual inexperience, "H does not know what he was doing when he placed his privates on hers. She thought he was raping her because she is a child and has no sexual experience."

78. The trial court discharged the accused in respect of count no. 10 (the alleged October 2010 rape of H). The trial court was additionally of the view that the charges pertaining to count no. 9 and count no. 10 possibly pertained to the same events.

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[28] Regrettably the trial court misread or misunderstood count nos 4 and 7 is pertaining to rape. The trial court was however satisfied that the appellant had sexually assaulted M (count 4) and T (count no. 7). On balance, nothing turns on this however.

D. THE SENTENCING HEARING AND THE SENTENCES IMPOSED

79. The appellant's sentencing circumstances were (then) the following: He was, at the time of the trial, a 35-year-old. He has two children. The oldest was 3 years old and the youngest was 11 months old. He lived with his girlfriend, renting a room in Zola, Soweto. His girlfriend was employed in the informal sector. She earned a R300 per week. His highest education level is grade two. This is because he did not have somebody to help him further with his studies. His grandmother passed away whilst he was still young. He regarded himself as illiterate. He had been employed as a taxi driver since 1991, earning between R600 and R700 per week. He had no prior convictions and there were no (other) pending criminal proceedings against him. He had been incarcerated, pending the finalisation of the criminal trial, for about a year. He did not accept the convictions and maintained his innocence. As such, the appellant stated that he did "not see any sentence that is suitable".

80. Despite the appellant's stance, the trial court nevertheless sought to elicit, from the appellant, if there were any further compelling or substantial circumstances that would persuade it against imposing the required life sentence. The appellant however simply maintained his innocence. The trial court did nonetheless elicit the following from the appellant: the appellant was born in Empangeni. His parents were separated. He has 4 maternal siblings and 11 paternal siblings. He come to Johannesburg in 1990 at the age of 15.

81. No other witnesses or evidence was led on behalf of the appellant on the question of sentencing and more specifically the issue of compelling and exceptional circumstances.

82. The State led the evidence of the complainants' parents (who were also cross-examined). In this regard:

    82.1. B's father's evidence was that prior to 8 November 2010, she was "a very good child", that she was "clever at school" and she helped with chores and duties. His evidence was that he noticed a change after 8 November 2010. She "has become emotional even at school her performance has dropped", and that she

would “lose her temper easy”. She failed her 2010 school year and was required to complete her grade. She was “bunking” from school, pretending she was sick. She was however receiving counselling, but that this interfered with her schoolwork. B’s father stated that the appellant had “ruined” B’s virginity, and asked the court that the appellant be sentenced to “direct imprisonment”.

82.2. T’s mother gave evidence next. She confirmed T’s date of birth and age (11 years old). She stated that “before 2010”, T was “a very humble child who liked working”, but that there had been a change in her behavior in that “she then became violent and engage in fights with her brothers”. She had not previously behaved like this. She stated that the assault on T had a “sad” effect of the family. She nevertheless passed grade 5. On the issue of the appellant’s sentencing, she stated that: “Because now it is before court let the court take its course”.

82.3. M’s and H’s mother, G M, was the State’s last witness. Her evidence was that before the events in issue, M (who was 12 at the time of the trial) and H (who would be turning 11 on 27 November 2011) “were comfortable they were like working type of kids in the house” but that there was a change in their behavior “after they had been raped”. M always complained of “tummy aches” and “every time after school she would like to sleep”. Whilst M passed grade 6 in 2010, H failed grade 4 in 2010. H’s teachers inform her that H is “laughed at” by the other learners at school (albeit this issue and the cause therefore was regrettably not explored further). Both children received counseling. She said she was satisfied with the appellant’s convictions. As to sentencing, Ms M stated that the “court must take its course to overseeing the sentence”.

83. The appellant’s representative argued[29] that the mitigating factors included the appellant’s age and the absence of previous convictions. He argued blandly that a sentence of life imprisonment would be “inappropriate and unjust” and that the trial court

[29] Strangely, the argument on sentencing took place before the State led any evidence on sentencing. The appellant however makes nothing of this in his appeal and he does not appear to have been prejudiced in this regard. He certainly does not claim any prejudice. Moreover, his legal representative, Mr Bantwini, was asked by the trial court if he wished to address it on the closing of the sentencing evidence, which invitation he declined.

should “exercise its discretion”. He did however answer “yes” to the following question from the trial court: “Is he not a danger to society?”.

84. The State argued forcefully that there are no compelling and substantial factors at play but rather that the trial court should have regard to various factors such as B’s young age, the appellant’s violation of her privacy, human dignity, and bodily integrity and the need for the community to be protected from the appellant who had “violated four kids already and now M comes and say that he wants more kids”.

85. In its sentencing judgment, the trial court noted that the “pain through the eyes of these parents cuts through the situation.” The trial court found that because the accused does not believe he is guilty, his prospects of “rehabilitation are very slim”. The trial court further found that just because M, H and T were not penetrated, does not mean that the “situation was not dramatic for them”. The trial court stated that a consideration of the appellant’s personal circumstances (within the context of sentencing) “is not less important”. The trial court furthermore brought into account that the appellant had come to Johannesburg at the young age of 15 and he had to fend for himself without any (adult) supervision. The trial court was of the view that the appellant posed a threat to society. It feared that had the appellant not been apprehended when he was: “we would be sitting here today dealing with a number of little girls”. The trial court weighed the accused’s personal circumstances (including those pertaining to his two children) against the severity of the crimes for which he was convicted and felt obliged to impose the requisite minimum sentence in the absence of the there being compelling (and exceptional) circumstances.

86. Accordingly, on 24 November 2011, the trial court imposed the sentences that it did and as set out in paragraph 7 above.

E. THE APPEAL & GROUNDS OF APPEAL

(a) The unexplained delay in the finalisation of the appeal

87. The appellant was convicted and sentenced in the latter part of November 2011. His notice of appeal is dated 8 December 2011. It is accompanied by a similarly dated notice of application for condonation for the late filing of the notice of appeal, together with what appear to be appropriate reasons. The State understandably does not oppose the condonation application.

88. What is however worryingly unexplained and inexplicable, and not apparent from the appeal record, is the reasons for the delay between November 2011 and in the filing of the notice of the set down of the appeal dated 24 May 2021 (i.e., some approximately 9½ years after the filing of the notice of appeal). It is moreover not clear when the appeal record was filed; albeit the index to the appeal record, including the transcript, however has a "12/04/2012" date stamp at the bottom of the page. CaseLines indicates that the record was uploaded during July 2021.

89. Whilst the mantra "justice delayed is justice denied" is not all-encompassing and has its limits,[30] its import cannot be ignored; whatever it may be and whoever may be responsible therefor. There can be no suitable explanation for the aforesaid unexplained 9½ year delay. The delay, whatever its reasons, is gravely concerning, on the face of it unjust, and contrary to the constitutional dictate that a criminal trial is to be concluded "without unreasonable delay" (which dictate, by necessary implication, must include subsequent appeal proceedings).

90. In **S v Manyonyo**,[31] dealing with the preparation of a review record, the following was held:

> "The reason for the statutory insistence on the expeditious despatch of records on review is generally to promote the speedy and efficient administration of justice, but in particular to ensure that an accused is not detained unnecessarily in cases where the court of review sets aside the conviction or reduces the sentence."

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30 See the reference in **Lelaka v S** (CAF10/2014) [2014] ZANWHC 34 (10 October 2014) para 1 to paper delivered by the Right Honourable Sir Frank Kitto, formerly a Justice of the High Court Australia in a paper presented to a Convention of Judges of the High Court of Australia and the Supreme Court of the States and Territories in 1973".

31 1997 (1) SACR 298 (E).

91. Albeit in a different (civil) context but nevertheless applicable and apt, the Constitutional Court in **Minister of Health and Another NO v and Others (Treatment Action Campaign and Another as Amici Curiae)**[32] states that:[33]

> "An application to the SCA to grant leave to appeal on the ground that there has been a constructive refusal of leave to appeal by the High Court is a legitimate cause of action. An unreasonable delay in dealing with an application for leave to appeal interferes with a litigant's constitutional right to have access to court. This is of particular concern where the issues are urgent and the delay may cause substantial prejudice. A case in point is where an accused person has been convicted and sentenced to imprisonment. A long delay in dealing with an application for leave to appeal against the conviction and sentence may result in a miscarriage of justice if the appeal is ultimately successful."

