THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 353/13

Reportable

In the matter between:

Buzwe Maxwell Maseti Appellant

and

The State Respondent

Neutral citation: *Maseti v S* (353/13)[2013] ZASCA 160 (25 November 2013)

Coram: MAYA, TSHIQI, MAJIEDT, WALLIS and PILLAY JJA.

Heard: 12 November 2013

Delivered: 25 November 2013

Summary: Criminal law – sexual offences – improper splitting of charges – attempt to commit a sexual offence – need to specify the offence in the charge sheet – proper approach to evidence – inability of accused to proffer reason for allegations against him not, on its own, a proper ground for rejecting his evidence or convicting him.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Sandi J and Griffiths J sitting as court of appeal from regional magistrates' court):
The appeal is upheld and the convictions and sentence are set aside.

JUDGMENT

WALLIS JA (MAYA, TSHIQI, MAJIEDT and PILLAY JJA concurring)

[1] Mr Maseti was charged before Ms Reddy in the regional magistrates' court in Port Elizabeth with two counts of contravening the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). The first charge alleged that on 26 December 2007 he had committed a sexual assault on SM, a 12 year old girl, by 'putting his tongue in her mouth'. The second was a charge of 'attempt to commit a sexual offence' committed on the same day by 'pushing [SM] onto the bed and removing her clothes'. He was convicted on both counts and sentenced to four years' imprisonment, the two counts being treated as one for the purposes of sentence. His appeal to the Eastern Cape High Court, with the leave of the trial court, was dismissed and leave to appeal was refused. This further appeal is with the leave of this court.

[2] The evidence tendered by the prosecution revealed that both charges arose out of a single incident that allegedly occurred at Mr Maseti's home on Boxing Day in 2007. SM and her brother, LM, who

reside with their mother in Bisho, had been spending their Christmas holiday with their older sister and her husband, Mr Maseti. They had been there since 1 December 2007. SM testified that on the evening of 26 December she had left LM and one of her nieces, BM, playing in the garage, which is detached from the house and gone to watch a television programme 'Generations' in one of the bedrooms. She said that while she was sitting on the bed Mr Maseti entered the room, closed the door but did not lock it, approached her and kissed her for a lengthy period, inserting his tongue into her mouth in the process. She tried to push him away but was unable to do so. He then pushed her onto the bed and removed her skirt, leggings and underpants. He then removed his own trousers and underwear. At this point her sister, Mrs Maseti, who had been in an adjacent bedroom watching television, called her to come and warm some meat in the microwave oven. She accordingly got up, dressed herself and left the room. Those factual allegations formed the basis for the two charges.

[3] It is apparent that charging Mr Maseti with two separate counts, arising out of what was clearly one and the same incident, involved an improper duplication (splitting) of charges. It has been a rule of practice in our criminal courts since at least 1887 that 'where the accused has committed only one offence in substance, it should not be split up and charged against him in one and the same trial as several offences'.[1] The test is whether, taking a commonsense view of matters in the light of fairness to the accused, a single offence or more than one has been committed.[2] The purpose of the rule is to prevent a duplication of convictions on what is essentially a single offence and, consequently, the

[1] *Ex parte Minister of Justice: in re R v Moseme* 1936 AD 52 at 59.

[2] *S v Grobler en 'n ander* 1966 (1) SA 507 (A) at 511H- 12E and 523B - 524A; *R v Kuzwayo* 1960 (1) SA 340 (A) at 342F-344D.

duplication of punishment. Its operation is well illustrated by the example given in *R v Kuzwayo*[3] of the theft of ten apples from an orchard on one occasion, where there is only a single offence and the theft of one apple a day over ten days, where there are ten offences. Here, if there was an offence it was patently a single offence committed with a single intention. It should not have been split into two charges.

