THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 537/2018

In the matter between:

Y **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Y v S* (Case no 537/2018) [2020] ZASCA 42 (21 April 2020)

Coram: NAVSA, DAMBUZA, MOLEMELA and MBATHA JJA and MOJAPELO AJA

Heard: 18 February 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 21 April 2020

Summary: Criminal law and procedure – evidence – sexual assault and rape of child complainant in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 – multiple contradictions and inconsistences in the evidence of single child witness – whether the evidence

was sufficient to prove the offences beyond a reasonable doubt – evidence unsatisfactory in material respects – appeal upheld.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Mbhele J and Chesiwe AJ, sitting as court of appeal):

1 The application for leave to appeal is granted.

2 The appeal is upheld and the order of the court below is set aside and substituted as follows:

'The appeal is upheld and the convictions and related sentences are set aside.'

JUDGMENT

Mbatha JA (Navsa and Dambuza JJA concurring)

[1] The applicant, Mr Y, was arraigned before the Regional Court for the Division of Free State, Bloemfontein (the regional court) on one count of sexual assault in contravention of s 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007[1] (the Sexual Offences Act), and two counts of rape in contravention of s 3 of the Sexual Offences Act.[2] He entered a plea of not guilty on all charges. He was subsequently convicted of all charges. He was then sentenced to five years' imprisonment on the

[1] Section 5(1) reads as follows:
'A person ("A") who unlawfully and intentionally sexually violates a complainant ("B"), without the consent of B, is guilty of the offence of sexual assault.'

[2] Section 3 provides:
'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.'

conviction of sexual assault and life imprisonment on the two convictions of rape.

[2] His application for leave to appeal his convictions and related sentences was dismissed by the regional court. A petition to the Judge President of the Free State Division of the High Court, Bloemfontein (the high court) met the same fate. This was followed by an application for leave to appeal to this Court, which leave was granted to the full court of the high court, in respect of both conviction and sentence. That appeal failed.

[3] The applicant then lodged an application for special leave to appeal to this Court, which was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013. The parties were directed to be prepared, if called upon to do so, to address the court on the merits of the appeal. We heard argument on both the application for leave to appeal and on the merits.

[4] It is necessary at the outset to state that the police, the prosecuting authority and courts are required to display the requisite sensitivity and attentiveness to cases involving sexual offences, including consideration of the trauma attendant upon those who were victims, especially when they are children. Care should however also be taken at the end of the case to ensure that the criminal standard of proof has been met. The State is required to be technically proficient in prosecuting the case. In this case the prosecution fell short. This is an aspect to which I will repeatedly refer.

[5] The complainant in this matter was born on 4 November 1996. She was thus 13 years and six months old when the trial commenced in the regional

court. The applicant, the accused in the regional court, is her stepfather. It is necessary to pause to have regard to the charge sheet which we had to call for during the hearing before us as it was not provided as part of the record. In respect of the first count, the particulars provided in the charge sheet read as follows:

'In that on or about the During 2008 and at or near Bloemfontein in the Regional Division of Free-State the said accused did unlawfully and intentionally sexually violate the complainant, to wit minor child (Ms X) 12 years by making her touch and caress your penis and touching and caressing her breasts without the consent of the said complainant.'

In respect of the second count the charge sheet reads as follows:

'In that on or about the During 2008 and at or near Bloemfontein in the Regional Division of Free-State the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, (Ms X) a 12 year old girl by penetrating her vagina with fingers more than once without the consent of the said complainant.'

In respect of the third count the charge sheet set out the following:

'In that on or about the during August 2009 and at or near Bloemfontein in the Regional Division of Free-State the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, 12 year old (Ms X) by penetrating her vaginally with his penis once.'

[6] It is common cause that the complainant, her mother, her stepfather and her sibling, all lived together in Trompsburg before they moved to a caravan park in Bloemfontein. The allegations against the applicant first surfaced after an incident that occurred on 17 September 2009. The complainant had stolen a chocolate at a local Spar supermarket. Her mother was informed about this. She in turn telephoned the complainant's stepfather who then arrived at the shop and physically admonished her in public. According to the complainant

she was smacked across her face. The applicant, in his evidence, insisted that he had struck her across her buttocks.

[7] In respect of the theft of the chocolate and subsequent events Ms V, the complainant's 17 year old friend, testified that on 18 September 2009, whilst they were walking home from school, she enquired about a blue eye that the complainant had sustained and which had been visible at school the day before. The complainant told her that she had been struck by her stepfather with an open hand, across the face, the day before, because she had stolen sweets from the supermarket. Ms V, in turn, told her mother about this exchange. Her mother imparted this information to the caretaker of the caravan park, who suggested they wait for the complainant to arrive before they contacted a social worker. As the complainant approached the caravan park, Ms V told her that she had informed her mother about the assault by her stepfather. Upon hearing this the complainant started crying and was concerned that her mother might be angry that she had told someone about the assault.

[8] Following on what is set out in the preceding paragraph, according to Ms V, she then knelt before the complainant and advised her that if there was anything she wished to communicate she must do so, because the social worker was on her way. The complainant's response was to cry even more. The following part of Ms V's evidence-in-chief on this aspect, is important:

'I then asked if uncle Y was. . . Or if she was touching, if Oom Y was touching her body. Ugh-huh? --- She then said to me; yes. I then asked her; what does uncle Y do to her. She then said that uncle Y puts some hard(?) parts into her. …(indistinct) and she showed me. … (interpreter clarifies). He insert his part into her (sic).

How did she show you? --- She stood upright and showed me and pointed to her genitals and okay(?) this(?) part of the man … (indistinct) that(?).
You mean… What parts? --- This part of a man…
INTERPRETER: The witness is pointing to her genitals.
Into what? --- Into her vagina.
Ugh-huh? --- I then asked her; what else does uncle Y do? She told me that uncle Y also touches her body all(?) over(?) her body. I then asked her if she could still remember the last time that uncle Y inserted his private part into hers.
Ugh-huh? --- She told me she could not remember quite well but it was about a year ago.'

[9] It is common cause that subsequent to the discussion described above, Ms V's mother was informed and a social worker was summoned and after she had spoken to the complainant in the presence of Ms V, the police arrived and arrested the applicant. In light of the narrative thus far and the information available to the prosecutor, one would've expected care to be taken in the presentation of the evidence of the complainant, especially in relation to the chronology, location and frequency of the actions of the applicant. This was not done.

[10] I now turn to set out the relevant parts of the evidence of the complainant who testified through an intermediary. It is necessary to deal with her evidence in some detail. The material part starts with the prosecutor saying: 'Now let us start the whole episode from 2008. Do you remember the month when this started?' And the complainant responding first: 'My pa het my geleer van seks.' The court then pointed out that the intermediary had not conveyed the question concerning the month in which the offending conduct commenced. The complainant then said that she could not remember the

month. It must at this stage be kept in mind that the prosecutor started by suggesting the year in when the 'whole episode' started.

[11] The prosecutor then posed the following question: 'Can you then tell us how it started what your dad did first before you reach to the rape, what did he do? The answer to that question was: 'Hy het aan my gepeuter'.'Peuter' is defined in the Pharos *Afrikaans-Engels Woordeboek*[3] as follows: 'fiddle, potter, putter, niggle, tinker, palter, footle, piddle, tamper. . .' It is to be noted that the prosecutor started by suggesting that she still has to testify about being raped. Up until that stage, she had not mentioned rape.

[12] Immediately after the exchange set out in the preceding paragraph the prosecutor said the following:

'Tell us everything how it started, how you touched him, all those things.'

Once again the prosecutor is leading the witness. She had not yet testified about touching the applicant. Shortly thereafter the prosecutor then asked the following question:

'Tell us where were you, who came and how it happened.'

The following is the relevant exchange:

'Hy het langs my kom lê in die bed.

Whose bed? --- My bed.

Yes? --- Hy het gepeuter aan my. Toe trek hy sy broek af. Toe trek hy my broek af. Toe verkrag hy my.

How did he rape you, what did he do, actually do. What part of the body did he use? --- Sy private deel.

Where, what did he do with his private part? --- In my privaatdeel gesit.

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[3] M du Plessis, F Pheiffer, W Smith-Müller & J Luther (eds) *Pharos Afrikaans-Engels English-Afrikaans Woordeboek Dictionary* (2010) at 447.

And did what? --- Hy het my verkrag.

COURT: Do you have the dolls there Mrs Van der Walt.

[INTERMEDIARY]: Ja ek het.

COURT: I think you can give her the dolls to demonstrate because she is struggling to talk. Proceed.

Before, had she done anything to you on the body? --- Hy het aan my gepeuter.

Not on the day of the rape, I am talking about before then? --- Ja.

What did he do? --- Hy het sy vinger in my private plek gesit.

And where were you when he did so, at home, in your bedroom, in the kitchen? --- Ek kan nie onthou nie.