92. Delays like this ought not to be tolerated, even if the appellant has not, for whatever reason, prosecuted the appeal. In this instance, the State set down the appeal for hearing. It could, and should, have done so long ago.

(b) The grounds of appeal

93. Turning to the notice of appeal itself: (i) it starts out being no more than a generic regurgitation of unspecified and unspecific grounds of appeal, not tied to findings of the trial court, but (ii) then worryingly progresses to assert that which is impossible to reconcile with that (actually) in issue in the trial, the unchallenged medical / clinical evidence and that for which the appellant was convicted. By way of example, the following assertions in the notice of appeal, and observations, bear mention:

93.1. in respect of the appellant's conviction: there is reference to unidentified "crucial witnesses not called" – albeit that these crucial witness are nowhere identified in the notice of appeal or in the appellant's heads of argument; and

93.2. in respect of the appellant's sentences, the following is worryingly asserted:

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32 2006 (2) SA 311 (CC) at para 68.

33 Footnotes omitted.

> "… these young virgins were allegedly raped violently six times and yet they had no virginal bleedings or discharges afterwards and suffered minimal injuries It is humbly submitted that if everything happened as the three kids alleged, they would have been more badly injured internally. The first complainant, B, nine years old virgin was raped six (6) times, however suffered no visible injuries to the rest of her body".

94. The appellant was not been convicted on the basis of six violent rapes. The appellant must know this. There are also four complainants, not three. The notice of appeal was filed some two weeks after the appellant's convictions and sentencing. The aforesaid fictitious content of the notice of appeal raises grave concerns regarding the appellant's appreciation, inter alia, for the seriousness of the crimes for which he was convicted.

(c) The appellant's heads of argument

95. The (expanded) grounds of appeal articulated in the appellant's heads of argument are generic, unspecific, and largely unhelpful. These include that the trial court: (i) committed a material error on the facts, (ii) erred when it found the State had approved the case beyond a reasonable doubt, (iii) the State's case "was fought with contradictions and inconsistencies, and (iv) that the sentences are "shockingly inappropriate".

96. In the appellant's heads of argument, these grounds of appeal are amplified in respect of each of the convictions and witnesses, in summary, as follows:

96.1. B:- The trial court failed to exercise the necessary caution when dealing with the evidence of the child witness, there are various inconsistencies and contradictions between the evidence of B and M, and the trial court erred in relying on the evidence of M;

96.2. M:- M was a reluctant witness, her evidence coaxed out of her, her evidence is not corroborated by H, and the medical / clinical evidence of her being sexually abused was inconclusive.

96.3. T:- Her evidence is that of a single witness, M did not corroborate her version of the events pertinent to her assault, and the trial court failed to "apply the cautionary rule sufficiently".

96.4. H:- Her evidence is similarly that of a single witness; there are material discrepancies, inconsistencies, and contradictions between M's and her evidence, and the trial court was selective, without sound reason, when deciding which portions of her evidence to believe.

96.5. Ms M:- There is an inconsistency in the evidence between H and her about the number of times that M and H are permitted to sleep at the appellant's house. H's evidence was that it was four nights, whilst Ms M's evidence was two nights.

96.6. The appellant:- The heads of argument regurgitate the evidence regarding Ms M's alleged motive for inducing the complainants to lay the criminal complaints against the appellant.

97. Much is additionally made in the appellant's heads of argument regarding the following:

97.1. the trial court purportedly misdirecting itself regarding to the complainants' understanding of matters of sex and sexuality because: (i) H testified that the appellant showed them "sex movies", and (ii) the age at which children now engage in sexual activities;

97.2. the mis- or non-application of the cautionary rule within the context of child witnesses; and

97.3. the State's inability to disprove the appellant's alibi that he was working as a taxi driver at the time given the uncertainty as to the "date on which the incidences occurred".

98. For the reasons advanced below, there is no merit in the appellant's appeal contentions, be they as stated in the notice of appeal or in the appellant's heads of argument. Moreover, the trial court applied due caution when considering the evidence of the complainants, as single (where applicable) child witnesses.

F. APPELAS AGAINST CONVICTIONS: THE APPLICABLE AUTHORITIES AND PRINCIPLES

99. The question on appeal regarding the appellant's convictions is ultimately whether the evidence in the trial is sufficient to prove the guilt of the appellant beyond a reasonable doubt; this being the State's burden of proof. In this regard, Plasket J in **S v T**[34] held that:

> "The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. The high standard of proof - universally required in civilised systems of criminal justice - is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994 to a fair trial. It is not part of a Charter for criminals and neither is it a mere technicality. When a Court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he/she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law. South Africans have a bitter experience of such a system and where it leads to."

100. In **S v Zuma**[35] the aforesaid principles was restated as follows:

> "The presumption of innocence is infringed whenever the accused is liable to be convicted, despite the existence of a reasonable doubt."

101. In summary, **S v van de Meyden**[36] emphasises that while the onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused

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34 2005 (2) SACR 318 (E) at para [37].

35 1995 (1) SACR 568 (CC) at paras [25] and [33].

36 1999 (1) SACR 447 (W) at 448 F–G.

beyond reasonable doubt, the corollary is that an accused is entitled to be acquitted if it is reasonably possible that the accused might be innocent.

102. The question, otherwise cast, is therefore whether, at the end of the trial, the evidence presented in the trial is, as a whole, sufficient to ground the conviction of the appellant. As confirmed in **S v Van der Meyden**[37] and as adopted and affirmed by the SCA in **S v Van Aswegen**,[38] the evidence in the trial as a whole must be considered. The overall picture is therefore of central importance.

103. It is also critical to remember, having regard to that set out in paragraph 12 above, when quoting from the decision in **S v Leve**, that an appeal court is not a trier of fact at first instance; that is the function of the trial court. The appellant concedes, as he must, the correctness of this position in his heads of argument.

104. That being the case, the credibility findings, and factual findings of the trial court cannot be disturbed unless the recorded evidence shows them to be clearly wrong.[39] This was expressed in **S v Francis** as follows:[40]

> "This Court's powers to interfere on appeal with the findings of fact of the trial Court are limited ... In the absence of any misdirection the trial Court's conclusion ... is presumed to be correct. ... In order to succeed on appeal ... a reasonable doubt will not suffice to justify interference with its findings ... Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with the trial Court's evaluation of oral testimony ...''

105. In respect of sexual assault cases specifically, the following decisions and principles are particularly pertinent:

105.1. In **Otto v S**[41] the Supreme Court of Appeal held:

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37 1999 (2) SA 79 (W).

38 2001 (2) SACR 97 (SCA).

39 **S v Hadebe and Others** 1997 (2) SACR 641 (SCA) at 645.

40 1991 (1) SACR 198 (A) at 204C-E.

> "The onus rests on the State to prove all of the elements of the offence of rape, including the absence of consent and intention. That is so even where, as in this case, the version put to the complainant by the appellant's legal representative was a denial of any sexual contact with her."

105.2. Our law no longer recognises the cautionary rule which enjoyed unwarranted general prominence in sexual offence cases. In this regard, **S v Jackson**[42] held:

> "In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."

105.3. Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 statutorily codifies the position stated in **Jackson** by providing that a court may not treat the evidence of a complainant in a sexual offence "with caution, on account of the nature of the offence".

105.4. The court in **S v K**[43] emphasises that the consideration that complainants in sexual cases happen to be the most vulnerable members of our society "should not be allowed to be a substitute for proof beyond reasonable doubt or to cloud the threshold requirement of proof beyond reasonable doubt". It also emphasised that "judicial officers ought to and are expected to evaluate evidence properly and objectively as a whole and against all probabilities in order to arrive at a just and fair conclusion".

