

## Viveiros v S (75/98) [2000] ZASCA 95; [2000]2 All SA 86 (A) (9 March 2000)

KEY CONCEPTS	
Cautionary Rule	Onus of Proof
Contradictions and inconsistencies in evidence	

**BACKGROUND:** The appellant was formerly the principal of a home on the Cape Flats for homeless, abandoned or abused children. He was charged in the Regional Magistrate's Court, with six counts of indecent assault and one of sodomy. The complainants were all minors at the time of the offences, some very young while others at the age of puberty, and they were all cared for at the home. The accused was convicted on 4 counts of indecent assault and one of sodomy. He appealed to the High Court and the sodomy charge was set aside, but the others confirmed. In this matter he appealed against the 4 remaining convictions of indecent assault.

**DISCUSSION:** The court reminded itself that the evidence of a child needed to be treated with caution and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach. The present case was plainly one which required caution.

### Onus of proof

The SCA noted the following:

- The magistrate failed to properly appreciate the significance of the onus which rested upon the State, as he stated: "The accused's failure to convince the court is a further guarantee of the veracity of the evidence tendered by the State." There is no obligation upon an accused person "to convince the court" where the onus is on the State. If the accused's version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. The test is whether there is a reasonable possibility that the accused's evidence may be true.
- The magistrate found it improbable that the complainants would conspire to fabricate charges against the appellant. The magistrate is incorrect when he found that there was no evidence to support this. The appellant had provided reasonable grounds for suspecting that some of the witnesses may have had a grudge against him and a motive to falsely implicate him.
- The magistrate judged the accused on his demeanour in the witness box and convicted on this ground, finding that "the accused was ill at ease when testifying." The SCA was of the opinion that this was not unusual nor surprising amongst accused persons and even witnesses generally who may be afraid or even overwhelmed at the experience of giving evidence in a court.

- The magistrate's findings concerning two of the witnesses was inconsistent. He said that their evidence "must be regarded as of no value" yet he used their evidence to discredit the appellant.
- There was a long delay between the alleged incident and the trial (about 3 years) and, although the time delay could be responsible for discrepancies, it was nevertheless necessary to be cautious when evaluating the evidence. The court found a number of discrepancies in the evidence of all the complainants as well as motives for the witnesses to have grudges against the appellant.

**FINDING:** In view of the discrepancies and contradictions in the evidence of all the complainants, on which the conviction was based, the SCA found that the magistrate was incorrect in convicting the appellant on the four counts in question. The appeal was allowed and the convictions and sentences set aside.