Was it once or many times, several times? --- Meer as een keer.'

[13] The complainant then testified that she had been sworn to secrecy by the applicant. The prosecutor proceeded to ask the following question:

'Has Y ever shown you his body or anything? --- Ja'

What appears hereafter is the relevant exchange:

'What? --- Sy private plek.

Where were both of you? --- In sy kamer.

What did he start saying before he showed you his private part, his penis? --- Hy het my verduidelik van seks.

Saying what? --- Ek kan nie so mooi onthou nie.

Did you know how kids were made? --- Ja.

Did anyone tell you how they are made? --- Nee.

So you did not know why he was showing you his private part? --- Nee.

What did he say about sex? --- Hy het my vertel hoe word babas gemaak.

What did he say? --- Hy het gesê as jy seks het, 'n sperm gaan in jou in 'n vrou se liggaam in, dan word dit groter en dan kry jy 'n baba daar.

Hm-hm? --- Ek kan nie mooi onthou nie.

Did you touch or only see that penis? --- Hy het my hand gevat en dit op sy private deel gesit.

Did you agree to do so or were you just ordered to? --- Ek het vir hom gesê ek wil nie.
But what happened? --- Toe vat hy my hand en toe sit hy dit op sy private deel.'

[14] The complainant was asked whether she had told her mother about what had occurred and her answer is: 'Nee'. Asked why she had not done so, she stated 'Ek was bang' and then immediately thereafter 'Ek was bang hy maak my seer'. The following further exchange is also relevant:

'Did this touching of his penis happen on a separate date or time or day from the rape? --- Ja.
So am I correct to say the touching of your breast and the putting on fingers was also different from this touching of penis and rape?
COURT: Do you understand? --- 'n Paar dae daarna, ja.'

Significantly, the complainant had not testified about the touching of her breast before it was mentioned by the prosecutor, nor did she testify about it thereafter. It is also, at this stage, important to note that in the exchange referred to above, it is clear from the complainant's evidence, that the three incidents set out in the charges sheet, occurred within days of each other.

[15] The prosecutor subsequently attempted to obtain clarity in relation to the sequence of events:

'So can you then tell us which comes first, when did he do this first and then this and then that? --- Heel eerste het hy vir my verduidelik van seks. Daarna toe begin hy vat aan my privaatdele.
Hm-hm? --- Toe het hy een dag my verkrag.
All these times you did not tell your mother? – Nee.
Did anyone say you must not tell? --- My Pa.'

At this stage she was denying that she told her mother about any one of the three incidents.

[16] The prosecutor continued and questioned the complainant about how the applicant's conduct became known to others:

'--- Toe my pa my verkrag het toe het ek vir hom gesê, los my uit, toe raak hy kwaad, toe sê hy iets vir my ma. Die volgende dag in die badkamer toe vra ek vir my ma wat het gebeur. Toe sê ek vir haar hy het my seergemaak. Toe vra sy vir my hoe seergemaak. … Toe sê ek vir haar hy het sy privaatdeel in my privaatdeel ingedruk.'

From this exchange it appears that what her stepfather said to her mother, caused her to ask what had happened, rather than her disclosing anything before that.

[17] The complainant went on to testify that Ms V came to know about it after she had been asked by the latter whether the applicant was molesting her. The prosecutor then asked the complainant whether she had an injury on her face. This was before anybody had testified about such an injury. Despite this impermissible leading of the witness, the magistrate did not once intervene. The complainant confirmed that she had an injury on her face and that this had occurred because her stepfather had assaulted her after the theft of the chocolate. She confirmed that Ms V and her mother had contacted the caretaker of the caravan park and thereafter the social worker.

[18] Towards the end of her evidence-in-chief the complainant said that after she had informed her mother about what her stepfather had done, the former had undertaken to talk to him about it, but did not appear to have done so.

[19] Under cross-examination the complainant described the inside of the caravan in which her family lived. She described how the front door of the caravan was kept open so as to access a small room standing apart from it.

Two beds stood within the caravan and one in the adjoining room. Her mother and stepfather slept in the caravan and she slept in the adjoining room. The beds were apparently two to three metres apart. The complainant was asked to explain what she meant when she used the word ‘gepeuter’ in her earlier evidence. She replied that she meant that the applicant had placed his finger in her private part. She did not protest because she was afraid he would assault her.

[20] The complainant was asked when the applicant had exposed his penis and placed her hand on it. She said that this had occurred in his room. This incident, she said, had occurred in his room when they still lived in Trompsburg. She could not remember the date of that incident. She could not say whether it was two, three or six months before they moved from Tromspburg to the caravan park. She did say however, that it had occurred before the rape in the caravan. She could not remember whether it was three months or six months before they had moved to the caravan park,[4] ostensibly from Trompsburg. Almost immediately thereafter, she said that the rape in the caravan had occurred a few months after the incident in Trompsburg.

[21] It will be recalled that the first two incidents, including the one presently being discussed were said in the charge sheet to have occurred in 2008, whereas the rape was said to have occurred in 2009. It will also be recalled that the complainant had testified earlier, in-chief, that the three incidents in respect of which the applicant had been charged had occurred a few days apart. From her evidence-in-chief they appear to have occurred at

[4] ‘Was dit twee maande of drie maande of ses maande voor julle getrek het? --- Ek kan nie onthou nie.’

one location, namely, the caravan park, as that is where they had been living at the time. Trompsburg was never mentioned by the complainant during her testimony in-chief.

[22] Under cross-examination the complainant was asked, once again, when the applicant had first abused her sexually. Her reply was that she could not recall. She said she could not recall when it occurred because she might not want to recall it. She was asked about the second time when he had abused her sexually. Her response was: 'As ek kan reg dink, in my bed.' She had no idea where her mother was at that time. According to her, the caravan door was open at the time.

[23] Asked how many times he had abused her sexually (gepeuter het), she replied, 'baie keer'. She was asked whether it occurred in the caravan park or in Trompsburg. She replied that it had occurred in both locations. She could not recall where her mother was when any one of these incidents occurred.

[24] Further, under cross-examination, the complainant repeated that she had not called for help because she was afraid. She was then asked why she then told her mother about it, when they were in the bathroom together the next day. She replied as follows:

'Want ek wou dit uit my kry.'

Asked why her fear had dissipated, she replied:

'Want ek het besef hy kan niks aan my doen nie.'

As to why she had feared her stepfather before, she replied

'Want toe ek klein was het hy Martial Arts gedoen'

As to why she chose, nevertheless, to disclose her stepfather's misconduct to her mother she stated:

'Ja maar hy het nie'

Later under cross-examination she was asked, once again, why she had told her mother about the rape. She replied:

'Want ek het besef ek moet'.

Shortly thereafter she said the following:

'Ek was bang daardie aand want as ek vir my ma vertel het of ekskuus, as ek geskree het daardie aand sou my ma en my pa gestry het en ek wou hulle bymekaar hou.'

Pressed by counsel for the applicant as to why she told her mother about the incident the next day, she replied:

'Ek het nie meer omgegee nie . . . Want ek het besef een van die dae gaan kom wanneer hulle twee gaan skei.'

A short while later, in response to a question, yet again, about why she had changed her mind, she said the following:

'Want my pa was kwaad gewees het vir my oor ek vir hom gesê het: los my uit. Toe sê hy iets vir my ma. Die volgende oggend toe vra my ma vir my wat het gebeur. Toe sê ek vir haar my pa het my seergemaak. Toe vra sy hoe seergemaak.'

[25] The complainant had testified that while she was raped in the caravan she had said the following to her stepfather:

'los my uit'.

She said her mother would not have heard because she speaks softly.

[26] Asked about whether she had stolen sweets before, she replied:

'Nie wat ek aan kan dink nie, nee'

Urged by counsel for the applicant to tell the truth, she then testified as follows:

'Toe ek klein was uit my oupa sê winkel uit, ja.'

[27] Asked about the time of day that the rape (the third count) had occurred she replied: ‘In die aand’. Asked where her mother was at the time, she replied: ‘In haar bed’. It will be recalled that she had testified earlier that she could not recall where her mother was at the time of any one of the three incidents. Later, under cross-examination, she repeated that the rape (the third count) had occurred at night. It was common cause that her stepfather drove trucks over long distances for a living and that he was often away from home. The complainant testified that he worked Mondays to Fridays. Some nights he was at home. She was adamant that at the time that her stepfather raped her, she was in her pyjamas. She could not recall whether he was dressed or not. Later she stated that in order for him to have raped her: ‘Hy het seker sy broek afgetrek.’ Asked if she had seen him do this, she replied: ‘Dit was onder die komberse, ek kon niks sien nie.’ It will be recalled, as set out in para 12 above, that the complainant clearly testified that she had seen the applicant remove his pants before he raped her.