106. Turning to the evidence of a single witness, section 208 of the Criminal Procedure Act, 1977 provides that: "an accused may be convicted on the single evidence of any

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41 [2017] ZASCA 114.

42 1998 (1) SACR 470 (SCA) at 476 and see **S v M** 1999 (2) SACR 548 (SCA) at 554 to 555.

43 2008 (1) SACR 84 (C) at para [6].

competent witness". Young children are competent witnesses if, in the court's opinion, they understand what it means to tell the truth.[44]

107. Apropos the accompanying cautionary rule, it is trite that for a trial court to convict on the evidence of a single witness, the evidence must be sufficient to convict. The evidence however need not be clear and satisfactory in every material respect as is commonly believed.[45]

107.1. In **Sauls**,[46] it was held that there is no rule of thumb, test, or formula to apply when it comes to considering the credibility of a single witness. Rather, a court should consider the merits and demerits of the evidence, then decide whether it is satisfied that the truth has been told, despite any shortcomings in the evidence.

107.2. In **R v Abdoorham**,[47] Broome JP held that a court is entitled to convict on the evidence of a single witness: "if it is satisfied beyond reasonable doubt that such evidence is true. The court may be satisfied that a witness is speaking the truth notwithstanding that he is in some respect an unsatisfactory witness".

107.3. The court in **S v M**[48] held that the fact that the complainant had been shown to be an unreliable and, in some respects, untruthful witness, was a factor that might prompt a court to adopt a cautionary approach and to look for some supporting material for acting on the impugned witness' evidence.[49]

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44 See **Zeffertt et al**, The South African Law of Evidence, LexisNexis at 671.

45 As is stated to be the requirement, see **S v Sauls** 1981 (3) SA 173 (A) at 179G-180G quoting **R v Mokoena** 1932 OPD 79 at 80. See **BR Southwood**, Essential Judicial Reasoning, LexisNexis at page 71.

46 Supra.

47 1954 (3) SA 163 (N) at 165.

48 2000 (1) SACR 484 (W). See also **R v Makanjuola, R v Easton** (1995) 3 All ER 730 (CA), a decision referred to with approval in **Jackson**.

49 See also **S v Van der Ross** 2002 (2) SACR 362 (C) and **S v Jones** 2004 (1) SACR 420 (C) where the complainant was a single witness and there were unusual features in her evidence which, in the court's view, triggered the exercise of caution.

107.4. It has also been said more than once that the contrary rule should not displace the exercise of common sense.[50]

108. As to when a trial court is faced with the evidence of single witnesses who are young children, the court in **Woji v Santam Insurance Company Ltd**[51] examined the concept of trustworthiness and found, relying on the views of **Wigmore**,[52] that it comprised the following four components (considerations):

> "(a) the capacity of observation which the Court should ascertain whether the child appears sufficiently intelligent to observe;
>
> (b) the power of recollection which depends on whether the child has sufficient years of discretion to remember what occurs;
>
> (c) narrative ability which raises the question whether the child has the capacity to understand the questions put and to frame and express intelligent answers; and
>
> (d) sincerity in regard to which the Court should satisfy itself that there is a consciousness of the duty to speak the truth."

109. Bekink[53] explains and deals with the cautionary rule pertaining to the evidence of child, and its application, as follows:[54]

> "The cautionary rule relating to the evidence of children entails that the presiding officer should fully appreciate the dangers of accepting the evidence of children. …

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50 See **BR Southwood**, supra at 73.

51 1981 (1) SA 1020 (A) at 1028B-D.

52 At para [506].

53 Mildred Bekink is a Senior Lecturer in Child Law, University of South Africa.

54 Bekink, **Defeating the anomaly of the cautionary rule and children's testimony – S v Haupt** 2018 (1) SACR 12 (GP), De Jure (Pretoria), Vol. 51, N.2, Pretoria, 2018. Bekink raises persuasive arguments culminating in her submission that the abolition of the cautionary rule should no longer be postponed, inter alia, because: "the rule is based on outdated and discredited beliefs about the trustworthiness of child witnesses and is void of a clear rationale for its application it will be difficult to pass constitutional muster". The constitutionality of this cautionary rule is however not required to be considered within the context of this judgment, because the appellant's reliance on the rule is not definitive of this appeal for the reasons set out in this judgment.

> In terms of the cautionary rule a court should not easily convict unless the evidence of the child has been treated with due caution. Where the child is also the sole witness the evidence will be regarded with even more caution (S v Mokoena 1932 OPD 79 at 80). As a consequence the court will seek corroboration, even though corroboration of a child's evidence is not required by law or by practice. A child's evidence, if not corroborated, will therefore be scrutinised with great care in terms of this rule and will be accepted with great caution (R v Manda 1951 (3) SA 158 (A)).
>
> There is no particular age below which the cautionary rule applies. The degree of corroboration or other factors required to reduce the danger of reliance on the child's evidence will vary with the age of the child and the other circumstances of the case (R v Manda 1951 (3) SA 158 (A); Woij v Santam Insurance Co Ltd 1981 (1) SA 1020 (A)."
>
> ...
>
> The essential question in any criminal matter is whether the state has proven its case beyond a reasonable doubt. The cautionary rule should not be allowed to be a substitute for the test of proof beyond a reasonable doubt. Judicial officers are expected to evaluate evidence properly and objectively. This should be conducted as a whole and against all probabilities in order to arrive at a just and fair conclusion. Judicial officers are trusted to weigh the evidence correctly in order to distinguish between trustworthy and unreliable evidence (See S v Haupt par 16; S v Hadebe at 426f-426h; S v Chabalala at 139i-140a). If the witness's evidence is found to be unreliable, the court may reject it. Even though it may be necessary in a particular case to approach the evidence of the child with caution it does not mean that a general cautionary rule should be applied. S v Haupt represents an example of such a case and illustrates that it is possible to reach a fair conclusion without the application of a general cautionary rule."

110. Accordingly and when analysing a child's evidence, the trial court must be satisfied that child witness is trustworthy. **S v De Beer**[55] holds, not dissimilarly from the factors listed in **Woji**, that the trial court, in doing so, should consider: (i) whether the child is able to narrate his/her experience with clarity, (ii) whether the child is able to provide sufficient details of the offence, (iii) whether the child understands the importance of being truthful, and (iv) whether the child understands what he/she is saying.

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[55] [2016] 3 All SA 746 (GJ) at para [33].

111. Finally, it is trite that the failure to put one's version to a witness amounts to the witness' testimony being regarded as correct and unchallenged.[56]

G. AN EVALUATION OF THE APPEAL GROUNDS

112. With the above trite principles restated, regard must now to be had to the grounds of appeal. There is little to nothing to commend the grounds of appeal in the appeal record. This is particularly so when the grounds of appeal and the submissions contained in the appellant's heads of argument are measured against the applicable authorities and the contents of the appeal record.

(a) B: The rape conviction

113. The appellant was not convicted of rape "merely on the say-so" and evidence of a single (child) witness.

114. B's evidence about the relevant and material events leading to her rape and her rape is clear, consistent, unambiguous, and forthright. The trial court records in its judgment that:

> "She was screaming when it was put to her that nothing was done to her and she said I will never forget because it was my birthday."

115. B's rape is furthermore confirmed by the unchallenged medical / clinical evidence and her physical injuries. There is also M's evidence about being told by B about the rape almost immediately after it occurred and being shown the damp cloth used by B to wipe away "the sperms".

116. The appellant argues that it cannot be said that the complainants are "completely clueless regarding matters of sex and sexuality", this is in part because they watched "sex movies" at the appellant's house. There is however no evidence that B, as opposed

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[56] **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 2000 (1) SA 1 (CC) at 36J-37E, paras [61] to [63].

to H, had watched “sex movies” at the appellant’s house and, as such, there is no evidence that B was not sexually naïve. The trial court assessed that her evidence regarding the rape falls beyond her experience as a child. There is nothing to gainsay this assessment.