[4] That raises the question of what should have been the proper charge. The first count as formulated fell within the terms of s 5(1) of the Act as read with para *(a)*(ii)*(bb)* of the definition of 'sexual violation' in s 1. It did not, however, cover all the alleged conduct of Mr Maseti. That led to the second charge of an attempt to commit a sexual offence. However, that charge was defective because it did not specify which sexual offence Mr Maseti was alleged to have committed. A sexual offence is defined in s 1 of the Act as meaning:

'any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71 (1), (2) and (6) of this Act'.

The charge sheet accordingly referred to all these provisions as well as some others. In the result it covered an attempt to commit incest (s 12); bestiality (s 13); flashing (sections 9 and 22) and all the other myriad offences covered by the Act. Apparently what was intended, but mentioned for the first time in the penultimate paragraph of the heads of argument for the State in this court, was an attempt to commit rape.

[5] The charges appear to have been formulated in this way because, under s 5(1), a sexual assault is committed when the accused sexually violates the complainant. The definition of a sexual violation is extensive,

[3]Ibid.

no doubt in an attempt to cover all possible situations that formerly fell within the common law crime of indecent assault. It includes:

‘any act which causes—

(a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(bb) the mouth of another person;

(cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—

(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or

(iii) mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,

but does not include an act of sexual penetration …’

The first count fell within para *(a)*(ii)*bb)* of this definition. As a result of a mechanical approach to the formulation of the charges it does not appear that the person responsible for them took account of the need to avoid a duplication of charges.

[6] The problem with this mechanical approach is that an attempt to commit rape inevitably involves the perpetrator in the performance of one or more of the acts defined as a sexual violation. Thus a failed attempt at

penetration will involve contact between the genital organs or anus of the victim and some part of the body of the perpetrator. But that cannot mean that it is proper to charge the perpetrator with both attempted rape and sexual assault. There could be few clearer examples of the same conduct constituting more than one offence. Mr Engelbrecht correctly accepted this. In that situation it is for the prosecution to determine which of the two offences should be charged or to charge the two in the alternative. Where a single alleged occurrence justifies a charge of attempted rape, as was the case here, then there should not be separate charges of the component acts underpinning that charge. If the evidence is insufficient to prove attempted rape, but sufficient to prove a sexual assault, the latter is a competent verdict in terms of s 261(1)*(c)* of the Criminal Procedure Act 51 of 1977. In view of the overlap that may exist between different offences under the Act prosecutors must, when faced with a single incident, formulate the most appropriate charge bearing in mind the need to avoid duplication, the competent verdicts on that charge and the possibility of adding alternative counts. Furthermore charges must be formulated with clarity and where reliance is placed on statutory provisions the appropriate provisions must be identified.

[7] The conduct alleged against Mr Maseti would have been encompassed by a single count of attempted rape. The difficulties I have highlighted would then have been avoided. As it is, the first count is inadequate and the second defective, and together they amount to an improper duplication of charges. The impact of these defects on the outcome of the appeal will depend upon the merits of the appeal on the facts.

[8] The evidence of SM has been summarised in para 2 above. Some further detail must be added. She said that the family had participated in a braai that afternoon that ended around 5.00 pm. After the braai she had been sitting in the car in the garage listening to the radio, while her brother LM and her niece BM were playing. She said that she left them playing in the garage and went directly from the garage to the bedroom to watch 'Generations'. She denied that she had been sitting with LM and other members of the family, including Mr Maseti, watching television in the TV room. She said that she cried when Mr Maseti kissed her, but did not cry out or call for help. She said she did not run away or scream because she was shocked and scared. When called by her older sister she simply got up from the bed, dressed herself, and went out without interference from Mr Maseti. She said that she could not remember what he did at this time.