[28] The applicant was referred to a statement to the social worker where she had stated that he had raped her in the morning, when he was off work. When she was confronted with the contradiction between her statement to the social worker and her testimony about the time when the rape occurred she insisted that it had occurred at night and stated the following: ‘‘n mens is ook net ‘n kind ‘n mens vergeet baie maklik’.

[29] Asked under cross-examination whether her stepfather had been under the influence of alcohol at the time that he had raped her in the caravan, she replied: ‘Ek kan nie onthou nie, dit is lank terug’. In her statement to the social worker she had said the following:

‘Die keer toe hy sy ding in my ingedruk het was hy ‘n bietjie gedrink gewees. Dit het in die oggend gebeur.’

In explaining the contradiction, she said the following:

‘Maar ek kan nie onthou wat ek in die verklaring gesê het nie, want dit is lank terug.’

[30] Asked about whether she was angry at her stepfather because he had assaulted her following the theft of the chocolate, she replied:

‘Ek was nie kwaad vir hom gewees nie, elke kind kry sy pak, maar deur die gesig, nee, dit werk nie so nie.

So jy was vir hom kwaad gewees omdat hy vir jou deur jou gesig geklap het? --- Ek was nie kwaaad vir hom gewees nie, maar dit werk ook nie so dat hy ‘n mens deur die gesig klap nie.’

[31] It is to be noted that the complainant repeatedly stated under cross-examination that she is telling the truth and that it was up to others to believe her or not. At one stage she refused to answer a question on the basis that she had answered it already.

[32] In respect of how the disclosure of the allegation about her stepfather raping her came about, the following question and response are relevant:

‘Het jy ook toe vir haar vertel dat jou pa jou verkrag het? --- Sy het my gevra, het hy, toe sê ek ja.’

[33] Significantly, Ms V testified that the complainant was reluctant to speak to the social worker because she did not want the latter to disclose to her mother what she had done. This is at odds with the complainant’s testimony that she had already disclosed to her mother what her stepfather had done to her. Asked about what had prompted her to suggest what the applicant had

done to the complainant, she replied that many people in the caravan park had suspicions about the applicant. It was clear from the evidence of Ms V, her mother and the applicant that there was little love lost between them and him. More accurately it appeared that they positively disliked each other.

[34] In respect of the blue eye that the complainant had sustained, Ms V agreed that it was strange that it had not been visible the morning after the chocolate incident, and that she had only seen it that afternoon on the way home from school. She testified that the complainant had initially said that she had sustained the blue eye in a fight. It was only after Ms V accused her of lying that she implicated the applicant. This evidence came to light for the first time during cross-examination.

[35] Under cross-examination Ms V was emphatic that the complainant had not disclosed her stepfather's misdeeds to her mother 'want sy was bang my ma vertel haar ma'. The following exchange a little later is important:

'Verstaan ek reg; jy sê dat [X] het vir jou gesê sy het nooit vir haar ma van die goed vertel nie, wat nou Mnr Y sou gedoen het nie? --- Nee, sy het nie haar ma vertel nie.'

[36] Further on in cross-examination Ms V was even more emphatic:

'Ek noem dit vir jou dat [Mnr Y] hier hier getuig het in die hof dat sy dit wel vir haar ma vertel het. --- Maar ek sê mooi vir jou sy het nie haar ma vertel nie, want haar ma weet van niks nie, tot en met die dag wat [die maatskaplike werker] daar was'.

Ms V insisted that the complainant had only told her that she had been molested sexually by her stepfather, and nothing more.

[37] Ms V's mother, Ms H, confirmed her testimony that the complainant said that she had not told her mother about her stepfather sexually abusing her. She did, however, provide some corroboration for the applicant's version that he had struck the complainant on the buttocks by stating that Ms V told her that the complainant had been beaten on her buttocks. Towards the end of cross-examination she added the injury to the eye.

[38] Sister Mokoena, a forensic nurse, testified that she had examined the complainant on 30 September 2009. She completed the J88 medical form, which showed no evidence of penetration. Irrespective of that, Sister Mokoena concluded that the lack of injuries did not exclude the occurrence of sexual assault.

[39] The social worker testified that upon receipt of the complaint, she interviewed the complainant and her family. She testified that she immediately placed the complainant in foster care permanently. The social worker's testimony was that she observed a blue mark on the right hand side of the complainant's face. As she was leaving with the complainant she observed the applicant making gestures to the complainant indicating to her not to say anything. Upon being questioned the complainant told her that her stepfather was responsible for the mark on her face. The social worker testified that there were no indications of any marks on the complainant's buttocks or her back.

[40] The applicant testified in his defence and denied ever sexually assaulting or raping the complainant. He testified that the complainant started to misbehave after the birth of her youngest sibling. The complainant had

become uncontrollable as she was stealing, drinking and associating with people who had a bad influence on her. He testified that the complainant had laid false charges against him after he chastised her for stealing chocolate at the supermarket. He denied assaulting her on her face but admitted that he had slapped her twice on the buttocks. He admitted assisting the complainant with a school project on sex education with reference to a compact disc that they viewed on a computer. He also used an encyclopaedia. It contained drawings which dealt with the basics of sex education. The complainant's mother was present at the time. The applicant denied that he initiated the sex education so as to sexually groom the complainant.

[41] He testified that in order to commit the alleged rape he would have had to go over his wife, who was asleep in their bed, remove the complainant's sibling from the bed to get into bed with the complainant. He testified that in the circumstances of the layout of their home, his actions would not have escaped the attention of his wife who was a very short distance away from where the alleged rape took place.

[42] According to the applicant he and his wife had contacted a social worker after Ms V and her sibling had come to complain that they had been beaten by their mother. When Ms H found out about this, she swore and abused them and said that she would get back at them. He described in graphic terms the animosity between Ms V's family and him.

[43] The applicant also called Dr Deon Wagner as an expert witness, who testified on the unusual behaviour of the complainant when examined by

Sister Mokoena and the lack of physical injuries to her vagina. His evidence was largely speculative and deserves no further attention.

[44] I return to what I set out at the beginning of this judgment. It is important that I emphasise the displeasure of this Court concerning the manner in which the prosecution led the evidence of the complainant. Cases of this nature require great care in preparation, presentation and leading of the witnesses. Meticulous attention to detail, consultation, and understanding the language of the complainant are paramount in the prosecution of sexual offences. It is very important that a child witness, in particular, needs to be allowed to state their version before clarification is sought by the prosecutor. The prosecutor should not interrupt the flow of the witness' testimony nor pose leading questions to the witness. Not only does this affect the testimony of the witness but may have an adverse impact on the accused who is entitled to a fair trial in terms of s 35(3) of the Constitution.

[45] In criminal proceedings, the State bears the onus to prove the accused's guilt beyond a reasonable doubt. Furthermore, the accused's version cannot be rejected solely on the basis that it is improbable, but only once the trial court has found on credible evidence that the accused's explanation is false beyond a reasonable doubt. (See: *S v V* 2000 (1) SACR 453 (SCA) at 455B.) The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. It is trite that in an appeal the accused's conviction can only be sustained after consideration of all the evidence and the accused's version of events.

[46] In light of the apparent material contradictions and inconsistencies in the evidence of the State, particularly those arising from the evidence of the single witness, reasonable prospects of success exist. The merits of the case not only constitute compelling reasons for the appeal to be heard, given that they could result in the applicant being found not guilty, but they also constitute special circumstances as the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice.[5]

[47] The applicant's challenge is two pronged. First, the applicant argued that the regional court paid lip service to the cautionary rules when dealing with the evidence of a single witness. This is apparent from the fact that the evidence of the complainant was replete with material contradictions and inconsistencies and should have been rejected by the regional court. Secondly, the applicant argued that the applicant has reasonable prospects of success in the appeal, which is based on the material contradictions and inconsistencies in the trial together with the evidence of the foster mother, who testified at the sentencing stage of the trial and cast doubt on the credibility of the complainant.

[48] The applicant was convicted on the evidence of a single witness, which in order to be sufficient to convict, must be clear and satisfactory in every material respect. (See: *S v Sauls* 1981 4 All SA 182 (A).) It is trite that a court will not rely on such evidence where the witness has made a previous inconsistent statement, where the witness has not had a sufficient opportunity

[5] *Van Wyk v S, Galela v S* [2014] ZASCA 152; [2014] All SA 708 (SCA); 2015 (1) SACR 584 (SCA) para 21.

for observation and where there are material contradictions in the evidence of the witness. In *Sauls* it was held that there is no rule of thumb, test or formula to apply when it comes to the consideration of 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 the shortcomings in the evidence.

[49] In respect of sexual assault cases, thankfully there is no cautionary rule. In *S v Jackson* this Court aptly stated as follows:

'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.'[6]

[50] The only direct evidence implicating the applicant in this case was that of the complainant. For such evidence to be accepted it must be clear and satisfactory in all material respects. The regional court, in the evaluation of the complainant's evidence, stated that it was alive to the need to treat her evidence with caution because she was 13 years and six months old at the time of giving evidence and she had testified through closed circuit television with the assistance of an intermediary.

