

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: A150/2012

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| (1) | REPORTABLE: Yes <input checked="" type="checkbox"/> / No <input type="checkbox"/> |
| (2) | OF INTEREST TO OTHER JUDGES: Yes <input checked="" type="checkbox"/> / No <input type="checkbox"/> |
| (3) | REVISED: Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/> |

Date: 17 November 2023 WJ du

In the matter between:

N[...] A[...]

APPELLANT

and

THE STATE

JUDGMENT

DU PLESSIS AJ

[1] Background

[1] This is an appeal from the regional court held at Protea Magistrate Court in Soweto. Mr N[...] was found guilty on 27 June 2011 on eight counts of rape of his stepdaughter, starting when she was 11 years old and continuing until she was 17 years old. The counts were the following:

- i. Count 1 – Rape (read with provisions of s 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 and s 51(1)(a) of the Criminal Law Amendment Act 105 of 1997 as amended, in that from 20 August 2004 and at or near Soweto in the Regional Division of Gauteng, the accused unlawfully and intentionally committed an act of sexual penetration with a female person, to wit B[...] N[...] (11 years), by inserting his penis in her vagina without her consent.
- ii. Count 2 – Rape (read with provisions of s 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 and s 51(1)(a) of the Criminal Law Amendment Act 105 of 1997 as amended, in that during 2005 and at or near Soweto in the Regional Division of Gauteng, the accused unlawfully and intentionally committed an act of sexual penetration with a female person, to wit B[...] N[...] (12 years), by inserting his penis in her vagina without her consent.
- iii. Count 3 – 7 reads similar to count 2, only the year and the age differ; in other words, each year constituted a charge.
- iv. Count 8 – Rape (read with provisions of s 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 and s 51(1)(a) of the Criminal Law Amendment Act 105 of 1997 as amended, in that 19th day of September 2010 and at or near Soweto in the Regional Division of Gauteng, the accused unlawfully and intentionally committed an act of sexual penetration with a female person, to wit B[...] N[...] (17 years), by inserting his penis in her vagina without her consent.

[2] Mr N[...] pleaded not guilty on all counts.¹ He was found guilty on all charges. For counts 1 – 6, he was sentenced to life imprisonment; for counts 7 and 8, he was sentenced to ten years of direct imprisonment, all sentences running concurrently.

¹ For the year 2004, 2005, 2006, 2007, 2008, ,2009, 2010.

[3] Leave to appeal was granted by the trial court on 3 October 2012 against the sentences imposed only. The appeals against the sentences were dismissed by the court of appeal on 10 September 2013.

[4] On 18 March 2019, the appellant petitioned against the refusals of leave to appeal his convictions. On 26 April 2019, the petitions against both his sentences and the convictions were refused.

[5] Counsel for the appellant argued that since the trial court had already granted the appellant leave to appeal against his sentence, and since the appellant only appealed the conviction to the High Court, dismissing leave to appeal against the sentence was made in error since the matter was already *res judicata*. This court will thus only deal with the appeal of the conviction.

[2] S 309(1)(a) of the Criminal Procedure Act

[6] The appeal is before us in terms of ss 10 and 11 of the Judicial Matters Amendment Act² read with s 43(2) of such Act promulgated on 22 January 2014. These sections amended s 309(1)(a) read with s 309B(1)(a) of the Criminal Procedure Act³ with retrospective effect to 1 April 2010,⁴ granting all persons sentenced to life imprisonment by a regional court with an automatic right of appeal to the High Court.

[7] The question that arises is whether the dismissal of the petition by the High Court of the application for leave to appeal the convictions prohibits the appellant from exercising his automatic right of appeal in terms of s 309(1)(a) of the Criminal Procedure Act,⁵ and if not, whether there is also automatic leave for the convictions that resulted in the determinative sentences (ie those imposed for counts 7 and 8 for which he received 10 years on each count). S309(1) reads:

"309: Appeal from lower court by person convicted

² 42 of 2013.

³ 51 of 1977.

⁴ 51 of 1977.

⁵ 51 of 1977.