117. The appellant additionally pursues the absence of DNA evidence incriminating him. This challenge is unmeritorious because it ignores the unchallenged evidence: (i) of B and M regarding the “sperms” being wiped away with a cloth, and (ii) B, when attending at the clinic the following day, had, since the incident, already washed, urinated, and changed her clothing. B furthermore had suffered physical injuries consistent with a recent rape. The importance of the DNA evidence for purposes of identifying the appellant as B’s rapist is overstated. This is because B knew and could identify the appellant.

118. For the reasons already listed and quoted above, when dealing with the trial court’s judgment, the trial court was mindful of B being a child witness and that required of it in assessing her evidence.

119. Furthermore, any possible inconsistencies and/or contradictions that they may be in B’s evidence are inconsequential and immaterial. If any anything, these are the product of: (i) her age, (ii) incorrect and artificial distinctions being drawn between the evidence of M and B, and (iii) not unexpected, but inconsequential, gaps in reconciling M’s and B’s evidential timelines. As already mentioned, B’s evidence is in any event corroborated in material respects by the unchallenged medical / clinical evidence, the already mentioned evidence of M, and the reporting of the assault that same day to the police and her mother.

120. The applicant’s alibis about: (i) being at the taxi rank the time of B’s rape on 8 November 2010, and (ii) Ms M’s vengeful motive, on a conspectus of the evidence, lacks credibility. This lack of credibility is exacerbated by there being no basis for B to be influenced by Ms M. The alibis were also not offered, for example, when the appellant pleaded not guilty or in a plea explanation. They were raised for the first-time during the cross-examination of certain of the State’s witnesses.

121. The belated raising of an alibi defence may adversely affect the value accorded thereto. In **S v Thebus and Another**,[57] the Constitutional Court recognised that it would be an illegitimate basis for a court to draw an adverse inference against an accused for failing to raise his alibi timeously. Standing alone, it does not justify an inference of guilt as this would be contrary to the right to remain silent. The Constitutional Court nevertheless held in **Thebus** that a failure to raise an alibi timeously is not a neutral factor but that it can legitimately be considered, as one of the various factors to be brought into account, in evaluating the evidence as a whole to determine the truthfulness of the alibi. The issue of the appellant's alibis is dealt with again later in this judgment.

122. Whilst we deal more extensively with the issue of the appellant's alibis later on in this judgment, the appellant's alibis, within the context of the totality of the evidence and the (trial court's) impression of the witnesses on the court,[58] are improbable. The trial court correctly rejected them. The trial court's holistic consideration of the evidence, and rejection of the appellant's versions (alibis), cannot be faulted.

123. Accordingly and within the context of **S v Leve** and **S v Francis**, there is no basis, and no exceptional case exists, for interfering on appeal with the trial court's evaluation of the oral testimony. It also cannot be said that the trial court's findings are patently wrong.

124. Overall, the trial court cannot be faulted. It adopted a holistic and overall approach to the evidence. The following statement in **S v Chabalala**[59] is particularly apt in this appeal:

> "The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

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57 2003 (2) SACR 319 (CC).

58 **S v Kandowa** 2013 (3) NR 729 at 732F–I, a judgment of the Namibian High Court, Main Division, Windhoek.

59 2003 (1) SACR 134 (SCA) at para [15].

125. Considering the evidence in the trial as a whole regarding B's kidnapping and rape, no case exists for this court, on appeal, to interfere with the trial court's evaluation of the witnesses' oral testimony and the trial court's credibility findings. The trial court's conviction of the appellant for the rape of B must therefore stand.

(b) B: The kidnapping conviction

126. In its judgment, the trial court considered B's kidnapping within the context of B and M being picked up in Bram Fischer by the appellant whilst driving his taxi and then being taken by the appellant to his house.

127. The trial court however confuses B with T. The evidence in the trial was that the appellant took M and T (not B) from Bram Fischer by taxi to his house. The trial court – when traversing and recounting the evidence of the T in its judgment and when convicting the appellant of kidnapping T – specifically dealt with the accused picking M and T up in Bram Fischer, but instead of dropping them off, he proceeded to take both of them by taxi to his room.

128. The trial court's (initial) confusion on this score is however inconsequential because notwithstanding the aforesaid, the evidence in the trial establishes beyond a reasonable doubt that B was "pulled" (forced) into the accused's room against her will (i.e., "he pulled me he put me in his house") and, in so doing, he deprived her of her freedom of movement.

129. However, the issue of B's kidnapping, and the accompanying kidnapping conviction, requires a consideration of an issue not raised as a ground of appeal. This is because B's kidnapping takes place within the broader context of her rape.

130. It is trite that an accused cannot be convicted twice of the same offence. That said, the then Appellate Division in **S v Grobler en 'n Ander**[60] confirms that the State is not barred from putting charges that might constitute a duplication of convictions but that the trial

[60] 1966 (1) SA 507.

court has to guard against convicting an accused on charges that constitute a duplication of convictions. The rule is obviously to prevent a duplication of convictions in instances in which the accused's criminal conduct reveals only one offence which could be contained in a single comprehensive charge. A duplication of convictions may seriously prejudice an accused in that he might receive a heavier sentence than one which he would or should have received if a duplication of convictions had not occurred. Further prejudice may occur if the accused is sentenced in a subsequent case and that sentence is influenced by the number of previous convictions which would then include the duplications of convictions.

131. **Hiemstra's** commentary on section 83 of the Criminal Procedure Act, 1977 states that he "test for splitting" (duplication of conviction) is as follows:

> "There is no universally valid criterion for determining whether there is splitting. In S v Davids 1998 (2) SACR 313 (C) the topic is discussed afresh and the most important decisions are usefully summarised. The courts over the course of time developed two practical aids (S v Benjamin en 'n Ander 1980 (1) SA 950 (A) at 956E-H):
>
> (i) If the evidence which is necessary to establish one charge also establishes the other charge, there is only one offence. If one charge does not contain the same elements as the other, there are two offences (R v Gordon 1909 EDC 254 at 268 and 269). This can be called 'the same evidence test'.
>
> (ii) If there are two acts, each of which would constitute an independent offence, but only one intent and both acts are necessary to realise this intent, there is only one offence (R v Sabuyi 1905 TS 170). There is a continuous criminal transaction. This test is referred to as 'the single intent test''.

132. Ordinarily, the relevant and particular circumstances of a specific case will dictate which one of these two aides (tests) applies.[61] The SCA referred to the "single intent test" with approval in **S v Dlamini**[62] but added:

> "There is, however, no all-embracing formula. The various tests are more guidelines, and they are not rules of law, nor are they exhaustive. Their application may yield a

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61 **R v Johannes** 1925 TPD 782.

62 2012 (2) SACR 1 (SCA).

clear result but if not, a court must apply its common sense, wisdom, experience and sense of fairness to make a determination."

133. Whether "the same evidence test'", the "single intent test" or common-sense approach is applied, the appellant kidnapped B solely for purposes (intent) of raping her. Without the kidnapping, there would not have been the rape. The two offenses are inextricably woven together. B's kidnapping and rape go hand-in-hand. They are time bound and, together with the death threats, constitute a single criminal transaction. The evidence necessary to sustain the kidnapping is necessary to sustain the rape conviction. In the result, the conviction of the appellant on the charge of kidnapping amounts to a duplication of convictions ("splitting of charges") within the context of the rape conviction. The defendant was therefore wrongly convicted of kidnapping.

134. Whilst this is not a specific ground of appeal and does not it appear in the appellant's heads of argument as a ground upon which to challenge the kidnapping convictions, there has nevertheless been a material misdirection on the part of the trial court in this regard, and in respect of which an appeal court is entitled to, if not must, interfere. As such, the appellant's conviction for the kidnapping of B must be set aside.

(c) M: The sexual assaults and kidnapping convictions

135. We refer to that stated above regarding the trial court's assessment of M and her evidence. The trial court did not accept M's evidence merely at face value. It knew it was dealing with a reluctant child witness. The trial court correctly found that the appellant had sexually assaulted M. Despite M, at times, being a reluctant or not easily forthcoming witness and just because her evidence was required to be gently coaxed out of her, the trial court's conviction of the appellant, on the totality of the relevant material evidence, nevertheless cannot be faulted. The trial court noted that M "is adamant that he placed his privates both on her and [Z]." [63] M's adamance is reasserted and restated in the following extract from the trial court's judgment:

[63] I.e., H.