[51] In *Woji v Santam Insurance Company Ltd*[7], a civil judgment, this Court stated that the question which the trial court must ask itself is whether the

[6] *S v Jackson* 1998 (1) SACR 470 (SCA) at 476.
[7] *Woji v Santam Insurance Company Ltd* 1981 (1) SA 1020 (A) at 1021.

young witness' evidence is trustworthy. Trustworthiness depends on factors such as the child's power of observation, their power of recollection and their power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. Their capacity of observation will depend on whether they appear intelligent enough to observe. Whether they have the capacity of recollection will depend again on whether they have sufficient years of discretion to remember what occurs while the capacity of narration or communication raises the question whether the child has the capacity to understand the questions put, and to frame and express intelligent answers. There are other factors as well which the court will take into account in assessing the child's trustworthiness in the witness-box. Do they appear to be honest – is there a consciousness of the duty to speak the truth? Recently, in *Matshivha v S* this Court expressed itself as follows:

'… the prosecution of rape presents peculiar difficulties that always call for greater care to be given and even more so where the complainant is young.'[8]

This Court went on to cite an earlier judgment *S v Vilakazi*[9] where Nugent JA said the following:

'From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence.'

[52] The objective evidence, namely, that of the nursing sister who examined the complainant is at best for the State, neutral or at worst exculpatory. I am willing to assume, in favour of the State, that it is a neutral factor.

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[8] *Matshivha v S* [2013] ZASCA 124; 2014 (1) SACR 29 (SCA); [2014] 2 All SA 141 (SCA) para 24.
[9] *S v Vilakazi* 2009 (1) SA SACR 552 (SCA) (2012 (6) SA 353; [2008] 4 All SA 396 para 21.

[53] An assessment of the complainant from the record suggests that she is as mature and as intelligent as could be expected for her age. At times she stood up to the attorney representing the applicant, asking him why he was defending her stepfather. At other times she appeared petulant refusing to answer questions and asserting sternly that the cross examiner and others were at liberty to decide whether or not to believe her. Her evidence noted in para 28 above in explaining away a contradiction, namely that one forgets as one is after all a child indicates a perceptive nature.

[54] It is very difficult from the record to obtain a clear picture of a chronological sequence of events from the complainant's evidence. The evidence vacillates between the incidents occurring within days of each other, possibly at one location, and being months apart and at different locations. I am conscious of the fact that the charge sheet states that the charges in count 2 were committed on diverse occasions. The evidence of the complainant should have given some kind of certainty as to the period of when the offences were committed. One is unable with any degree of certainty to locate where the incidents occurred, save perhaps for count three. This might have been partially due to the manner in which she was led by the prosecutor, but it cannot all be excused on that basis.

[55] In her statement to the social worker the complainant appears to have been careful to make the time of the rape in the caravan coincide with the time that the applicant would have been off work, namely the morning. The statement was taken much earlier in time in relation to the incident than her testimony. In her testimony she contradicted the statement, by saying that the rape had occurred at night but could not say whether it was light or dark.

[56] In her statement to the social worker, the complainant had said that her stepfather had been a little drunk when he raped her. In her testimony in court she said she could not remember if he had been drunk at the time of the rape.

[57] This is not an instance where reliance can be placed on cases that justify inconsistencies between statements made by witnesses and other to police officers and viva voce evidence on the basis of a misunderstanding due to language or cultural differences. The social worker was Afrikaans speaking as is the complainant. The complainant never disavowed the statement she had made to the social worker. The complainant never said that she was misunderstood or that she had not said what the social worker had written.

[58] In relation to the reason for disclosing earlier that she had been sexually abused, her evidence is unsatisfactory. This coincided with the various reasons she gave for not raising the alarm when she was being raped: she was afraid of the applicant, who was a martial arts expert, and that she had spoken softly when she told him to leave her alone. When it was suggested to her that her mother was within earshot, she gave a different reason: she wanted to keep her family together and if she had told her mom that night or screamed, her parents would have fought and she wanted to keep them together. Nonetheless, she testified that the following morning she no longer cared and told her mother. As shown in para 24 above, she followed this testimony by a sudden realisation that they would be divorced one day soon. This too changed and the reason provided, as set out at the end of para 24, is that the disclosure about the rape appears to have been prompted by the discussion between her stepfather and her mother asking her about what had occurred.

[59] When it was put to the complainant that her mother would have heard when she said ‘los my!’ (let me go), she then said she was soft-spoken. When questioned why she spoke softly, her reason was that she was a soft spoken person. A soft spoken person is not prevented from speaking more loudly or even shouting.

[60] The complainant’s evidence about whether her stepfather had removed his pants when he allegedly raped her, demonstrates yet another inconsistency and contradiction. She initially said that he removed his underpants. Under cross-examination she said she could not see because it all happened under the blankets.

[61] Her testimony that she had disclosed the rape to her mother, the morning after the event, is in sharp contrast to Ms V’s evidence that she was dead-set against her mother being told about sexual abuse. Ms V’s evidence, as set out above, is emphatic and calls into question the veracity of the complainant’s entire account of how and why she spoke to her mother the morning after the alleged rape.

[62] The complainant had initially lied about whether she had stolen sweets on more than one occasion. The inconsistencies and contradictions abound.

[63] One cannot discount that the disclosure to Ms V was prompted by the latter. On Ms V’s own version, she had literally gone down on her knees alongside the complainant in order to elicit the disclosure of sexual molestation. Furthermore, all that was communicated, according to Ms V, was

sexual molestation and not rape. The complainant's evidence vacillated between communication of molestation only and of both molestation and rape.

[64] The ill-will between Ms V and her mother on the one side and the applicant on the other, is a disturbing feature, when seen against what is set out in the preceding paragraph.

[65] One cannot ignore that on Ms V's version the complainant had initially lied about the reason for the blue eye, which she later recanted. The question that persists is when one can believe the complainant and when not.

[66] A further factor to be considered is that although the complainant said she was not angry at her stepfather for the beating she received after the theft of the chocolate, her evidence set out in para 30 above demonstrates that she was deeply aggrieved. She had reason to implicate him. No wonder then that the foster mother, who was called by the State, in aggravation of sentence, and who had lived with her for a few years, testified that she had told her that she had accused the applicant to get her own back at him. This evidence, of course was not available to the magistrate before conviction. Neither was the evidence of the foster mother that she bragged publicly about how she had stolen sweets.

[67] I am not unmindful of the pressures of being in a court room, nor the trauma attendant on victims of sexual assault. As can be seen from what is set out above, I have taken great care to assess the evidence adduced in the court below. The contradictions, the inconsistencies and the overall unsatisfactory nature of the evidence by the complainant, cannot be excused.

[68] Counsel for the State was constrained to concede the many inconsistencies and contradictions set out above. He argued, however, that they were not material. On the contrary, they were essential to the proof of elements of the offences with which the applicant was charged.

[69] For all the reasons set out above the regional court erred by convicting the accused on evidence that was unsatisfactory in so many respects and ultimately unreliable. The high court, in holding that the complainant was consistent and frank and dismissing the appeal, erred. In the premises the application for leave to appeal must succeed and so too the appeal.

[70] The following order is made:

1 The application for leave to appeal is granted.

2 The appeal is upheld and the order of the court below is set aside and substituted as follows:

'The appeal is upheld and the convictions and related sentences are set aside.'

_____

Y T MBATHA JA

JUDGE OF APPEAL

Dambuza JA (Navsa JA concurring)

[71] I have had the benefit of reading both the majority and minority judgments. I am in agreement with the reasoning and the outcome in the

majority judgment. I consider it necessary to provide my own brief observations regarding the evidence adduced and to comment on the standard of proof in criminal cases. Proof beyond reasonable doubt can only be met where reliable evidence sets out coherently the event(s) on which a charge is founded. The version that emerges at the end of the State case must be sufficiently coherent to avoid conflict with the constitutional rights guaranteed to every person charged with a criminal offence. And while the compound effect of imperfections in a child's recollection and communication faculties, together with the possible trauma of sexual violence must be taken into account in the evaluation of the evidence in sexual assault cases, these factors do not justify discarding the set standard of proof for conviction. An accused's constitutional rights both in relation to fair trial procedures as well as to a just result cannot be discarded.

[72] As pointed out in the judgment of Mbatha JA, the manner in which the prosecutor led the complainant's evidence in this case was woefully deficient. In my view it is difficult to make out a sufficiently cohesive version. Confusing, suggestive interruptions by the prosecutor began shortly after the start of the complainant's evidence to derail the flow of the testimony, particularly in relation to the fondling and sexual assault charges or 'peutering'. It has been said that 'whilst it is certainly true that the evidence of children should not be approached on the basis of assumptions that all children make false allegations, have poor memories and are highly suggestible, it is equally true that a court may not and cannot convict unless it is safe to do so, that is, unless there is proof beyond reasonable doubt'.