(1) (a) any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51 of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B" (own emphasis)

- [8] *Sefatsa v Attorney-General, Transvaal*⁶ stated that the Criminal Procedure Act⁷ governs jurisdiction relating to appeals. This view was broadened in *Hansen v The Regional Magistrate, Cape Town*,⁸ to allow for the impact of s 173 of the Constitution, which broadened the inherent jurisdiction of the courts to regulate their own processes, to develop the common law and to take into account the interests of justice.
- [9] Any conviction, sentence or order of a lower court is subject to leave to appeal in terms of ss 309 and 309B of the Criminal Procedure Act,⁹ subject to the exception of child wrongdoers¹⁰ and accused who have been sentenced to life imprisonment¹¹ who need not apply for leave to appeal as they are entitled, as of right, to a further hearing.
- [10] However, there was a brief period between 1 April 2010, with the enactment of the Child Justice Act¹² and 22 January 2014, with the enactment of the Judicial Matters Amendment Act,¹³ where there was no automatic appeal for people given life sentences. This was rectified by enacting the Judicial Matters Amendment Act, which applied retrospectively from 1 April 2010. The problem then arose as to the status of the matters that were unsuccessfully appealed or petitioned between 1 April 2010 and 22 January 2014.

⁶ 1989 (1) SA 821 (A).

⁷ 51 of 1977.

⁸ 1999 (2) SACR 430 (C).

⁹ 51 of 1977.

¹⁰ S 84 of the Child Justice Act.

¹¹ S 309(1)(a) of the Criminal Procedure Act.

¹² 75 of 2008.

¹³ 42 of 2013.

- [11] In *S v Molatudi*¹⁴ a full bench of this court considered the argument that the appellant has an *ex lege* automatic right of appeal against, in that case, also his conviction due to the retrospective operation of the Judicial Matters Amendment Act.¹⁵ The court granted a declaratory order clarifying the legal position being that even though a High Court might have dismissed an appellant's petition for leave to appeal against their conviction (during the relevant period), such dismissal did not disqualify such appellant from benefitting from their automatic right of appeal in terms of s 309(1)(a) of the Criminal Procedure Act¹⁶ as amended, read with s 309B(1)(a). It follows that an appellant who unsuccessfully appealed also does not lose this right. Thus, if an order is invalid and stands in the way of subsequent legal proceedings, the court which hears the subsequent proceedings may disregard it.
- [12] Based on this *dictum*, the appellant requests that the order of the court dated April 2019 under case number P40/2019, which dismissed his petition seeking leave to appeal his convictions, to be a nullity insofar as counts 1 – 6 are concerned for which he was sentenced to life imprisonment is concerned. I agree that this is correct as this is on all fours with the Full Court judgment relied upon.
- [13] However, the novel question in this case is whether this entitles the appellant to an automatic appeal in respect of counts 7 and 8, which are not life sentences. Since this is a novel question, it is important to consider the principles applicable to leave to appeal and to interpret 309(1)(a) of the Criminal Procedure Act.¹⁷
- [14] *Ndlovu v S*¹⁸ dealt with whether an appellant convicted and sentenced to life imprisonment enjoyed an automatic right to appeal the conviction and sentence or only the sentence. The court held that the automatic appeal in terms of the provisions was not limited to an appeal against the life sentence imposed only but also included the conviction, as the sentence to imprisonment for life is descriptive

¹⁴ 2023 (2) SACR 307 (GJ), also referred to as *S v Dingaan* 2022 JDR 2445 (GJ).

¹⁵ 42 of 2013.

¹⁶ 51 of 1977.

¹⁷ 51 of 1977.