[9] SM did not report these events to her sister or her brother that evening. Both asked her why her eyes were red and she told them it was nothing. At some time on the following day (27 December) she said that she sent a text message to her mother. Her evidence was that she could not recall what was in the message. Its exact terms were not placed before the court although available. Instead her mother was lead as to its contents through the medium of an interpreter. The court was not even told whether the original text was in Xhosa or English. That was obviously an unsatisfactory way in which to obtain this evidence that was of considerable importance. When asked what the contents of the message were her mother simply said that SM asked to come home the following day. The prosecutor then prompted her by asking 'Yes, did she say why?' That attracted the answer, which one would have thought would have been in the forefront of the mother's mind, that Mr Maseti

had wanted to have sex with her. Then followed the blatantly leading question: '[W]hat else was in the text message?' That attracted a lengthy reply, which seems inconsistent with the usually terse nature of text messages, that SM could no longer cope with staying at the Maseti home and that her mother should tell her sister (Mrs Maseti) that she now wanted to go back, whether she liked it or not. The prosecutor then started to move on by saying 'Now those were the contents of the SMS, the text message she sent you?' and SM's mother responded:

'And then she said to me that she had already finished to do her washing insomuch that she wants to come back on the Friday not on the Saturday, which would be the 28th that Friday.'

It is no understatement to say that this alleged final component of the text message is odd in the context of a message that this child had been the subject of a sexual assault by a close family member. However, none of this was or could be explored and the evidence was that it prompted SM's mother to telephone Mrs Maseti and then on the following day (28 December) to come and collect her, take her to the police to lay a charge and take her home to Bisho.

[10] SM's mother's evidence added little else to the picture. She testified as to the receipt of the text message at about 2.00 pm on 27 December and her anger at what she was told. She said that when she came to collect SM on 28 December she asked her what had happened. She was told that SM had been in the spare room, lying on the bed, watching 'Generations' and that this was at about 8.00 pm. Otherwise her description of what her daughter told her largely corresponded with SM's evidence. There were two discrepancies. The first was that she said SM told her that when Mr Maseti came into the room he asked SM whether she loved him. This was not mentioned in the child's evidence. The

second was that she did not say that SM told her that Mr Maseti had removed his trousers and underwear. Neither discrepancy was clarified by the prosecutor or formed the subject of cross-examination, so it is not clear whether these were omissions arising in the course of giving evidence or whether they reflect SM giving different versions of events. SM's mother denied that there was any bad blood between her and her son-in-law, but then accepted that after these alleged events there had been an incident when she had refused to allow her granddaughter to be collected by him. This had resulted in her daughter (SM's older sister) and Mr Maseti having to obtain a court order against her to return the child. However, this appears to be an unrelated incident occurring at a later stage.

[11] LM also gave evidence. He confirmed that there had been a braai that day. He said that earlier he and his niece BM had been playing in the garage and SM was also there with them. Later, on the evening in question, he and BM had been sitting in the TV room watching wrestling on television. This was at about 8.00 pm and Mr Maseti joined them for a brief period but then left them. SM had gone into one of the bedrooms to watch 'Generations'. When he finished watching television he went to the bedroom where his sister was sitting and saw she had red eyes. He said that he asked her why her eyes were red and she gave no reply, just covering herself with a blanket. The prosecutor asked whether she appeared to be crying, to which he responded that he could see she was crying 'because her eyes were red'. At some time on the following day Mr Maseti called him and asked what had happened in connection with SM. His response was that he did not know. It was put to him that he had told Mr Maseti that he did not see his sister crying. His somewhat ambivalent reply was 'No, Your Worship, I did not see'. It is not clear

from this whether he was confirming the correctness of what was put to him or telling the magistrate that he had not seen her doing so, but there was no attempt to clarify the matter.