> "M confirms that the accused did not insert his privates into hers, he only moved on top of her. When it was denied by Mr Batwini that he even did this she loudly shouted and said yes he did."

136. The inconsistencies and contradictions in M's evidence when measured against the evidence of H and T, confirm that B, H, T, and M were not coached as witnesses and did not calibrate their evidence; a necessary, if not unavoidable, corollary of the appellant's unsustainable version that the criminal complaints were pursued against him because of Ms M's claimed personal vendetta against him.

137. Moreover, the appellant's reliance on **R v Manda**, a decision dealing with the cautionary rule within the context of the "imaginativeness and suggestibility of children" must, for the same reason, fail.

138. The trial court furthermore observed, as already mentioned, M being overwhelmed and crying, requiring even an adjournment. No doubt this is because her re-living and re-telling of the events in issue were understandably traumatic for her. It is also highly probable that M's reluctance to give evidence is because the appellant, a father figure, has groomed and sexually assaulted her on more than one occasion.

139. The appellant's criticism that M was only forthcoming after B revealed to M what has happened to her, is unfounded. It was also not explored in the cross-examination of M. On the inherent probabilities, it can be expected that M found comfort, and refuge, in learning that B, her friend since crèche, had also suffered at the appellant's hands and that she could confide in her. In due course, this was the position too for H and T, with their sisters, cousin and friend similarly having suffered at the appellant's hands.

140. Given that the appellant was not convicted of rape (requiring penetration), the fact that there is an absence of medical / clinical evidence of M being sexually abused is inconclusive and inconsequential.

141. As foreshadowed above, an unfortunate, but worrying, feature of M's evidence is that the appellant had, by all accounts, groomed her for some time and sexually assaulted her on more than one occasion. The appeal record reveals, at the very least, that M was

sexually assaulted possibly on three separate occasions, notwithstanding the appellant only being convicted for two of these.

142. Considering the evidence in the trial as a whole regarding M's sexual assaults and kidnapping, no case exists for this court, on appeal, to interfere with the trial court's evaluation of the witnesses' oral testimony and the trial court's credibility findings. The trial court correctly convicted the appellant for the two sexual assaults of M. The convictions must stand.

143. The appellant's conviction for kidnapping M must however suffer the same fate, for the same reasons, as the kidnapping conviction for B. This kidnapping conviction must too be set aside.

(d) T: The sexual assault and kidnapping convictions

144. T is the sole witness for her sexual assault. The evidence upon which the trial court convicted the appellant in respect of the sexual assault and kidnapping of T is thus dependent solely upon the evidence of T. The appellant's conviction is however not precluded by the application of the cautionary rule, when consideration is had to the already mentioned authorities and academic work.

145. T's evidence about the relevant and material events leading to her sexual assault and the assault itself is clear, consistent, unambiguous, and forthright. The fact that there is no corroborating evidence is not in and of itself definitive of the value of her evidence. As foreshadowed above, whilst a court may seek corroboration, the "corroboration of a child's evidence is not required by law or by practice". Nevertheless, an interrogation, undertaken with great care and caution, of T's evidence in the trial does not reveal any reason for her evidence to be rejected simply because she is a single witness.

146. A consideration of T's evidence (which was satisfactory in every material respect) and the relevant and material evidence in the trial as a whole, does not establish any recognisable basis for an appeal court to interfere with, or second-guess, the correctness of the trial court conviction of the appellant for his sexual assault of T (count no. 7).

147. However, the appellant's conviction for T's kidnapping (including being spirited away in the appellant's taxi) unavoidably suffers the same fate as the kidnapping conviction for B and M, and then for the same reasons.

(e) H: The sexual assault and kidnapping convictions

148. H's evidence is not solely that of a single witness. M was present at the time and gave (corroborating) evidence about the appellant's assault on her. The inconsistencies between M and her evidence are inconsequential and immaterial; and may possibly be because they gave evidence about separate instances. H in any event provided extensive evidence, including demonstrating to a certain extent, that which took place when the appellant sexually assaulted them.

149. The trial court correctly assessed and accounted for H's inability to identify "rape" as requiring penetration, and, accordingly, her evidence on this score cannot be criticised. Her evidence ultimately was that the appellant did not penetrate her but instead "moved his penis on top" of her vagina.

150. In respect of her account of the rape (penetration) of M, her evidence must be qualified by the statement that at the time, she "had covered" herself and was "peeping a little bit". The nature and extent to which she was able to fully observe her account of the rape (penetration) of M was tested in evidence and she conceded that she could not see clearly what happened to M. Accordingly, the contradiction in her evidence regarding the rape (penetration) of M was ultimately clarified, and similarity her evidence on this score cannot be criticised.

151. Returning to the appellant's sexual assault on H, H's evidence was satisfactory in every material respect. A consideration of the evidence in the trial as a whole confirms the correctness of the trial court's conviction of the appellant on the competent charge of sexual assault count (count no. 9). The appellant has failed to establish a basis for an appeal court to interfere with the trial court's findings and conviction of the appellant on this score.

152. The appellant's conviction for kidnapping (including her being locked in the appellant's room with the appellant hiding the key to the door under a pillow) constitutes a duplication of convictions (a "splitting of charges") within the context of the sexual assault conviction. As such and like the kidnapping convictions for B, M and T, the appellant's conviction for kidnapping H cannot stand.

(f) Ms M's evidence

153. The contradiction in the evidence of Ms M's and H as to the nights that the children slept at the appellant's house is inconsequential, and nothing needs to be said any further on this score.

(g) The trial court's rejection of the alibi defences

154. As already stated, there is no duty on the appellant to prove his alibi.[64] That said, an alibi must be considered and assessed within the context of "the totality of the evidence in the case, and the Court's impressions of the witnesses".[65] As is also stated above, the trial court rejected the versions (alibis) of the appellant on a holistic consideration and evaluation of the evidence.

155. Whilst mindful of the principle that it is not incumbent upon an accused to prove his or her alibi or defence,[66] some regard must nevertheless be had to the fact that the accused produced no witnesses to give evidence and/or corroborate his assertions regarding: (i) his whereabouts on 8 November 2010, (ii) him being at the taxi rank on 8 November 2010 (including, importantly, the time at which he arrived at the taxi rank on that day, if at all), (iii) the alleged insistent position adopted by his father regarding Ms M on the passing of his brother, and (iv) the alleged "pre-agreement" purportedly concluded between Ms M's mother and his father.

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64 See **S v Shabalala** 1986 (4) SA 734 (A) and **R v Hlongwane** 1959 (3) SA 337 (A) at 340H-341B.

65 **Maluleke v S** (A285/2016) [2017] ZAGPJHC 72 (10 March 2017).

66 See **R v Hlongwane** 1959 (3) SA 337 (A), **S v Shabalala** 1986 (4) 734 (A) and **S v Sithole and others** 1999 (1) SACR 585 (W).

156. The Constitutional Court, in **S v Mathebula**,[67] noted that "[T]he vulnerability of unsupported alibi defences is notorious, depending, as it does, so much upon the court's assessment of the truth of the accused's testimony". This is no doubt so because the appellant's alibis must be assessed holistically and weighed against the totality of the evidence.[68]

157. As such and notwithstanding a right to silence, an accused always runs the risk that absent sufficient and suitable rebuttal evidence, the State's case may be sufficient to prove the elements of an offence and, as such, the accused's guilt beyond a reasonable doubt.[69]

158. Accordingly, where there is credible evidence placing the appellant at the scene of the crime (so to speak) – as there is in respect of each of the convictions – as such, the appellant is at least expected to tender evidence corroborating his alibi.[70] The appellant could have done so easily. This evidence would pertain: (i) to him being at the taxi rank on 8 November 2010, and (ii) the time he usually left for the taxi rank in the morning and returned in evenings etc. He could have, in these regards, notionally easily led the evidence of: (i) his girlfriend, (ii) his fellow taxi drivers (including Mshasazi), (iii) the regular attendees at the taxi rank, or (iv) his regular passengers. The appellant failed to lead any of this evidence. He also, by way of example, failed to introduce any corroborating witnesses or evidence in support of: (i) Ms M's alleged ill-disposition towards him, and (ii) the alleged "pre-agreement" concluded between his father and Ms M's mother. Whilst the appellant indubitably has a right to silence, some significance, on appeal at the very least, falls to be attached to the appellant's failure to lead any of the aforesaid evidence.