¹⁸ A593/2013

of the person seeking to appeal and not what is sought to be appealed. This was confirmed in *S v Bangala*.¹⁹

- [15] Mr Guarneri, for the appellant, argued that since it is descriptive of the person seeking appeal, the appeal should lie against all the convictions. Thus, a person who is sentenced to life imprisonment in terms of s 51(1) and who is in addition sentenced to any other determinative sentence remains in the class of persons that were sentenced in terms of s 51(1) to life imprisonment and is thus entitled to automatic leave to appeal against all the charges.
- [16] On my reading of s 309(1)(a), the introductory sentence gives "any person convicted of any offence" a right to appeal. S309(1)(a) then, in addition, grants an *automatic* right of appeal to persons who were sentenced to life imprisonment in terms of s 51(1) of the Criminal Law Amendment Act.²⁰ Thus, any person convicted may appeal against the conviction and sentence, but persons sentenced to life imprisonment enjoy an *automatic* right of appeal, presumably either because of the harsh effects of the life sentence²¹ or to ensure extra safeguards on the expanded powers of regional courts in this regard.²² It does not specify the convictions or sentences that form part of the automatic appeal.
- [17] This does not solve the problem of this court being whether this court has jurisdiction to hear the appeals for the determinative sentences. This necessitates a consideration of the requirements for establishing jurisdiction to hear an appeal.
- [18] *S v Van der Merwe*²³ laid down certain principles regarding the jurisdictional requirements for leave to appeal. In this case, the appellant was convicted and sentenced in a regional court and was granted leave to appeal against the sentence only. Both judges had reservations about the conviction on appeal, which led to the question of whether the court had the necessary jurisdiction to interfere

¹⁹ [2014] ZAGPJHC.

²⁰ 105 of 1997.

²¹ *S v Molatudi* 2023 (2) SACR 307 (GJ), also referred to as *S v Dingaan* 2022 JDR 2445 (GJ).

²² *Chake v S* [2013] ZASCA 141 para 7.

²³ 2009 (1) SACR 673 (C).

with the conviction. The appellant argued that the court has jurisdiction based on, among other things, its inherent jurisdiction and expanded jurisdiction in terms of s 173 of the Constitution. The court disagreed, finding instead that its appeal jurisdiction is circumscribed by legislation (and thus not part of the court's inherent jurisdiction), and that it had no power to hear a matter that was not properly before it. *S v Moyo*²⁴ confirmed this position (specifically focusing on the relationship to review), namely that the procedure to access an appeal court on conviction and sentence is regulated by statute.²⁵

[19] This corresponds with *Appolis v S*²⁶ and *Mpinda v S*²⁷ that Mr Gueneri referred the court to, where, in both cases, an appellant had been sentenced to life imprisonment but needed to apply for leave to appeal on the convictions and sentences where determinative sentences were imposed, otherwise the appeal court would not have jurisdiction. In *Appolis*, the life sentence related to murder, while the other two sentences related to attempted murder. Although it happened in the same incident, the victims were different. In the case under consideration, the perpetrator and the complainant are the same in all the charges. In *Mpinda*, the life sentence related to rape, and the determinative sentence to child abuse.

[20] A narrow reading of s 309(1)(a) restricts the appeal to only the life sentence and the conviction on which it rests. However, in this case, an overly narrow interpretation of s 309(1)(a) can lead to absurdity in instances such as these, that deal with the same accused, the same complainant, the same act, and where the State relies on the same evidence for all counts. For instance, should s 309(1)(a) in such an instance mean that Mr N[...] has an automatic right to appeal on counts 1 to 6 but will have to apply for leave to appeal for counts 7 and 8, and should the appeal succeed for instance for want of sufficient evidence, counts 7 and 8 will then stand on evidence that was found not to be adequate, and will have to be

²⁴ [2017] ZAGPJHC 356; 2018 (1) SACR 658 (GJ).

²⁵ Par 38.

²⁶ [2021] ZAWCHC 105.

²⁷ A07/2019.

appealed separately. This seems absurd, not an interpretation favourable to the appellant and against the interests of justice.

[21] In this instance, a more expansive interpretation is called for based on established rules of interpretation. The first is that a court is to start with the wording of the section. In this case, the wording is ambiguous. On the one hand, it can be interpreted as it was in *Appolis* above that the automatic leave to appeal pertains only to the life sentence and that leave to appeal is required for other sentences (and convictions). On the other hand, it can be interpreted that people sentenced to life imprisonment are entitled to an automatic right of appeal against all convictions and sentences (based on *Ndlovu*). The section is not clear on this.