[73] While any expectation that the complainant would be able to recall exact dates of each of the alleged incidents, or what she or the applicant was wearing on each day, would be unreasonable for obvious reasons, the deficiencies in her version described in the majority judgment, considered comprehensively, revealed a less than satisfactory version. Self-contradictions in her evidence, improbabilities and contradictions between her evidence and that of other state witnesses, particularly Ms V and the social worker, cannot be overlooked. Too many questions were left unanswered – was Ms V the first person that the alleged conduct was reported to, as she insisted? If so, the manner in which the report was extracted bears scrutiny as was done in the main judgment. Or was the first report made to the mother? If no report was made to the mother as Ms V insisted, did the rape which, according to the complainant, led to a complaint to her mother, take place? Did it take place in the evening as she testified or in the morning as reported to the social worker? Did it take place at all? What exactly happened?

[74] When the report she had made to the social worker about the time the rape had occurred was put to the complainant she did not disavow having made such a statement about the time. There was no objection by the State in relation thereto.

[75] The applicant was clear, in his evidence in-chief, about the bad blood between him and Ms V and her mother, due, inter alia to past confrontations and to a complaint he had lodged with a social worker in the past. He was equally clear about it when he was cross-examined by the prosecutor:

‘Ek haa[t] hulle soos gif ek praat nie met hulle oor wat hulle doen nie’.

The deep seated animosity testified to by him was not contested by the prosecutor in cross-examination. That animosity and Ms V and her mother's base motivation in acting against him cannot be discounted. It was put to the applicant that his legal representative had not put to the complainant that she had been influenced by Ms V and her mother. He, in turn, said he had informed his attorney about it. He said the following:

'Ek het vir Kobus van die begin af gesê dat die ma ons wil terugkry vir wat sy gedoen het en dat die kinders later van tyd [complainant] beinvloed het dat sy kon skeef uigedraai het, en toe later is Kobus dood'.

[76] The material deficiencies in the State's case were never pertinently considered by both the trial court and the high court. And they are by no means trivial. Neither did the high court consider the evidence of the foster parent (Mrs J) who, having been called as a witness by the State, after more than three and a half years of fostering the complainant, expressed concern and exasperation at her conduct, and testified that the complainant had told her that she laid the complaint against the applicant to get back at him for hitting her. According to her the complainant was deceitful and manipulative:

'[Complainant] het n manier van dinge gehad, om 'n ding skelm te doen, leuens te vertel'.

This last part of her evidence was tendered whilst she was being led by the prosecutor, and not under cross-examination by the applicant's legal representative.

[77] References to dicta in which appeal courts have deferred to a trial court's assessment of evidence are unhelpful when the evidence on record in an instant case, or lack of it, militates against the conclusions reached by a

trial court. In the end the relevant standard of proof was not met and the application and appeal in my view must succeed.

N DAMBUZA
JUDGE OF APPEAL

Molemela JA (Mojapelo AJA concurring)

[78] I have read the judgment of my sister Mbatha JA (majority judgment). Regrettably, I am unable to agree with both its reasoning and outcome. I consider it appropriate to preface this dissent with two passages that put into perspective the situation that typically confronts a child complainant in court. In 2004, this Court said:[10]

'Rape is a topic that abounds with myths and misconceptions. . . . For many rape victims the process of investigation and prosecution is almost as traumatic as the rape itself.'[11]

(Footnotes omitted.)

For its part, the Constitutional Court remarked as follows in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others*:[12]

[10] *S v De Beer*, an unreported case of the SCA, case no 121/04 (12 November 2004).
[11] Ibid para 18. See also *S v Matyityi* [2010] ZASCA 127; [2010] 2 All SA 424 (SCA); 2011 (1) SACR 40 para 10.
[12] [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC) paras 105-106.

'[105] . . . If the cross-examination is conducted by the legal representative, the child will be taken through his or her evidence in the most minute detail. The cross-examination may bring out facts that were so grotesque that the child could never have imagined being forced to recount them. The child will be taken to task for placing events, often months after they had occurred, out of sequence and for not being able to remember important details concerning the events. In this intimidating and bewildering atmosphere, the child complainant is required to relive and reveal sordid details of the horror that he or she went through.

. . .

[106] Those who know more about child behaviour from a professional point of view tell us that children are reluctant to relate their sad and often sordid experiences to several different people. As a result, repetition tends to heighten their sense of shame and guilt at what happened to them.' (Footnotes omitted.)

Any fair criticism of a child complainant's testimony in a rape case ought to bear these remarks in mind.

[79] I must at this juncture point out that one of my difficulties with the majority judgment is that it sets aside the decision of the trial court without having engaged with the credibility findings it made. This flies in the face of the well-established principle that courts of appeal will not tamper lightly with the trial court's credibility findings.[13] As an appellate court, it is essential that this Court remain cognisant of the strictures on it pertaining to the factual findings made by the trial court.[14] Absent demonstrable, material misdirections and clearly erroneous findings, we are bound by the trial court's factual findings.[15] In this dissent, I state why I hold the view that the credibility findings made by the trial court are beyond reproach.

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[13] *R v Dhlumayo and Another* [1948] 2 All SA 566 (A); 1948 (2) SA 677 (A) at 705-706. See also *S v Francis* 1991 (1) SACR 198 (A) at 204C-E.
[14] *Naidoo v The State* (333/2018) [2019] ZASCA 52 (1 April 2019) para 46.
[15] Ibid.

[80] Given the fact that the majority judgment is critical of several aspects of the complainant's evidence and concludes that it is unsatisfactory and unreliable. It is therefore necessary to determine whether the credibility findings made about her are justified. This entails scrutinising her evidence with a view to assessing whether there are unexplained contradictions, inconsistencies and improbabilities that have an impact on her credibility. Of course I also address myself to the criticisms made in the majority judgment and the submissions made on behalf of the applicant.

[81] The majority judgment criticised the complainant for 'the unsatisfactory manner in which the evidence was led' and partially attributed the blame to the poor execution of the prosecutorial function. In *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others*, the Court observed that questioning a child in a court room environment requires skill which, undeniably, not all of our prosecutors possess.[16] It must therefore be borne in mind that due to the complainant in this matter being a child witness, her narration of the events largely depended on the guidance of the prosecutor pertaining to the aspects of evidence on which she was expected to testify.

[82] It is true that the prosecutor adduced the evidence of the complainant in a haphazard fashion, constantly interrupting her and directing her to other scenes before exhausting the questioning in relation to a particular aspect. While this was indeed a poor reflection on her prosecutorial skills, we need to be careful not to, in the process of determining whether the requisite standard

[16] Paragraph 104.

of proof has been met, throw the proverbial baby of credible evidence out with the bathwater. Of significance is that this court, being a court of appeal, has the benefit of an overall conspectus of the transcribed evidence. It is therefore in as good a position as any other court to determine the sequence of events.

[83] Although the background facts have been sketched out in the majority judgment, it is necessary to reiterate aspects that require a further elucidation. This will unfortunately necessitate a repetition of the salient facts that form the basis of this dissent. My understanding of the complainant's evidence is that she was a victim of historical sexual abuse, the nature whereof will become clear shortly. In a nutshell, her evidence is that her stepfather, the applicant, sexually abused her during 2008 and 2009, starting from the time when the family lived at Trompsburg, continuing after their relocation to Bloemfontein. In relation to count one and two, she testified that the there were various instances during which the applicant asked her to touch his penis. Furthermore, the applicant would come into her bedroom and start touching her. During one of these encounters the applicant inserted his finger in the complainant's vagina and made her touch his penis. She was unsure of the exact dates on which these incidents happened.

[84] The complainant testified that the incident in relation to count 3 happened in the family home in Bloemfontein. The family comprised the applicant, his wife (the complainant's mother), the complainant and her younger sister born on 19 June 2006. The family home in Bloemfontein was a caravan that was attached to a small adjoining room. Two beds stood within the caravan and one in the adjoining room. A cupboard was put at the door that separated the caravan from the adjoining room, as a result of which the

door could not close. The applicant and complainant's mother slept in the caravan section, which was used as the main dwelling by the family. The complainant slept in the adjoining room. It was here that the applicant, on a specific night, got into the complainant's bed, lowered her pyjama pants and penetrated her with his penis. She stated that it was painful when the applicant penetrated her in that manner. She softly uttered the words 'los my uit'. The applicant was angered by her reaction and went back to his bed, where he joined the complainant's mother.

[85] The complainant testified that she later overheard the applicant mentioning her name to her mother. The next morning, while she and her mother were in the bathroom, she informed her that the applicant had hurt her. When her mother asked her how he had hurt her, she told her that the applicant had inserted his penis into her private parts. Her mother undertook to confront the applicant about it but that never happened. She could not remember the exact date of this incident.