[12] Mr Maseti bluntly denied the charges. He confirmed that the family had a braai that day and said that he had not felt well. The children had dinner in the TV room between half past six and seven and then carried on watching television. He and his wife did not eat with them, in his case because of his not feeling well. His wife went to have a shower and a nap, while he watched wrestling on television for a while with LM, SM and his two daughters. At about 8.00 pm SM went to his daughter's bedroom to watch 'Generations', which she preferred to wrestling. He was vomiting and several times had to go to the bathroom until at about 8.30 pm he went to bed, taking his younger daughter with him, and leaving LM and BM to continue watching the wrestling. He said that he did not go into BM's bedroom where SM was watching television. He emphatically denied that he had done any of the things of which he was accused and characterised them as absolutely ludicrous.

[13] Mr Maseti said that the first inkling he had of these charges was during a telephone conversation with his sister the following afternoon. He had been working in his study all day when she phoned and asked what he had done the previous day. Having told her that it was nothing to write home about and that he had been unwell, his sister reported that she had heard that SM's mother had said that he tried to sleep with SM. He said he was shocked by the allegation and flatly denied it, as it was not true. After thinking about it he called LM and said he had received a disturbing call from his sister about what had happened the previous night. His evidence was that, in response to his query, LM said they had

simply watched wrestling on television and when Mr Maseti went to bed he had told LM to switch off the lights. Later when BM had fallen asleep, LM said he took her to her bedroom where SM was already sleeping. Mr Maseti then called SM in and asked her, in the presence of her brother, what had happened and she just looked at him, said nothing and cried. He then phoned his wife and told her about the call from his sister. His wife came home, took SM out in her car and spoke to SM, who then told her that he (Mr Maseti) had tried to have sex with her.

[14] In those circumstances a consideration of the merits of the charges came down to an issue of credibility as between SM and Mr Maseti. She made serious allegations against her brother-in-law. His response was that the allegations were a blatant lie. In those circumstances one would have expected there to be a detailed and careful cross-examination of Mr Maseti by the prosecutor. That did not occur. It was put to him, which he confirmed, that SM and LM were regular visitors at their home having also been there in June 2007. He was then questioned on whether there was bad blood between him and his mother-in-law, to which he replied that there had been differences of opinion, of which he instanced that she did not approve of his leaving his job. It was then put to him that his version did not make sense because there had been no previous incident of this nature, even though the children had previously come to his house.

[15] The broad thrust of the cross-examination was to ask Mr Maseti why the witnesses for the prosecution would lie. This started with SM as appears from the following passages, in which I have adjusted some of the punctuation to make it more readily comprehensible:

‘[B]ut now, why would the complainant now all of a sudden say: “Buti”, referring to you, wanted to have sex with me. I thought at that stage I was going to be raped.”

That is what she said exactly [she] thought at that stage you were going to rape her. [Y]ou know why would the complainant do that to someone who is like you, that she used to come and visit and spend holiday with? Why would she do that? - - -Ma'am that's exactly what puzzles me. When I first heard of this it was a shock to me, because I always regarded her not only as a sister-in-law, but as a sister to me.
Hmmm --- Personally I raised my two other sisters, you know, so for me this whole thing was a total shock to my system.
Ja, but why should she lie? Why would she lie about you, being that respected figure to her, you know? --- Your question now will lead me to speculate. I would actually speculate and say her mother put her up to it.'

[16] The prosecutor then pointed out that it was SM who had made a complaint to her mother. This prompted Mr Maseti to say that there was no reason for him to want to have sex with his sister-in-law as he had a good relationship with his wife and could not see why in those circumstances he would want to have sex with a child. Then he was asked why LM would lie about seeing his sister crying that night to which Mr Maseti responded that this was contrary to what LM had said to him the day after the alleged incident. He tried to explain that it was also contrary to a statement that LM had made that there was nothing wrong with his sister, but the prosecutor interrupted him and the magistrate told the prosecutor 'You can leave that for argument.' In the result Mr Maseti was not allowed to say what he wanted to say. As there was no evidence on the alleged statement there was nothing to be left for argument.