[22] In this case, various interpretational principles come into play. For one, an interpretation that will lead to an absurdity,²⁸ as set out above, must be avoided. Likewise, piecemeal and prolonged litigation that can lead to wasteful use of judicial resources is best avoided²⁹ and is not in the interests of justice. Arguably, an interpretation that enables an appellant's right to access courts rather than one that restricts it should be preferred in the case of ambiguity. Thus, s 309(1)(a), in this case, where the determinative sentences are based on convictions that rely on the same evidence as the convictions that led to the life sentences, should be interpreted to include the appeal against the non-life sentence convictions, too. To the extent that the facts from this case are not distinguishable from the *Appolis* and *Mpinda* case above, those cases are, for the reasons already stated, wrong, and I do not consider this court bound thereby.

[23] Since the petition only related to the convictions and not the sentences, the appeal is restricted to the convictions, including those that resulted in determinative sentences. The appeal will now be dealt with.

²⁸ *Ndebele v Mutual & Federal Insurance Company Ltd* 1995 (2) SA 699 at 704.

²⁹ *Cloete and Another v S, Sekgala v Nedbank Limited* 2019 (4) SA 268 (CC) at par 57.

[3] The factual background

- [24] The State called the complainant, Ms B[...] N[...] ("B[...]i"), who was 18 when she testified, her friend Ms Nandi Mkhize ("Nandi"), her mother, Ms N[...], Mr Mbata, and Dr Mberga, a gynaecologist.
- [25] According to B[...], when she was 11 years old, in August 2004, her mother went to Venda. It was during this absence that her stepfather started to rape her. She recounted the first rape in detail as set out in the judgment, which need not be repeated here. Since then, B[...] testified, the rape did not stop. She did not count the number of times it happened when the mother was at work.
- [26] She did not recount any other incidents in detail but testified that this continued until September 2010, when she was 17. Mr N[...] threatened that should she tell anyone about the rape, then he would hunt her for her whole life to do her harm. He was violent at times, and at one time, he hit her and her mother with a broomstick that broke. She never told anyone about the rape because she was afraid.
- [27] Mr N[...] then instructed her not to play with her friends anymore. When she informed Nandi of this, she realised something was not well and probed her about what was happening. B[...] told her that her father had been raping her since before high school.
- [28] Nandi then went home and told her mother, who went to school the following day, to report the rape to the principal. The principal then called the police. Mr N[...] was arrested, and B[...] was taken to the hospital to be examined.
- [29] At some stage, they moved into a house belonging to Mr Mbata. He did not suspect anything and was not at home often as he travelled. He had a good relationship with Mr N[...]. Still, one day, he was in the house and realised B[...] and Mr N[...] were also there. Mr N[...] went to the bedroom door and knocked, but he did not answer. Mr N[...] then went to the child's room, and he could hear the footsteps of B[...] from her room to Mr N[...]'s room. He could not see anything as

the door was closed. B[...] spent some time in the bedroom, from where he could hear sounds that sounded like sex. Later, he thought Mr N[...] dealt very harshly with B[...].

[30] Another day, when Mr N[...] did not know Mr Mbata was in the house, the same thing happened. The house is about 455m², so if one stands in the passage of the dining room, one can hear what is happening in the other room. He asked B[...] about it, but she would not say anything. However, later, when pressed, she told Mr Mbata that Mr N[...] was molesting her. He suggested they must trap him with the phone and assure her she could trust him. He did not want to tell the mother because he did not want to give Mr N[...] a chance to run away; he wanted to deal with it in a quiet and short manner. He later learned from the principal that charges had been laid.

[31] The mother, Ms N[...], testified that Mr N[...] was unemployed in 2004 but got employment in 2005. However, after a while, he was unemployed again. She left early in the morning for work. She returned after 19:30. She went to Venda in 2004 because Mr N[...] wanted her to speak to her family about their families meeting and possible lobola. She left on a Friday and came back on Sunday. She asked if the child should not go to Pretoria to her sister, but she remembered that the accused replied, "I am not a dog or a South African man who can sleep with a child".