[86] The evidence of the complainant portrays continual sexual abuse that occurred over a period of time. This may be the reason for her inability to pinpoint the precise timeline for the occurrence of the sexual violations described in the charge sheet. This appears to be the reason why the charge sheet fixed no dates for the various sexual violations beyond a reference to the years 2008 and 2009. I did not understand the complainant's evidence to be that all the incidents happened within days, as suggested in the majority judgment. The complainant's response of ''n paar dae daarna' must be seen in context. It was in response to a vague question posed by the prosecutor.

The sequence of events is captured in the following exchange between the prosecutor and the complainant is important:

'So can you tell us which comes first, when did he do this first and then this and that? --- Heel eerste het hy vir my verduidelik van seks. Daarna toe begin hy vat aan my privaatdele. Hm-Hm. --- Toe het hy my *eendag* verkrag.'(Own emphasis.)

[87] In her narration of the events, the complainant was consistent that the incident concerning the theft of the chocolate happened after the rape that constitutes count three. She attributed the bruise (blue eye) that she sustained to the fact that the applicant was wearing a ring when he slapped her in the face. It is noteworthy that despite all the trauma exhibited by the complainant during the proceedings, she was able to give her account of events in relation to all the charges. Her version, with all its imperfections, sticks together despite her testimony not having been led in a strict sequence. I was unable to identify any deficiency in her version that could warrant its outright rejection.

[88] The peculiar difficulties inherent in the evaluation of evidence adduced in rape cases and the requisite careful analysis of all evidence by judicial officers are well-articulated in a legion of court judgments. The question is whether functionaries, including courts, are demonstrably alive to that aspect in their analysis of evidence.

[89] The warning sounded by this Court in *S v Shilakwe*[17] comes to mind. In a nutshell, it boils down to this: once a detailed and critical examination of all the components of evidence has been done, a court must step back and observe the mosaic of evidence as a whole. Acknowledging that doubts about one

[17] *S v Shilakwe* [2011] ZASCA 104; 2012 (1) SACR 16 (SCA) para 11.

aspect of the evidence led in the trial may arise when that aspect of evidence is viewed in isolation, the court pointed out that such doubts may be set at rest when that aspect of evidence is evaluated again together with all the other available evidence.[18] In *S v Chabalala*,[19] this Court cautioned that 'a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in context of the full picture presented in evidence'.

[90] In *S v S*,[20] the Zimbabwean Supreme Court cautioned against approaching cases 'with a single-minded eye towards seeking corroboration', as one could, as a result of that approach, lose sight of the reasons for seeking it. It aptly pointed out that what was needed was a proper analysis of the possible shortcomings in a particular child's evidence, in which one applied a certain amount of psychology and remained aware of recent advances in that discipline. I share the same sentiments. Various experts in the field of child psychology and victimology give insight into the numerous challenges that sexual abuse presents to its victims. The following remarks are apposite:

'It is not reasonable to expect a trauma survivor – whether a rape victim, a police officer or a soldier – to recall traumatic events the way they would recall their wedding day. They will remember some aspects of the experience in exquisitely painful detail. Indeed, they may spend decades trying to forget them. They will remember other aspects not at all, or only in jumbled and confused fragments. Such is the nature of terrifying experiences, and it is a nature that we cannot ignore.' [21]

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[18] See *S v Van der Meyden*, cited and approved in *S v Cornick and Another* [2007] ZASCA 14; [2007] 2 All SA 447 (SCA) at para 42; *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426E-H.
[19] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.
[20] *S v S* 1995 (1) SACR 50 (ZS) at 59H-I and 60A-C.
[21] J Hopper and D Lisak *Why Rape and Trauma Survivors have Fragmented and Incomplete Memories* Time Magazine (2014). Biographies as provided in the article: 'James Hopper, Ph.D., is an independent consultant and Instructor in Psychology in the Department of Psychiatry at Harvard Medical School. He trains investigators, prosecutors, judges and military commanders on the neurobiology of sexual assault. David

[91] In *Bothma v Els*,[22] the Constitutional Court aptly stated as follows:

'[47] Child rape is an especially egregious form of personal violation. As law reports from other jurisdictions show, it is sadly found in all social classes in all parts of the world. It is widespread, if under-reported, in South Africa. By its nature it is frequently characterised by secrecy and denial. . . . Because it often takes place behind closed doors and is committed by a person in a position of authority over the child, the result is the silencing of the victim, coupled with difficulty in obtaining eye-witness corroboration. Complainants should be encouraged rather than deterred when, breaking through feelings of fear and shame, they seek to bring to light past abuses against them.

. . .

[50] The Supreme Court of Appeal accepted that rape had the inherent effect of rendering child victims unable to report the crime, sometimes for several decades, and that the policy was not to penalise them for the consequences of their abuse by blaming them for the delay. . . .

. . .

. . .

[53] A similar approach was adopted by the Supreme Court of Appeal in *S v Cornick*. In that matter the rapes for which the applicants had been convicted occurred in 1983, some nineteen years before the complainant laid charges against them. The complainant was then a child of fourteen and the applicants some four years older. . .

[54] Upholding the convictions, Lewis JA stated that it was not improbable that a young woman who had tried to bury memories of a traumatic event for many years would not appreciate until her mid-twenties, at a time when discussion and publicity about rape had become common, the full extent of what had happened. . . .'[23] (Footnotes omitted.)

[92] Against the backdrop of the authorities mentioned in the preceding paragraphs, the question is whether the trial court's evaluation of the evidence

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Lisak, Ph.D., is a forensic consultant, researcher national trainer and the board president of 1in6, a non-profit organisation that provides information and services to men who were sexually abused as children.'

[22] *Bothma v Els and Others* [2009] ZACC 27; 2010 (2) SA 622 (CC); 2010 (1) SACR 184 (CC); 2010 (1) BCLR 1 (CC).

[23] Ibid.

passes muster. In my view, it does. It is true that the complainant was a single witness to the sexual assault and the rapes. Her evidence therefore had to be approached with caution. It behoves our courts to bear in mind that the exercise of caution when assessing evidence, should not be allowed to displace common sense.[24] It is clear from the detailed judgment of the trial court that it was mindful of the cautionary rule that was applicable to the complainant's evidence as a single, child witness. In dealing with the complainant's evidence, it also dealt with the contradictions between her evidence and that of other state witnesses and the inconsistencies. Its application of the cautionary rule is demonstrable in its detailed judgment. I therefore cannot agree with the applicant's contention that the trial court paid lip service to the cautionary rule.

[93] The majority judgment bemoaned the fact that the prosecutor sometimes put leading questions to the complainant, which indeed happened on a few occasions. It[25] states that the prosecutor started by suggesting that the complainant still had to testify about being raped, well before the complainant had alluded to any rape. With respect, this observation is not borne out by the record. The record clearly shows that the complainant testified about being raped without any leading question being posed by the prosecutor.

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[24] *S v Artman and Another* [1968] 3 All SA 408 (A); 1968 (3) SA 339 (A) at 341. See also A Kruger *Hiemstra's Criminal Procedure* (May 2019, online) at 24-41, where the following is stated: 'Today, child evidence is approached with subtlety and sensitivity, not formally and stereotyped according to the standard cautionary rule but with an acknowledgement of the specific circumstances of each case. Presiding officers should have a particular awareness of the nature of the case and the attributes of the witness. No fixed rule exists any longer.'

[25] Majority judgment para 11.

[94] At the initial stages of her testimony, the complainant was asked why she had attended the court proceedings. Her response was that she was there to testify about rape. It was then that the prosecutor invited her to testify about 'the whole episode from 2008.' The record shows that with specific reference to count three, the complainant in her own narration, stated that the applicant raped her. Thereafter, the prosecutor followed up by posing questions aimed at eliciting her understanding of rape. As no leading question was posed by the prosecutor in relation to the two rape charges, the prosecutor's approach in relation to those charges survives scrutiny.

[95] In assessing the complainant's evidence, it is important to bear in mind that the complainant was traumatised by the sexual assault and rape. She became emotional on several occasions during the proceedings in the trial court, which at some stage necessitated the adjournment of those proceedings. The majority judgment's observation that the complainant 'appeared petulant refusing to answer questions' pays little regard to the complainant's trauma. The complainant was forthright in mentioning that she was trying to block out the memories of the historical sexual abuse she suffered at the hands of the applicant from her mind. This is not an uncommon reaction from victims of child rape.[26] Consideration must also be paid to the stress the complainant endured during the proceedings.[27]

[96] The line of cross-examination followed by the defence counsel is also a consideration here. It was clear that the complainant was cross-examined

[26] *S v Cornick* note 18 above.
[27] See K Müller 'The Judicial Officer and the Child Witness' (2002) 148. Also see J J A Key 'The Child Witness: The Battle for Justice' (1988) 241 *De Rebus* 54 at 55.

with the sole purpose of discrediting her, as the applicant's version was not put to her for comment. Any seasoned legal practitioner can attest to the difficulties ascribable to the posing of compound questions to a witness, which obviously become exacerbated when the witness in question is a child. A number of compound questions were put to the complainant, which made it difficult for her responses to be as effective as those of an adult could have been.