[17] The prosecutor then returned to the basic theme by suggesting that if SM was making things up she would 'go for the bigger things you know like rape, the real touching and the real stuff, instead of saying that you only undressed and kissed'. She suggested that SM would 'aim for

the killing not for the lesser things'. Not surprisingly this emotional line of questioning prompted the response:

'Well if you were to think rationally about such things there would have to be proof you know, she was red of which there isn't. Really I cannot get into her mind or into their minds, but having thought about this over and over hitting a dead end, ma'am it is difficult to answer that question, because I can't comprehend why you know something like this would happen. I can't comprehend why [SM] would actually go through with something like this. So to even take it a step further and answer those questions would be difficult for me.'

[18] That answer resulted in the prosecutor accusing Mr Maseti of wasting the court's time and making a lengthy statement that he was guilty of the charges because the only time that there was bad blood between him and SM's mother was over this incident. The statement ended with her saying that his version 'does not hold water at all'. Needless to say this was entirely improper and should have been stopped by the magistrate. The right to cross-examine does not entitle a prosecutor to get cross, or to make speeches or to harangue an accused person. Nor does that become permissible by interposing the words 'I put it to you'.

[19] The prosecutor's approach was wrong. Regrettably the error was compounded by the fact that it found favour with both the magistrate and the court below. The magistrate summarised the evidence of the State witnesses and held that they were all satisfactory. She had the following to say about Mr Maseti:

'The accused testified in a vague and unconvincing fashion. He was evasive about the bad blood between him and the second State witness and finally after much probing by the Public Prosecutor he said no bad blood was between them. He was unable to commit himself to any clear answer as to why the complainant would falsely implicate him in such a serious matter. Further no reason was in fact given either by

the complainant or the defence why the complainant would want to lie against the accused. It is highly improbable that the second State witness would involve her daughter in a process like this simply because she does not like the accused.'

The magistrate went on to explain that because the relationship between the families was good it was improbable that SM would have upset it by making these allegations against Mr Maseti. For those reasons she held that the probabilities weighed heavily in favour of the State's case.

[20] The court below adopted the same approach. It too referred to the fact that the family relationship was good, with SM and her brother spending their Christmas holiday with the Masetis. It regarded it as strange that SM would make such serious allegations against the appellant and said that it was improbable that she would destroy the good relationships between the two families by fabricating evidence against her brother-in-law.

[21] What is absent from the judgment of the magistrate and that of the court below is a careful evaluation of the evidence of both SM and Mr Maseti, weighing both against the intrinsic probabilities.[4] Take by way of example the point that there was no apparent reason for SM to fabricate allegations against Mr Maseti and thereby sour the relationship between the two families. It was entirely overlooked that it was equally improbable that Mr Maseti would sour that relationship by sexually assaulting his sister-in-law. When one looks at this issue from the perspective of both SM and Mr Maseti and asks why either of them would damage the family relationship, the answer can only be a matter of speculation.

[4] *S v Singh* 1975 (1) SA 227 (N) at 228G-H: 'The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and the defence witnesses but also to the probabilities of the case.' Approved in *S v Guess* 1976 (4) SA 715 (A) at 718H.

[22] That brings me to the issue of cross-examination that asks the witness to speculate. I have quoted the passage from the cross-examination of Mr Maseti in which the prosecutor demanded to know why SM should lie in her evidence. That is a question that is frequently asked in cases such as these. It is not a proper question because, as Mr Maseti quite correctly pointed out, it calls upon witnesses to speculate about matters in respect of which they can have no knowledge. Later in his evidence in response to another similar question he said he could not get into the mind of SM or her mother. The question requires the witness to express an opinion about the subjective state of mind of another person. That is a matter of speculation or conjecture and as such the answer is irrelevant and inadmissible.[5] It follows that questions directed at eliciting this type of evidence are impermissible and should be disallowed.