[32] She found out about the rape allegations when she was looking for the child and phoned the principal. She did not notice the rape, but she does remember a time when she wanted to send the child to buy tomatoes, and Mr N[...] suggested that she must go instead. When she returned, she saw the door ajar and Mr N[...] half-naked from the waist down. When she asked the child about it, the child looked down and said nothing. She did not confront Mr N[...] or let him know that she was suspecting anything.

[33] She confirmed the menstrual problems, as well as Mr N[...]’s abuse. She did not feel like she could stop the abuse because they were now married. He also prevented her from seeing her sister. When they went to the doctor for menstrual

problems, the doctor asked if no one slept with the child. Mr N[...] came with some pills for the child. She did not speak with the child when he returned to Congo at times, as he would want to know what they were talking about.

[34] B suffered from excessive bleeding during her periods and saw the very old Dr Mbherga for this issue. She did not disclose to the doctor during these visits that she was raped but did indicate that she was sexually active. This was in matric when she met a boy with whom she started to have sex. The doctor did not notice any injuries but noticed that she had no hymen, and he assumed it was because of sexual intercourse. However, it can be due to activities such as bicycle riding. He could not find evidence of forced entry; he just found the absence of a hymen.

[35] It was put to her that her mother had sex with different men in her presence, and this affected her, which she denied. She was also told that she was made to call the men "dad", but she denied this too. Lastly, it was also put to her that her mom was in a lesbian relationship with Mimi, which she denied. Mimi since passed away, and Mr N[...] was served with divorce papers while in custody.

[36] Mr N[...], during his defence, claimed he did not know about the rape allegations against him. He mentioned that B[...]s mother once told him about an incident of sexual molestation in Venda, but he wasn't involved. He emphasised that Mimi was always present in the house during this time, so he could not have raped her. He noticed a change in B[...]s behaviour as she became interested in boys. She had menstrual issues, which he attributed to her involvement with boys. Police told him that she kissed boys on the street.

[37] Mr N[...] only learned about the earlier rape in Venda when the child's school performance declined. He denied being abusive and claimed he didn't prevent the mother and child from communicating, even when he travelled to Congo. He expressed shock over allegations made against him by Mr Mbata, as he thought he had a good relationship with him.

[38] Furthermore, Mr N[...] argued that the charges were falsely laid due to Ms N[...]s HIV condition, which necessitated that he wear protection during intercourse,

which is not what she wanted. He stated he worked full-time as a salesman, mostly Monday to Friday, occasionally on Saturdays, and attended church with his family on Sundays.

[39] The Magistrate considered the evidence in her judgment. She considered that B[...] was 18 years old at the time of her testimony and that she vividly remembers what occurred when she was 11.

[40] The Magistrate noticed that she told the story to Nandi, who accidentally learned of the occurrence. She has not told this to her mother or the doctor before. The Magistrate noted that "[t]his is typical of teenagers; they have a mind of their own, and they treat sex and sexuality in a different way than us adults". She was not surprised that B[...] did not disclose the rape by referring to the South African Law Commission papers about how to approach the issue of teenagers and children to sex and sexuality. This report requires an approach that is aware of the fragmented and slow disclosure of abuse and the fact that the full extent of the abuse is rarely revealed.

[41] The court noted that if Nandi did not report the rape, it might not have been reported. Also, the doctor testified that the child has no hymen and testified that she only started having sex with her boyfriend in matric. She found no reason to disbelieve the child. The child was afraid to disclose the rape due to the abusive nature the father treated her.

[42] She found the version of the accused improbable, as his version that he is accused of refusing to have unprotected sex with his wife is improbable and needs to be rejected. She then accepted that the State proved its case beyond reasonable doubt. He was found guilty on all counts. The court relied on the oral evidence of the witnesses to come to this conclusion. It is against this that Mr N[...] appeals.