159. Moreover, if the appellant's versions are to be accepted, it must mean that, at least, B and M calibrated and fabricated their material and relevant evidence regarding 8

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67 2010 (1) SACR 55 (SCA) at para [11].

68 **S v Combrinck** [2011] ZASCA 116; 2012 (1) SACR 93 (SCA) at para [15].

69 Cf **S v Boesak** 2001 (1) SA 912 (CC) at para [25] and which in turn relies on **Osman and Another v Attorney General, Transvaal** 1998 (4) SA 1224 (CC) at para [22].

70 **Mpofu v S** (A0197/2017) [2018] ZAGPJHC 28 (26 February 2018) at para [19]. See also **R v Hlongwane** supra at 340H-341B.

November 2010; such that their evidence must be rejected. The appellant's version on this core also does not explain the medical / clinical evidence of B's injuries. Viewed holistically, the appellant's version is untenable. There is no reasonable doubt concerning the appellant's innocence. The evidence presented in the trial, as a whole, is sufficient to ground the conviction of the appellant for the rape of B.

160. The appellant argues that the State's uncertainty as to the date on which the incidences occurred assists the appellant in his alibi defence. The appellant however knew, at the very least, of the importance of the 8 November 2010 date. This date is specifically listed in the charge sheets pertaining to count nos 1 and 2.

(h) Additional arguments / considerations

161. There is no challenge in this appeal to the competency of any of the complainants to give evidence. The trial court, on a conspectus and holistic view of the evidence, was satisfied that the complainants, notwithstanding being children and in certain respects also single witnesses, were speaking the truth despite certain unsatisfactory aspects of some of their evidence. Where it needed to, the trial court looked for and found supporting and corroborating evidence. The appeal record further reveals that set out above in **Woji** and **De Beer** was considered by the trial court.

162. Whilst we have considered all the various arguments raised in the appellant's heads of argument, we address below only some of the pertinent arguments raised.

163. The appellant relies, in his heads of argument, on the decision in **JM v S**[71] for the proposition that the State did not discharge the requisite onus of proof because there was no explanation for the discrepancies and contradictions in the complainants' testimony. In addition to that already stated above in this regard, the decision in **JM v S** is distinguishable on the facts in at least four material respects. They are:

[71] (2017) JOL 38591 (GP).

163.1. First, the J88 medical / clinical reports in respect of the rapes in count nos 1 and 2 in **JM v S** were not placed on record, the consequence of which was that the evidence of the first complainant in **JM v S** was uncorroborated by medical / clinical evidence.[72] B's evidence of her rape is however corroborated by: (i) the medical / clinical evidence (her J88 medical legal report and its medical contents are unchallenged), and (ii) the evidence of M regarding, at the very least, the "sperms".

163.2. Second, the contradictions in **JM v S** pertained to "crucial aspects of the case".[73] However, the contradictions pointed out in the heads of argument in this appeal do not pertain to material and crucial aspects of the convictions. Furthermore, those contradictions that there are, are the type of contradictions one would expect from child witnesses.

163.3. Third, the "incidences" in **JM v S** were reported "after a long time had elapsed". This is not the case in respect of B, at the very least. Her assault (rape) was almost immediately reported to the Police. The other incidences in issue took place, by all accounts, during the period October to 8 November 2010, with the appellant being arrested on 9 November 2010.

163.4. Four, an apparently material witness in **JM v S** (referred to as "the first report witness") was not called to testify. In this appeal, despite that foreshadowed in the appellant's notice of appeal, there is no complaint in the appellant's heads of argument about any material witness not been called to testify.

As such, the appellant can place little store on the findings in **JM v S**, which findings are in any event specific to the facts and circumstances in issue in that matter.

164. The appellant further contends, in essence, that the contradictions in the State's evidence is dispositive of the appeal in the appellant's favour. The contradictions in the

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72 Supra at paras [7] and [13].

73 Supra at para [10].

State's evidence are largely however inconsequential and immaterial and do not warrant a rejection of the State's version.

165. Additionally, important aspects of the appellant's version were critically not put, or only put in parts, to the complainants and Ms M.

166. Holistically considering the probabilities within the context of a consideration of the totality of the evidence and the trial court's credibility findings and impressions pertaining to the witnesses, we cannot find that the State has not proven its case beyond reasonable doubt in respect of each of the rape and sexual assault convictions. The trial court additionally correctly rejected his alibi defence. It did so also on the totality of the evidence in the trial and its impressions of the witnesses.[74] Considering the evidence in the trial holistically, the trial court similarly found that the version of the appellant is untenable.

167. More fundamentally however and mindful that this appeal court is not a trier of fact as a court of first instance, there is therefore no basis for us to interfere with the trial court's findings of fact and credibility, and more particularly its finding that:

> "When I listened to the evidence and how they presented themselves during the evidence without really changing on demeanor, I am convinced beyond doubt that what happened to them is what happened.
>
> The same cannot be said of the accused's version."

168. All things considered, the appellant fails to establish in this appeal that there is any reason to disturb and overturn his rape convictions and sexual assault convictions. For the reasons already mentioned, the appellant's convictions on the accompanying charges of kidnapping however constitute a duplication of convictions ("splitting of charges"), and these must be set aside.

H. THE APPEAL SENTENCES IMPOSED

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[74] See **R v Biya** 1952 (4) SA 514 (A).

(a) The applicable authorities and principles

169. The appeal against the sentences imposed by the trial court centers, as per the appellant's heads of argument, on the contention that the sentences are "shockingly inappropriate". However, the appellant fails to identify which actual sentence(s) is/are "shockingly inappropriate" in the notice of appeal. This is instead left to paragraphs 108 and 119 in the appellant's heads of argument. There it is stated that "life imprisonment and 20 years" is shockingly inappropriate.

170. By way of introduction, in **S v Mhlakazi**,[75] the Supreme Court of Appeal stated the following in respect of the object of sentencing:

> "The object of sentencing is not to satisfy public opinion but to serve the public interest. A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the Court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public.
>
> Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence. Retribution may even be decisive."

171. To this must be added the following stated by Lewis JA in **S v Nkomo**,[76] namely:

> "But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing - mitigating factors - that lessen an accused's moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of these need be exceptional."

172. Additionally, this division in **S v Obisi**[77] states that:

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75 1997 (1) SACR 515 (SCA).

76 2007 (2) SACR 198 (SCA) at 201E-F.

77 2005 (2) SACR 350 (WLD).

> "It is true that traditionally mitigating factors, including the fact that the accused is a first offender, are still considered in the determination of an appropriate sentence. …. The nature of the crime, the brazenness, the callousness and the brutality of the appellant's conduct show that he attaches no value to other people's lives, or physical integrity, or to their dignity."

173. Regard is also to be had to the weighing and balancing of the "triad" of primary sentencing considerations formulated by the then Appellate Division in **S v Zinn**.[78] These are: (i) the crime, (ii) the offender, and (iii) the interests of society.

174. Equally instructive is the then Appellate Division decision in **S v Khumalo**,[79] which states:

> "Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances."

175. Turning to the issue of sentencing within the context of an appeal, it is trite that sentencing is pre-eminently the domain of the trial court and the trial court's exercise of its discretion.[80] This is why the Supreme Court of Appeal states the following in **S v Malgas**:[81]

> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial Court."

176. As such, an appeal court will only interfere with a sentence if it is of the view that the sentence imposed is, for example, disturbingly inappropriate such that it comprises a "material misdirection" with the result that the the trial court has not exercised its discretion in a proper, judicial and reasonable manner which, in turn, warrants appellate

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78 1969 (2) SA 537 (A) at 540G.