[23] This was not a case where the accused had, in evidence in chief, expressed a belief that the case against him had been fabricated for a particular reason, the validity of which might have been the proper subject of cross-examination. Instead the prosecutor was the one who asked Mr Maseti to say why SM would make false allegations against him. The question was asked on the postulate that he was being falsely accused. Accepting that postulate, it was unfair to expect him to speculate on the matter. That was especially so in the environment of a court where he was being pressed for an answer under cross-examination. The natural human inclination in that situation is to provide some answer, however

[5]Hodge M Malek QC (General Editor) *Phipson on Evidence* 16 ed (2005) 33.74: 'Nor are the opinions of witnesses admissible to prove another person's intention.' It follows that they are even less admissible to prove another person's motives for their acts. *Charles Velkes Mail Order 1973 (Pty) Ltd v Commissioner for Inland Revenue* 1987 (3) SA 345 (A) at 359H-I.

speculative or far-fetched, which may then be used to attack their credibility. That is what happened here. Magistrates and judges must be alert to disallow such cross-examination. An accused person who claims that they have been falsely accused is under no obligation to explain the motives of their accuser and should not be asked to do so.

[24] Instead of disallowing the cross-examination, the magistrate elevated Mr Maseti's perceived inability to provide a plausible reason for SM to fabricate these allegations against him into the major reason for convicting him, as appears from the passage from her judgment quoted in para 19. She returned to this theme later in the judgment when she said:

'The court finds that there is no motive for the complainant to falsely implicate the accused. The accused's evidence is not compatible with the general circumstances of the case, as reflected and facts which are common cause.'

However, as there had been no prior analysis of the 'general circumstances of the case' the latter statement added nothing to the magistrate's reasons.

[25] The approach, that an accused person is necessarily guilty because the complainant has no apparent motive to implicate them falsely and they are unable to suggest one, is fraught with danger. This was spelled out by Mahomed J in *S v Ipeleng*[6] in the following terms:

'It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him. The accused has no onus to provide any such explanation. The true reason why a State witness seeks to give the testimony he does is often unknown to the accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways. They often seek to curry favour with their supervisors, they sometimes need to placate and impress police officers, and on other occasions they nurse secret ambitions and

[6] *S v Ipeleng* 1993 (2) SACR 185 (T) at 189 *c-d*.

grudges unknown to the accused. It is for these reasons that the Courts have repeatedly warned against the danger of the approach which asks "Why should the State witnesses have falsely implicated the accused?".'[7]

[26] There will be circumstances in which the absence of any apparent reason for the prosecution witnesses to fabricate a case against the accused is a relevant factor for the court to take into account in the overall assessment of the evidence. However, on its own, where no other circumstances are present pointing towards the guilt of the accused it is not a proper or sufficient basis for a conviction.

[27] In this case both the magistrate and the court below adopted an incorrect approach to the consideration of the evidence. In effect they held that the inability of Mr Maseti to advance a plausible reason for SM fabricating these allegations, meant that her evidence had to be accepted and his rejected. That was incorrect and came close to placing an onus on Mr Maseti to prove his innocence. The proper approach was to evaluate both versions against the inherent probabilities taking account of all the evidence.[8] If, after undertaking that exercise, it appeared that his version could reasonably possibly be true, even if it was improbable or in some respects untruthful, he was entitled to be acquitted.

[28] I turn then to consider the evidence and to weigh it against the inherent probabilities of the situation. All of the witnesses gave their evidence clearly and none were particularly damaged in cross-examination, which was generally inadequate and ineffective. The evidence of SM had some support from her mother, to whom she reported

[7] *S v Makobe* 1991 (2) SACR 456 (W); *S v Lesito* 1996 (2) SACR 682 (O); *R v Mtembu* 1956 (4) SA 334 (T) at 336A-B.