[4] The appeal against the conviction

(i) The legal position

[43] The right to appeal is part of an accused's right to a fair trial.³⁰ In general, the trial court is better suited to make findings of fact, as the trial court directly observes the witnesses and is involved in the proceedings. This allows the trial court to consider the witness's appearance, behaviour and personality, which enables the court to make its findings. For these reasons, a court of appeal is usually hesitant to interfere with the findings of a court a quo³¹ unless the findings are plainly wrong.³² Such interference cannot be based on the opinion of the court of appeal that, after scrutinising the record and evidence, would have come to different factual conclusions. Specific care must be taken when there are findings of fact based on oral evidence.³³ *S v Hadebe*³⁴ is the oft-quoted authority on this, where the court stated that

“ . . . in the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong.”

[44] A trial court's finding of fact is presumed to be correct unless there is a demonstrable and material misdirection by the trial court.³⁵

[45] The appellant appeals on the following grounds:

- i. That the learned Magistrate erred in finding that the State had proved its case beyond reasonable doubt against the appellant;
- ii. That the complainant was a single witness;

³⁰ *S v Schoombee* 2017 (2) SACR 1 (CC) at para 19.

³¹ *S v Robinson* 1968 (1) SA 666 (A) 675G–H.

³² *Siphoro v S* [2014] ZAGPJHC 168.

³³ *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A) 790–1.

³⁴ 1997 (2) SACR 641 (SCA) 645e–f.

³⁵ *Hadebe* 1997 (2) SACR 641 (SCA) at 645.

- iii. That his version was reasonably possibly true and the trial court erred in not accepting the appellant's version.

[46] Since (i) and (iii) are intertwined, they will be discussed together.

(ii) Beyond reasonable doubt: the accused version was reasonably possibly true

[47] After addressing the court, the Magistrate noted that the State has to prove the accused's guilt beyond doubt and that the accused has no duty – if his story is probable, the court ought to acquit him.³⁶

[48] The criminal standard of proof is beyond reasonable doubt. This differs from the civil standard that is comparative in nature, where a party is required to persuade a court that their case is more probable than that of their opponent. In criminal cases, the test is absolute in that the State must prove its case beyond reasonable doubt, and whether this has been done is based on the strength of the State's case. If it is reasonably possible that the accused's version is reasonably possibly true, he is entitled to be acquitted.³⁷ This is the same test – there will only be no reasonable doubt if the accused's version is not reasonably possibly true.

[49] This determination rests on the evidence considered holistically. In other words, an accused's version is considered in the totality of the evidence of the case rather than in isolation.³⁸ The test is also not whether the court subjectively believes him or not, and similarly, whether the State's case must be rejected or not. The focus is on the reasonable possibility that his evidence may be true. On those grounds, he must be acquitted.³⁹ It is not weighing up competing versions and deciding on probabilities.

³⁶ CaseLines 003-144.

³⁷ *S v Van Der Meyden* 1999(1) SACR 447.

³⁸ *R v Hlongwane* 1959 (3) SA 337 (A).

³⁹ *S v Kubeka* 1982 (1) SA 534 (W) at 537F- H.

- [50] In coming to a conclusion, a court must give reasons – it is part of a right to a fair trial.⁴⁰ It shows that the court gave due consideration to the matter.⁴¹ Proper reasons require an intelligent analysis of the evidence, not a mere regurgitation.⁴² What follows is a discussion of the Magistrate's reasoning, as per judgment and record.
- [51] Mr N[...]s version is that the mother told B[...] to lay charges because they were on bad terms, a version that B[...] denied. When she was asked about his allegation that the only reason for her lying a charge was because her mother did not want to have sex with a condom with him, she stated that she did not know anything about it. The fact that he was served with divorce papers while in prison, he notes, supports this narrative.
- [52] The Magistrate found the accused's version highly improbable and rejected his version, finding the accused's version as "not favoured by probabilities".⁴³ She did not state that she did not find it reasonably possibly true, only that probabilities did not favour it. Based on this, she then rejects the version of the defence.
- [53] The court on appeal is restricted to the reasons given in the judgment and what can be gleaned from the transcripts. From the statement "not favoured by possibilities", the Magistrate appears to have decided the matter on probabilities. Moreover, other than engaging with the issue of protected sex as a motive for the mother to encourage the complainant to lay a charge, which she states is improbable, we do not know why the whole version of the accused was deemed improbable.
- [54] It might be so that the state has made out a solid case that seems more probable than the accused's version, but that is not the standard. The standard is beyond

⁴⁰ *Barlow v S* 2017 (2) SACR 535 (C) at 11.