[97] The defence counsel asked the same questions repeatedly. He put to the complainant that the medical report (J88) did not support her version of having been raped[28] or sustaining the injury to her eye area. The prosecutor, who was obviously in possession of the J88 during this questioning, did not object to that line of questioning. It was only much later that the prosecutor objected on the basis that the line of questioning on that aspect was not borne out by the record. This caused the court to express its displeasure at the manner in which a misleading statement relating to the medical evidence had been put to the witness. Counsel for the applicant even went to the extent of asking the complainant whether the rape was traumatic for her. The following exchange between counsel and the complainant is instructive:

'Nou vertel gou-gou vir ons en die hof dat ons kan verstaan, was hierdie verkragting vir jou baie traumaties? --- Ja

Hoekom was dit vir jou erg gewees? --- Want dit is, want hy het jou verkrag en hy is nog getroud met jou ma ook, hy moet jou pa wees, nie 'n flippen ou of pa wat jou verkrag nie.'

[28] This seems to have been based on the fact that the medical report stated that she had not sustained injuries to her genitalia. The applicant's expert witness, Dr Wagner, placing reliance on the hymen morphology of a 12 year old, testified that it was unlikely that the complainant had been vaginally penetrated as the hymen was still intact. This evidence was speculative. A study done by experts has shown that using hymen morphology to determine sexual history is not reliable. See R Mishori et al 'The little tissue that couldn't – dispelling the myths about the Hymen's role in determining sexual history and assault' (2019) 16(1) *Reproductive Health* 74.

[98] The majority judgment[29] states that the complainant had different explanations for not having previously told her mother that the applicant had been sexually abusing her. In relation to the complainant's testimony to the effect that she was soft spoken and thus spoke softly when she told the applicant to leave her alone, the majority judgment reasons that '[a] soft spoken person is not prevented from speaking more loudly or even shouting'.[30]

[99] With respect, I did not understand the complainant's evidence to be that by uttering the words 'los my uit' softly during the rape, she was trying to get the attention of the mother. This criticism fails to take into account that the complainant asserted that she had kept her historic sexual abuse a secret because she was scared of the applicant and also wanted to keep the family together. The reasons advanced can co-exist and are not mutually exclusive at all. As I see it, none of the answers she gave are inconsistent with the other. They merely reflect a further elaboration, as opposed to being a vacillation or contradiction.

[100] A careful reading of the complainant's evidence shows that the essence of her explanation for not telling her mother about any of the incidents of sexual abuse before the last incident of rape is twofold. Both reasons were disclosed in her evidence-in-chief. First, she was scared of the applicant, a martial arts expert who had practically silenced her by telling her that the incidents were not to be disclosed to anyone ('dit bly tussen ons'). The applicant's prowess in martial arts is an aspect that was attested to by Ms V

[29] Majority judgment para 59.
[30] Ibid para 60.

in her testimony. This evidence was never disputed. The complainant had witnessed the numerous fights between her mother and the applicant. Clearly, her fear was not unfounded.

[101] Second, she did not want to ruin her parents' relationship. She was aware that there was alcohol abuse within the family which led to fights between her parents. According to her, her parents hurt each other during those fights.[31] Her apprehension about her disclosure leading to a disintegration of her parents' marriage was reasonable. Under those circumstances, her failure to scream or to protest loudly was a neutral factor that did not detract from her plausible explanation.

[102] It must be borne in mind, in relation to the rape in count three, that this was something the complainant had not experienced before. This time around, the applicant had penetrated her with a penis. The complainant's version is that she found the experience extremely painful and traumatic to the point that she told the applicant to leave her alone. Under cross-examination, when asked why she considered that particular rape to be traumatic, she explained that as someone who was married to her mother, the applicant was expected to protect her and not rape her. It appears that overhearing what she believed to be a discussion about her between her mother and the applicant is what prompted her to open up to her mother about the rape the next morning. Given the general tenor of her evidence, it is not farfetched to infer that this may well have triggered the hope that if she confided in her mother about the incident, she would stand up for her, as most mothers often do. In the complainant's

[31] The complainant's evidence pertaining to the alcohol abuse within her household and the fights between the applicant and her mother was corroborated by a neighbour, Ms H.

own words, she decided to get the matter ‘off her chest’. Under those circumstances, I am unable to see anything wrong with the 12-year old complainant eventually deciding to take a leap of faith by informing her mother about how she had been violated by the applicant.

[103] During cross-examination, the complainant was confronted with the contradiction of having previously stated, in a statement made to the police that the incident happened in the morning. Notably, the trial court found that a basis for cross-examining her about the statement in question had not been laid by the cross-examiner. Furthermore, the statement in question was not handed up as an exhibit. The circumstances under which the statement was obtained are not evident from the record. We do not even know whether she signed that statement. Under such circumstances, I see no basis for concluding that this is an instance where reliance cannot be placed on cases that justify inconsistencies between statements made by witnesses to police officers and evidence on the basis of a misunderstanding due to language or cultural differences.[32]

[104] Barring minor contradictions relating to the applicant having been clad in his pyjamas before the event and whether the room was illuminated or not, the complainant remained consistent about how the rape was executed and about the conversation with her mother in the bathroom, during which she informed her about her ordeal. These minor contradictions do not, in the context of this matter, serve to discredit the complainant as a witness, nor do they render her evidence unsatisfactory. While they constitute

[32] Majority judgment, para 58.

'shortcomings'[33] in her evidence, they do not impinge on her honesty.[34] A feature of her evidence that, in my view, strongly attests to her honesty and reliability is that even in the heat of cross-examination, she did not try to portray the applicant as a monster. She openly professed her love for both her mother and the applicant and acknowledged that she missed them.

[105] Another important consideration anent to the assessment of the complainant's contradictions is that she was only 11 years old when the applicant started to sexually abuse her. She was 12 years old when the sexual abuse was revealed. By the time she testified, she was 13 years old. The very fact that the sexual abuse was perpetrated by her own parent and the time lapse since the offences were committed are aspects that must be taken into account in order to properly assess the reasonableness of any discrepancies in the complainant's evidence. Given the facts of this matter, the complainant's inability to pinpoint the exact date and the lighting in the room when the offences were committed are not material contradictions.[35] Thus, they ought not to lead to a rejection of her evidence as fabrication.[36]

[106] As stated before, the complainant stated that her parents often quarrelled and fought. This was corroborated by Ms H, who was a friend to the complainant's mother. Significantly, the friendship between Ms H and the complainant's mother was confirmed by the applicant. That there was no bad blood between these friends is evident from the fact that Ms H testified that

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[33] *S v Sauls and Others*.
[34] *S v Oosthuizen* [1982] 4 All SA 245 (T); 1982 (3) SA 571 (T) at 516A-B; *S v Mafaladiso en Andere* [2002] 4 All SA 74 (SCA); 2003 (1) SACR 583 (SCA) at 594A-F.
[35] *S v Mkohle* [1990] 3 All SA 1087 (A); 1990 (1) SACR 95 (A) at 98F-G.
[36] Compare *Mocumi v The State* (2015) ZASCA 201 para 20.

their friendship continued beyond the applicant's arrest on rape charges. This was not disputed by the complainant's mother in her evidence. The continuation of that friendship beyond the applicant's arrest dispels any notion of bad blood between the two families. With respect, the majority judgment's finding that there was animosity between the two families failed to pay due regard to this part of the evidence. It also failed to take into account that ill-will as a basis for Ms H being part of the conspiracy was never put to her for comment.

[107] The majority judgment made specific reference to the fact that the beds were two to three metres apart, noting that the applicant would have to move the younger sister who slept with the complainant, in order for him to get to the complainant. Counsel for the applicant considered the proximity of the beds as an indication of the improbability of the account given by the complainant regarding how the rape occurred. This contention fails to take cognisance of three important considerations. First, there was a cupboard standing at the doorway, as a result of which the door between the caravan and the adjoining room could not be closed. The applicant drew a sketch of the layout. As correctly observed by the trial court, the applicant's own words regarding the layout of the caravan and the adjoining room was that it allowed the children to get a measure of privacy. Second, the complainant testified about the misuse of alcohol in the family. This evidence stands uncontested. Third, the complainant's evidence that there was another bed in the caravan section was not disputed. It was only in his evidence in chief that the applicant stated that dishes were put on that bed. A crucial piece of evidence from which it can be inferred that the complainant did not always sleep with her younger

sister on her bed is embodied in the following exchange between the applicant's counsel and the complainant speaks for itself:

'Se gou vir my waar het jou klein sussie geslaap altyd? ---Daar was nog 'n bed in my ma-hulle se kamer.