79 1973 (3) SA 697 (A).

80 **S v Rabie** 1975 (1) SA 855 (A) 857D-F.

81 2001 (1) SACR 496 (SCA). See also **S v Pieters** 1987 (3) SA 717 (A).

interference to protect the integrity of the judicial process.[82] Such a misdirection is conveniently termed one that vitiates the trial court's decision on sentence.[83] An appeal court must therefore decide whether the trial court, in imposing sentence, exercised its discretion judicially and properly.

177. In **S v P B**,[84] the Supreme Court of Appeal moreover formulated an appellate court's approach in an appeal against a sentence imposed in terms of the minimum sentencing legislation. It did so as follows:

> "What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not."

178. Because B was 10 at the time that she was raped, the minimum sentencing legislation applies. In respect of this conviction, the statutorily mandated minimum sentence is life imprisonment, unless there are substantial and compelling circumstances. The existence, or not, of substantial and compelling circumstances, is however not a discretionary issue but rather a value judgment, which judgment a court of appeal is obliged to bring to bear on the facts presented in the trial.[85]

179. The trial court (albeit not in as many words) acknowledged that, within the context of the minimum sentencing legislation, physical and sexual violence in South Africa against women and children is rampant, overwhelming, and endemic. This division has already acknowledged this tragic reality in, inter alia, the following decisions:

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82 **S v Zinn** 1969 (2) SA 537 (A).

83 **S v Pillay** 1977 (4) SA 531 (A) at 535G.

84 2013 (2) SACR 533 (SCA) at para [20].

85 Rogers J in **S v GK** 2013 (2) SACR 505 (WCC).

179.1. Per Goldstein J in **S v Ncheche**:[86]

> "Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator, and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman's body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish rapists very severely. In this case, the complainant lived in a shack, without the security enjoyed by many citizens in more affluent circumstances. Unfortunately, very many people in our country still live in these circumstances and are entitled to look to the courts for protection.
>
> …
>
> The word must go out to the cities and to the suburbs, to the towns and to the townships, and to the countryside that Parliament has directed the courts to punish the perpetrators of gang rape and child rape as heavily and severely as the law will allow in the absence of substantial and compelling circumstances dictating otherwise, and that the courts will not shrink from their duty of carrying out this directive however painful it may be to do so."

179.2. More recently, per Opperman J in **Mazivi v S**:[87]

> "Rape of a child under the age of 16 is a heinous and abhorrent crime, which is why the lawmaker has placed this type of rape in the category of crimes attracting a life sentence in the absence of substantial and compelling circumstances."

180. Furthermore, as laid down in **S v Matitia**,[88] a trial court cannot be faulted for its victim-centric approach given the nature of the offences because to do so is to achieve proportionality and a balance between the interests of the complaints and society and those of the appellant.

(b) The absence of substantial and compelling circumstances

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86 (A1261/04, A1261/04) [2005] ZAGPHC 21 (23 February 2005) at paras [35] and [38].

87 (A8/2018) [2018] ZAGPJHC 443 (20 June 2018).

88 2011 (1) SACR 40 (SCA).

181. With the above in mind, it must now be determined whether the trial court – considering all the (known) circumstances, including the presence of any substantial and compelling circumstances – unjustly imposed a life imprisonment sentence and in so doing failed to exercise its sentencing discretion judicially and properly.

182. It is regrettable that neither victim impact reports, nor a pre-sentencing report for the appellant were obtained. Such would have assisted the trial court in considering the issue of substantial and compelling circumstances. Nevertheless, the record reveals that the trial court had sufficient facts available to it when considering that required of it during the sentencing hearing.

183. On particularly the question of the rape of B, the appellant was convicted of a serious crime for which the legislature has found it necessary to promulgate a minimum sentence of life imprisonment, unless the trial court finds that substantial and compelling circumstances exist which oblige the court to deviate from imposing such a sentence.

184. The sexual assault convictions (separate to the rape conviction), whilst not as serious as the rape conviction and not triggering a consideration of a mandatory minimum sentence, are nevertheless profoundly devastating on the victims, their families and society at large.

185. The trial court also considered the circumstances impacting on the appellant and balanced them against the legitimate interests of society. The trial court understandably found that there were no substantial and compelling circumstances, and the appellant, despite invitation by the trial court and being legally represented, failed to assist. There is nothing substantial and compelling in the appellant's circumstances set out in paragraphs 79 and 80 above.[89] His circumstances, in some measure and in whole or in part, are the same lamentable circumstances regrettably pertinent to a large portion of our population.

186. If anything, there are various aggravating circumstances underscoring the appropriateness of the trial court's imposition of the legislated minimum sentence. They

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[89] **S v Vilikazi** 2012 (6) SA 353 (SCA) para [58].

also strongly militate against the presence of substantial and compelling circumstances. These, separately and cumulatively and in no specific order of importance, include:

186.1. the appellant's brazenness with which the appellant forced B into his room, and spirited M and T away in his taxi, in broad daylight;

186.2. the rape of B, cannot be considered in isolation of the appellant's kidnapping of her, threatening to kill her and the sexual assaults perpetrated by him on the other complainants;

186.3. the appellant is M's and H's paternal uncle and a (substitute) father figure since their own father's passing – a trusted and privileged position which he abused. He in fact leveraged this relationship by asking M, per H's evidence, "how can you say I am silly I am your father" when he asked them to visit his room again;

186.4. his insistence that the complainants be put through the traumatic experience of the trial, being cross-examined therein, having their honesty impugned and then their having to suffer the accompanying stigma that ordinarily follows as complainants in a criminal trial of this nature – "[i]n effect, he victimised [them] again";[90]

186.5. his lack of remorse, both during the trial and in the sentencing proceedings;

186.6. the appellant's lack of empathy for any of the complainants – notwithstanding that two are his paternal nieces;

186.7. the appellant's demonstrative lack of insight of, or appreciation for, the crimes for which he was arraigned and convicted (regard being had to the fictional

[90] **S v SMM** 2013 (2) SACR 292 (SCA) at [27].

account set out in his notice of appeal)[91] – whilst this was obviously not before the trial court, it ought not be ignored within the context of this appeal;

186.8. the unchallenged evidence that the appellant asked that further children be brought to his room suggests that he is emboldened sexual predator;

186.9. the unavoidable conclusion that appellant poses a grave danger to society;

186.10. there is nothing to suggest any contrition on his part or any prospect of rehabilitation; and

186.11. there is nothing that diminishes the appellant's moral blameworthiness.

187. The appellant, in his heads of argument, places reliance on the finding in **S v M**,[92] namely that a court should not regard an accused's election to exercise his right to plead not guilty and insist upon the prosecution proving its case as an aggravating factor for sentencing purposes. The appellant's reliance on **S v M** is however misplaced. The trial court did not do this. What the trial court instead did is to correctly consider the appellant's inability to acknowledge his guilt (which is indicative of a lack of remorse and contrition) – after the State approved its case and within the context of sentencing proceedings – when arriving at its finding that the appellant's "chances of rehabilitation are very slim".

188. All things considered, the appellant had no regard for the complainants' tender ages, nor the physical and emotional integrity, and dignity of the complainants. He selfishly robbed them of their innocence. The evidence of the complainants' parents understandably reflects shock and sadness at the fate suffered by their daughters, but, at the same time, an admirable respect for justice and our courts. It is incumbent upon the judicial system to maintain this respect.

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91 As quoted in para 93.2 above.

92 2007 (2) SACR 60 (W).

189. Within the aforesaid context, the following stated in **S v Ncheche**[93] is also pertinent:

> "Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where s 51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment - which has been prescribed for a very specific reason - simply because such circumstances are, unwarrantedly, held to be present.

190. The appellant's circumstances are outweighed by the gravity of the offence. In respect of the rape of a child, the minimum sentence provisions recognise the gravity of the offence and the public's need for an effective sanction. As stated by the Supreme Court of Appeal, cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background.[94] There is also, as already mentioned, nothing apparent that reduces the appellant's moral blameworthiness.[95] Rather the opposite is the case. He, by all accounts: (i) sexually groomed M, if not assaulted her on more than two occasions, (ii) sexually groomed H by letting her watch "sex movies", and (iii) requires that other children be brought to his room. There is a fear that the appellant will offend again, which **S v Vilikazi** states "is a material consideration".[96] As such, the trial court correctly imposed the legislated minimum life sentence.