[8] *S v Van der Meyden* 1999 (2) SA 79 (W) at 82D-E; *S v Shackell* 2001 (4) SA 1 (SCA) para 30.

the incident on the following day. I would attach no adverse weight to the slight delay in making that report. It is also so that when her older sister, Mrs Maseti, questioned her on the following afternoon, she told the same story about the incident. LM, who saw her with red eyes, when he was putting their niece to bed in the room where SM said that the incident occurred, also lent SM's evidence some support, although his evidence did not support the magistrate's finding that SM had been crying.

[29] There are few objective facts against which to assess the probabilities in relation to SM's version. It is not in dispute that there had been a family braai that afternoon. It is also not disputed that she had gone into the bedroom to watch the programme 'Generations', while LM and their niece, BM, were watching wrestling on television in the TV room. This was at 8.00 pm, when 'Generations' aired. However, there is some inconsistency in regard to time and place, which cannot be resolved on the evidence and might have been significant if resolved. SM said that the braai finished at 5.00 pm, after which she sat in the car in the garage listening to music while LM and BM were playing in the garage and then went from the garage to the bedroom to watch 'Generations'. LM said that the braai finished between 5.00 and 6.00 pm and accepted that he and BM had been in the garage and had then watched television. He denied that SM had spent any time watching with them before 'Generations' started. On the other hand Mr Maseti's evidence that the children ate dinner between 6.00 and 7.00 pm in the TV room and then watched television together, until SM went to the bedroom to watch 'Generations' was not challenged in cross-examination. As LM was not questioned on this and Mrs Maseti was not called as a witness it is impossible to measure the accuracy of any of these differing versions against undisputed facts. What is not in dispute is that for at least some of the

time when LM and BM were watching wrestling Mr Maseti was watching it with them.

[30] As regards Mr Maseti's evidence there are again few objective facts against which the likelihood of it being truthful or untruthful can be measured. He said that there had been no such incident. If he was telling the truth, what else could he say? On his version SM had gone to watch television in the bedroom and, a short while later, he went to bed, taking his younger daughter with him, without seeing her again that evening. If that was correct there was nothing else that he could say to support his version. What is telling in his favour was his reaction to the news that SM had made these allegations against him. He was told about it by his sister and he immediately denied it. Then after some reflection he called in LM to ask him about the matter and, according to him, received a response that nothing had happened. He then, with LM present, asked SM about it and received no response. Not content to leave matters there he asked his wife to speak to SM and suggested that they go for a drive together. This is exactly what one would expect an innocent person to do when confronted with allegations of this type.

[31] There are also some curious features about the allegations made by SM. She said that she was watching television in a bedroom. It transpired from her brother's evidence that this was a room she was sharing with her niece, BM, a young child who could have wanted to go to bed for the night at any time. In addition the prosecutor put it to her, and she accepted, that her older sister was in the adjacent room. Because the prosecutor did not trouble to place a floor plan of the house before the court we do not know the exact relative position of these bedrooms to the TV room, where her brother was, but there was patently a risk that

someone in the household could come into the room at any time. Yet on her evidence Mr Maseti entered and, apart from closing the door, took no steps to lock it or ensure that they could not be disturbed, while removing her clothes and his own, so that anyone coming in would find the two of them semi-naked. This occurred, according to her, in a house where there were at least four other people – her brother and older sister and the two children. Yet she said that Mr Maseti kissed her, removed her clothing and she feared he would rape her, in circumstances where a single cry or scream would have brought people running into the room. By any standards that was an extraordinary risk to take. What is more the prosecutor asked her, by way of a grossly leading and quite improper question, whether she cried at any stage to show her disapproval of what was being done to her and she said she cried. If that was so, why did no-one hear her? This was not explained.

[32] There are also some odd features about the contents of the text message as described by SM's mother. It seems most peculiar that, when SM was finally able to make a complaint to her mother about Mr Maseti's alleged conduct, she would explain that she had done her washing and therefore could come home a day earlier than originally planned. The evidence in this regard is rendered even more unsatisfactory by the fact that the mobile phone on which the message was received was not produced so that the court was not apprised of its exact terms, but instead was given secondary evidence of its contents. Under cross-examination SM's mother indicated that the mobile phone with the text message could be made available and she was asked to produce it. However, this did not happen, resulting in an important piece of evidence not being before the court.