⁴¹ *National Director of Public Prosecutions v Naidoo* 2011 (1) SACR 336 (SCA).

⁴² *S v Bhengu* 1998 (2) SACR 231 (N) 234.

⁴³ CaseLines 003-148.

reasonable doubt, requiring the Magistrate to deal with the question of whether the accused's version is reasonably possibly true. *R v M*⁴⁴ the court stated that

"The Court does not have to believe the defence story, still less does it have to believe in its details. It is sufficient if it seems that there is a reasonable possibility that it may be substantially true."

[55] Accordingly, the Magistrate misdirected herself with applying the wrong burden of proof, and that the state proved its case beyond reasonable doubt. On this ground alone, the appeal is upheld.

(iii) Single witness

[56] A court should not base its findings on unreliable evidence or evidence that is not trustworthy. If the evidence is suspect, the court should ensure that it is supported or confirmed in some way to ensure it can safely rely on the evidence. This is what is known as the cautionary rule. The rule is not a mechanical test and should not replace the exercise of common sense.⁴⁵

[57] Counsel for the defence noticed that the complainant was a child witness and properly admonished in terms of s 164 of the Criminal Procedure Act.⁴⁶ However, the State's case rests entirely on the evidence of a single child witness who was not approached with caution, especially seeing that there was no external corroboration of her version.⁴⁷

[58] *Director of Public Prosecutions v S*⁴⁸, the court set out the legal position relating to the evidence of children as follows:⁴⁹

"It is so that children lack the attributes of adults and generally speaking, the younger, the more so. However, it cannot be said that this consideration ipso facto requires of a court that it apply the cautionary rules of practice as though they are matters of rote."

⁴⁴ 1946 AD 1023.

⁴⁵ *S v Snyman* 1968 (2) SA 582 at 585.

⁴⁶ 51 of 1977.

⁴⁷ *Stevens v S* [2005] 1 All SA 1 (SCA), *S v S* [2011] ZASCA 214.

⁴⁸ 2000 (2) SA 711 (TPD).

⁴⁹ 714.

On a parity of reasoning, based upon the judgment in F's case supra, it cannot be said that the evidence of children, in sexual and other cases, where they are single witnesses, obliges the court to apply the cautionary rules before a conviction can take place'

[59] Children are not automatically unreliable.⁵⁰ What needs to be considered when assessing the evidence of a child evidence is the age of the child and whether the child took the oath or not. In the end, the court must be satisfied that, having regard to all the facts and circumstances including the child's testimony, there is proof beyond reasonable doubt that the accused is guilty.

[60] This has recently been confirmed by the Supreme Court of Appeal in *S v Maila*⁵¹ where the court stated that

"the evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single child witness's evidence, tested through (in most cases, rigorous) cross-examination, should be 'trustworthy'. This is dependent on whether the child witness could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers. Furthermore, the child witness's evidence must not have changed dramatically, the essence of their allegations should still stand. Once this is the case, a court is bound to accept the evidence as satisfactory in all respects; having considered it against that of an accused person. 'Satisfactory in all respects' should not mean the evidence line-by-line. But, in the overall scheme of things, accepting the discrepancies that may have crept in, the evidence can be relied upon to decide upon the guilt of an accused person."

[61] S 208 of the Criminal Procedure Act allows an accused to be convicted on the single evidence of any competent witness. However, a single witness (regardless of age and the offence involved) must be approach cautiously. In *S v Sauls*⁵² this requires the consideration of the credibility of such a witness. The trial court must weigh the evidence of the single witness. It must consider the merits and demerits to decide whether the court is satisfied that the truth has been told despite the evidence's shortcomings, defects, or contradictions.