191. In summary, the sentence of life imprisonment imposed by the trial court for the rape of B is not unjust, but rather a reasonable and appropriate sentence. Otherwise stated, an injustice has not been done by the trial court's imposition of the minimum sentence.[97] The trial court's imposition of the prescribed minimum sentence is moreover not disproportionate to the crime and the needs of society.

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93 Supra at paras [13] and [18].

94 Ibid.

95 **S v Radebe** 2019 (2) SACR 381 (GP) para [53].

96 **S v Vilikazi** Ibid.

97 **S v Malgas** 2001 (2) SA 1222 (SCA) para [25].

192. There is in this appeal, as there was before the trial court, no substantial and compelling circumstances of the type comprising a "weighty justification"[98] which justify a departure from the legislatively benchmarked sentence of life imprisonment imposed by the trial court. The appellant's conduct was both brazen and callous.[99] There is a brutality inherent in a father figure sexually violating young defenceless children. There are no substantial and compelling circumstances that justify the imposition of a lesser sentence than life imprisonment for the rape of B.

193. The trial court considered all relevant factors when deciding on the appropriate sentences to be imposed. The sexual assault sentences are balanced and proportionate to the sexual assault offences committed by the appellant and moreover satisfy the considerations set out in **S v Zinn**.

(c) The competency of a life plus 20 year sentence

194. The trial court did not order that the combined sentences of 20 years for the sexual assaults should run concurrently with a life sentence for the rape conviction.[100] Its position in this regard is no doubt because the rape and sexual assaults each have their own separate young and defenceless victims, each of whom suffers separately, together with their loved ones, from the other victims. The rape and sexual assaults did not take place at the same time or during course of or in furtherance of the same purpose.

195. Nevertheless, and within the context of the competency of a life sentence plus a further period of imprisonment, the trial court failed to have regard to section 39(2)(a)(i) of the Correctional Service Act, 1998.

196. Section 39(2)(a)(i), under the heading "Commencement, competition and termination of sentences", provides:

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98 To employ the language and phraseology used in **S v Malgas**.

99 To employ the language and phraseology used **State v Obisi** 2005 (2) SACR 350 (WLD).

100 Sentences of imprisonment run consecutively unless the court specifically directs otherwise or directs that the sentences run concurrently – see section 39(2)(a) of the Correctional Services Act, 1998.

> "(2)(a) …, a person who receives more than one sentence of imprisonment or receives additional sentences while serving a term of imprisonment, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs that such sentences shall run concurrently but -
>
> (i) any determinate sentence of imprisonment[101] to be served by any person runs concurrently with a life sentence …;

197. In the above regard, the full bench in **Mogaga v S**[102] was specifically asked by the Supreme Court of Appeal to determine, amongst others, the question of the competency of a life sentence plus a further period within the context of section 39(2)(a)(i). The Supreme Court of Appeal did so when it granted Mr Mogaga leave to appeal to the full bench on petition against a sentence of life imprisonment plus a further period of 27 years imprisonment. The full bench found that such sentencing is indeed incompetent. Albeit it did so within the context of the almost similar, albeit antiquated, wording in section 32(2) of the now repealed Correctional Services Act, 1959 (which was operational at the time of imposition of the sentence).[103]

198. In arriving at its decision, the full bench relied on the decisions in **S v Mhlakaza and Another**[104] and **S v Mahlatsi**.[105] These decisions in essence hold that a sentencing court shall not consider the possibility of release on parole when determining an appropriate sentence, but that the sentence imposed must be one which the court intends as the

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101 A determinate sentence is where the court sets a fixed or defined period or length for the prison sentence.

102 (A622/2013) [2014] ZAGPPHC 199 (26 March 2014). This decision inexplicably appears to remain unreported.

103 The pertinent portions of section 32(2) of the repealed Correctional Service Act,1959 read:

> "When a person receives more than one sentence of imprisonment or receives additional sentences while serving a term of imprisonment, each such sentence shall be served the one after the expiration, setting aside or remission of the other in such order as the Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs that such sentences shall run concurrently: …: Provided further that any determinate sentence of imprisonment to be served by any person shall run concurrently with a life sentence …; and that one or more life sentences and one or more such indeterminate sentences, or two or more such indeterminate sentences, shall also run concurrently."

104 1997 (1) SACR 515 SCA.

105 2013 (2) SACR 625 (GNP) page 521.

ultimate punishment that should be served. A prisoner's release on parole is a function of the executive arm of government over which a court has no control. As such, a life sentence is thus a sentence that may, potentially, amount to imprisonment for the rest of the prisoner's natural life.

199. The full bench in **Mogaga v S** thus held[106] that a sentence of life imprisonment plus a further period of 27 years imprisonment constituted a misdirection on the part of the trial court. It further found that the trial court ought to have ordered that Mr Mogaga's sentence of 27 years imprisonment run concurrently with the sentence of life imprisonment.

200. Accordingly, and within the context of this appeal, the trial court in casu similarly misdirected itself in the aforesaid material regard. The trial court ought to have ordered that the appellant's sentence of 20 years imprisonment run concurrently with the appellant's life sentence. As is the case in **Mogaga v S** and because of a similar misdirection by the trial court, this appeal court is entitled to interfere with the appellant's sentence.

(d) Conclusionary remarks and findings on sentencing

201. Save for the aforesaid section 39(2)(a)(i) misdirection, there is no other indication that trial court improperly exercised its sentencing discretion. There is also no other irregularity that results in a failure of justice, or which shows that the trial court misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it".[107] There is equally nothing else disturbingly or shockingly inappropriate about the sentences imposed by the trial court for the sexual assaults, and no case is made, and no basis is laid, out for the sentences to be interfered with on appeal.

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106 Supra at paras [11] and [12].

107 **S v Bogaards** 2013 (1) SACR 1 (CC) para [41].

202. Simply put and except for that already stated: (i) indirectly in respect of the kidnapping convictions, and (ii) directly in respect of the trial court's section 39(2)(a)(i) misdirection, there was no basis for this court to interfere with the sentences imposed by the trial court.

203. Accordingly, the sentences imposed by the trial court in respect of the appellant's respective rape and sexual assault convictions must stand except that the combined 20-year sentence for the four sexual assaults should run concurrently with the appellant's life sentence for rape.

I. CONCLUSION

204. Except for: (i) the kidnapping convictions, and (ii) its misdirection in failing to consider section 39(2)(a)(i), there is no clear material misdirection by the trial court and the trial court's findings are not clearly erroneous in respect of either the convictions or the sentences imposed, and, as such, there is no basis for their being interfered with on appeal.

J. ORDER

205. For the reasons set out above, the following order is made:

1. The appellant's late filing of his notice of appeal is condoned.

2. The appeal is upheld in part only, namely:

    2.1. the appellant's convictions on the kidnapping counts (counts 1, 3, 6 and 8) and the accompanying sentences imposed in respect of each such kidnapping count is set aside; and

    2.2. the sentences for sexual assault in respect of counts 4, 5, 7 and 9 are ordered to run concurrently with the sentence to life imprisonment imposed in respect of count 2 (rape).

3. Except for that provided for in paragraph 2 above, the appeal against the appellant's convictions and against the accompanying sentences is dismissed.

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G AMM
ACTING JUDGE OF THE HIGH COURT JOHANNESBURG

I CONCUR

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EF DIPPENAAR
JUDGE OF THE HIGH COURT JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 02 September 2021
DATE OF JUDGMENT	: 08 November 2021
APPELLANT'S COUNSEL	: Adv. Mpo Milubi
APPLICANT'S ATTORNEYS	: Legal Aid SA Johannesburg Local Office
RESPONDENT'S COUNSEL	**:** Adv C Mack
RESPONDENT'S ATTORNEY	**:** State Attorney