[33] Whilst the best evidence rule seems everywhere to be in retreat[9] that does not mean that a court must accept as accurate secondary evidence of a document or other form of writing, such as an text message. The fact that it has been thought necessary to make elaborate provision in a statute[10] for the admissibility in evidence of such messages demonstrates the need for caution in this regard. Here the original message would have been admissible provided the court was satisfied that it had been generated, stored and communicated in a reliable manner; that its integrity had been maintained in a reliable manner and after taking into account any other relevant factor.[11] Perhaps the oddities about this message would have been explained had the original been produced as it should have been. Perhaps its production would have prompted an application to recall SM for further cross-examination as to its contents. We cannot tell. There can be no excuse for the prosecution's failure, in the light of the request by the defence attorney that the phone be produced, either to have the original phone, with the message, available or to provide an agreed transcript of its contents. That point was pertinently raised in the closing address by Mr Maseti's attorney, but was ignored by the magistrate in her judgment. In fact she relied on the first and second parts of the mother's evidence regarding this message and disregarded both the attorney's submission and the balance of the message.

[9]DT Zeffertt and AP Paizes *The South African Law of Evidence (formerly Hoffmann and Zeffertt)* 2 ed (2009) 381-3; *Phipson on Evidence* supra 7-37 to 7-45.

[10]Electronic Communications and Transactions Act 25 of 2002, ss 11 to 28.

[11]Section 15(3) of Act 25 of 2002. *S v Ramgobin & others* 1986 (4) SA 117 (N) illustrates the dangers of relying on modern means of recording facts if insufficient care is taken to examine them and their authenticity. Accepting secondary evidence of their contents poses a number of similar dangers, not least, of inaccuracy.

[34] There are many other respects in which the prosecution case was inadequately presented. It started with the deficiencies in formulating the charges. It extended to leading three witnesses without any attempt to relate the evidence of the one to that of the others. No plan of the house was produced and nor was the original, or a transcript, of the text message. The cross-examination of Mr Maseti was inept, canvassing none of the material facts and pursuing an approach that assumed his guilt. There was no explanation for the failure to call Mrs Maseti, whose evidence on the events of that day and that evening could have clarified many issues, such as the timing of events; whether SM was with the rest of the family during supper and watching television afterwards; whether she had herself gone to watch television separately or to have a shower and a rest; and crucially whether she called SM to warm up some meat and asked her about her red eyes.[12]

[35] These deficiencies were compounded by the magistrate. She permitted the prosecutor to ask a number of leading questions on critical issues, particularly when leading the evidence of SM. She upheld an objection by the prosecutor to an entirely proper question to SM by the defence attorney about the omission from her police statement of a reference to Mr Maseti disrobing so that she could see his private parts. She prevented Mr Maseti from referring to a statement by LM when explaining why an answer LM had given in his evidence was incorrect. Then when it came to her judgment she failed to address any of the submissions made by the defence attorney. The court below repeated that error and compounded it by refusing leave to appeal.

[12]Such evidence was not excluded by s 198 of the Criminal Procedure Act 51 of 1977.

[36] In the result I am satisfied that there was no proper basis for the rejection of Mr Maseti's evidence and that it could reasonably possibly be true. He was accordingly entitled to his acquittal. That means that it is unnecessary to resolve the problems caused by the defects in the charge sheet. The appeal is upheld and the appellant's convictions and sentence are set aside.

M J D WALLIS
JUDGE OF APPEAL

For Appellant:	T N Price Instructed by Nogcantsi Attorneys, Port Elizabeth; Honey Attorneys, Bloemfontein.
For Respondent:	J Engelbrecht National Director of Public Prosecutions, Grahamstown.