[62] The court noted in the judgment that the child understood the importance of taking an oath.⁵³ The proceedings were held in camera due to the sexual nature of the

⁵⁰ *Director of Public Prosecutions v S* 2000 (2) SA 711 (T).

⁵¹ [2023] ZASCA 3.

⁵² 1981(3) SA 172.

⁵³ CaseLines 003-127.

offence. She was 18 years old when she testified, and the acts of sexual penetration started when she was 11. She remembered the occurrence vividly and described it in detail.

[63] While the cautionary rule used to apply to evidence given by children, this has been criticised, and the South African Law Commission has recommended its abolition.⁵⁴ This recommendation has not become binding law, although it has been taken into by courts before.⁵⁵ The Magistrate took into account the findings of the South African Law Commission Discussion Paper⁵⁶ that indicates that the disclosure of child sexual abuse is a painful and slow process and that any disclosure will be fragmented and rarely reveal the full extent of abuse.⁵⁷ Disclosure is a disjointed and inconsistent process. The Magistrate assessed the testimony of B[...] in this light, indicating that she sees this case as such a case. She found that it was reasonable for the child to not disclose the rape earlier because of fear. The Magistrate was satisfied that the child was truthful when answering questions.

[64] The Magistrate also notes that the doctor saw the child for menstrual bleeding, and the doctor says the child has no hymen and that the child only started having sexual intercourse in matric.

[65] After this discussion, the Magistrate states, "What reason is there to disbelieve this child really?"⁵⁸ indicating that she accepts the child's testimony. While there may not be a reason to disbelieve the child, the Magistrate cannot just stop there. The Magistrate failed to consider whether Mr N[...]s version is reasonably possibly true. It seems from the records that she only assessed the evidence on the State's evidence. However, the State has only discharged its onus if it has made out a proper case *and* the accused's version is not reasonably possibly true.

⁵⁴ SALC Project 107 Discussion Paper 102 *Sexual Offences: Process and Procedure* (2002) at 31.3.4.7.

⁵⁵ *S v M* [2002] ZASCA 75.

⁵⁶ 102 of 2001.

⁵⁷ CaseLines 003-145.

⁵⁸ CaseLines 003-145.

[66] The Magistrate did not engage with the accused's version which can be summarised as follows: The timing of the report, namely after the accused told the complainant that she was not allowed to play with Nandi, showing that she had a grudge against the accused that gave her reason or motive to be untruthful and should thus have been approached with caution. There were no radical changes in her behaviour during the commission of the offence, as only would expect, except that she would close herself in her room.

[67] They also state that the absence of physical evidence of rape presented by the State also means that Mr N[...]’s version is reasonably possibly true. The testimony of Dr Mberga supports this view, they state, since it notes that there is nothing significant to clarify any sexual penetration over such a long period. As for the noises or sounds, Mr Mbata only reported it to her mother after the accused was arrested, saying he was afraid that Mr N[...] would run away should be rejected due to the timing of the report.

[68] The lack of engagement with these arguments means the Magistrate erred in finding the accused guilty beyond reasonable doubt. The appeal against the conviction thus succeeds, also on this ground.

[69] Finally, it should be noted that the State conceded that another court may come to a different conclusion due to the lack of caution exercised with the single witness, amongst other reasons.

[5] Order

[70] I, therefore, make the following order:

1. The dismissal of the appellant's petition in the High Court on P40/2019 refusing leave to appeal against his conviction is declared to be a nullity by reason of the effect of s 10 of the Judicial Matters Amendment Act 42 of 2013 and the amended s 309(1)(a) of the Criminal Procedure Act 51 of 1977.
2. The appeal against the conviction is upheld.

WJ DU PLESSIS

Acting Judge of the High Court

Gauteng division

I agree and it is so ordered

PJ JOHNSON

Acting Judge of the High Court

Gauteng division

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the appellant:

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Mr E Guarneri

Instructed by:

Legal Aid SA

Counsel for the State:

Mr VI Mushwana

Date of the hearing:

16 October 2023

Date of judgment:

17 November 2023