Is dit nie waar dat jou klein sussie nie alleen wou slaap nie en dat sy elke aand by jou geslaap het nie? --- Party aande wou sy by my slaap, ja.

Nou watse werk doen oom Y -- Hy is 'n bestuurder.'

[108] While on this aspect of the close proximity of the beds in the caravan occupied by the family, sight should not be lost of the unequal society that survives side by side in South Africa. A huge section of the community lives in abject poverty in crowded informal settlements where families cohabit in cramped shacks as small as the caravan in which the complainant lived with her family. As pointed out in *Bothma*, child rape is found in all social classes, is widespread in this country and no community is spared.[37] The close proximity of beds is a common feature in many households. Such is the reality of life in South Africa. It is thus not unheard of that sexual abuse of a child is perpetrated in their own homes and in the presence of someone who is in a position of authority to the child in question.[38] Unfortunately, in some of these instances, the incidents are perpetrated by the partners of the persons fulfilling a parental role to the child.[39]

[109] The majority judgment is critical of the circumstances in which the complainant disclosed the sexual assault and rapes to Ms V. The complainant testified about this aspect in her evidence-in-chief. Her evidence was not

[37] *Bothma* para 46.
[38] *The Director of Public Prosecutions, Grahamstown v Mantashe* [2020] ZASCA 5 para 15.
[39] Ibid.

swayed by cross-examination. Further details concerning the disclosure of the sexual abuse were provided by Ms V.

[110] At the time of the disclosure, Ms V was 17 years old, while the complainant was 12 years old. Ms V's younger sister, T, was a friend of the complainant. The essence of Ms V's evidence is this. Ms V and her family resided at the same caravan park where the complainant lived with her family. She was aware of a rumour doing the rounds at the caravan park, the essence of which was that the complainant was molesting the complainant.

[111] Ms V had last seen the complainant on Thursday afternoon. Seeing the complainant with a blue eye on Friday morning prompted her to ask her how she had sustained it. The complainant initially told her that she had sustained the injury at school. With the knowledge that the complainant did not have a blue eye on Thursday afternoon, she told the complainant that she knew that she was lying and asked her to tell the truth. The complainant then told her that she sustained that injury when the applicant slapped her. The complainant then went to school.

[112] Ms V then phoned her mother, Ms H, to notify her about the fact that the complainant had been assaulted by her father and had sustained a blue eye. Ms H in turn notified the caretaker of the caravan park, as a result of which the social worker was summoned. On the complainant's return from school, Ms V approached her and pertinently asked her whether the applicant was molesting her. The complainant answered in the affirmative and told her about the sexual assault and rapes. She informed the complainant that the social worker was on her way and that she would have to repeat the same

information. The complainant cried and pleaded with her not to tell her mother or the social worker about what she had told her. She encouraged the complainant to confide in the social worker. Upon the social worker's arrival, the complainant repeated her experiences to her and this ultimately led to the applicant's arrest.

[113] Ms V's evidence that the complainant spoke up about her sexual assault and rape was corroborated by Ms H, who was a friend to the complainant's mother. The social worker, too, confirmed that she was summoned to the complainant's home, where the complainant disclosed her the sexual assault and rape to her. The complainant's revelation of sexual assault and rape is also evident from the history recorded by the nurse in the J88, which should be accepted as objective evidence. Notably, the social worker's report also alluded to both the rape and molestation. It is therefore erroneous to state that the complainant's evidence 'vacillated between communication of molestation only and of both molestation and rape'.

[114] The majority judgment concluded that 'all that was communicated, according to Ms V, was sexual molestation and not rape'. It also remarked that it was 'strange' that Ms V had, under cross-examination, stated that she had not seen a blue eye on Ms V's face on the morning following the chocolate incident. With respect, these conclusions are not borne out by the record. Ms V explained that when she saw the complainant on the day of the chocolate incident, she had no injury. She noticed the blue eye on the morning following the chocolate incident. It is evident that cross-examination on this aspect commenced with the applicant's attorney posing a compound question to Ms V referring to *both* molestation and rape.

'Ek wil net seker maak. [X] het vir jou vertel dat *sy is verkrag*. Hy *betas haar*. Het sy nog iets vertel? [Translation: I just want to make sure. [X] told you that that she was raped. He molested her. Did she tell you anything else?] --- Sy het net vir my daai vertel en toe se sy dat [Y] slaan haar baie'. [Translation: She only told me about that/those and then she told me that [Y] beats her a lot]. (My emphasis.)

[115] He thereafter asked a series of other questions on this aspect. The questioning on that aspect concluded with Ms V repeating a question of the cross-examiner. The trial court interjected by asking her whether she agreed with the cross-examiner's proposition. She answered in the negative. It is clear that Ms V did not, at any stage, contradict herself on that aspect. She consistently stated that she had not seen the blue eye on the day of the chocolate theft but had noticed it the next day when the complainant was on her way to school.

[116] The existence of the blue eye on the Friday in question was corroborated by three witnesses, Ms V, Ms H and the social worker. The nurse who examined the complainant two weeks after the incident recorded in the J88 that the complainant had informed her that her father had assaulted her, but that the bruise on her face had healed.

[117] The majority judgment states that the 'ill-will between Ms V and her mother on the one side and the applicant on the other, is a disturbing feature' when consideration is paid to the fact that Ms V had literally gone down on her knees alongside the complainant in order to elicit the disclosure of sexual molestation.[40] It was also critical of the fact that, before telling Ms V that her

[40] Majority judgment para 65.

the applicant had assaulted her, the complainant had initially said she had fought at school. Sight must not be lost of the fact that the complainant had, just the previous night, been severely beaten by the applicant. The lie could have been because she feared that the applicant would assault her again if he learnt that she had disclosed the assault to outsiders. Viewed in the context of the whole evidence, the lie she initially told ought not to discredit the complainant as a witness. It is trite that the fact that a witness has lied about an aspect of evidence does not, without more, lead to the rejection of that witness' entire evidence.[41]

[118] Another significant aspect here pertaining to her only confessing about sexual abuse after being probed is this. Child rape is, by its nature, 'frequently characterised by secrecy and denial'.[42] The complainant's initial reluctance to speak out about the sexual assault and rape may simply have been due to the fact that she was not yet ready to reveal everything to an outsider.[43] The strong bond the complainant had with the rest of her family is evident from the record. The complainant repeatedly stated that she did not want to ruin her parents' relationship. Given those strong family ties, it is therefore not surprising that she would not readily disclose her home situation to an outsider.

[119] The dilemma the complainant faced after her confession, expressed through her tearful pleas to Ms V not to tell her mother or the social worker is not difficult to understand. As correctly acknowledged in a plethora of

[41] See *S v Oosthuizen*, note 34 at 576G.
[42] *Bothma* para 46.
[43] Compare *Hewitt v S* [2016] ZASCA 100; 2017 (1) SA 309 (SCA).

judgments, relating a rape incident to different persons entails reliving the encounter and is often traumatic for the victim.[44] It is not unusual for someone who is traumatised to cry. In this matter, the complainant cried several times during the proceedings and explained that she found the incident traumatic and was trying to block it out of her memory. Her tears, after informing Ms V about her ordeal must be seen against that background. That she cried even more when she was told that her mother and the social worker were going to be informed is also not hard to explain in the context of evidence that is seen as a mosaic.

[120] The shame and guilt that is often experienced by child rape victims at the thought of relating and repeating the sad and sordid details of their sexual abuse to others was acknowledged in *Director of Public Prosecutions, Transvaal*.[45] Ms V was an outsider. So, too, was the social worker. But perhaps a bigger challenge for the complainant was the realisation that her mother was about to find out that she had informed an outsider about a closely guarded family secret. Given the strong family ties, she was, in all probability, ashamed to face her mother because she considered her disclosure to be a betrayal of her family.[46] She obviously realised that her revelation would also show that her mother had failed to intervene. The contradiction between the complainant's evidence and that of Ms V on whether she had informed her mother about the sexual assault and rape must therefore be viewed in that

[44] See *Director of Public Prosecutions, Transvaal* note 12 above.
[45] Ibid.
[46] E H Weiss and R F Berg 'Child Psychiatry and Law – Child Victims of Sexual Assault Impact of Court Procedures' (1982) 21(5) *Journal of the American Academy of Child Psychiatry* 513 at XXX. In this article the authors opine that the most common reaction of the victims of child rape is 'deep guilt feelings' about 'the trouble they caused the family'. According to them, the emotional reactions suffered by those victims are often prolonged or intensified whenever legal proceedings are involved.

light. On this aspect, a major consideration is that the complainant's mother did not refute the social worker's evidence regarding her failure to deny that the complainant had told her about the rape. In my view, that contradiction can therefore not impact so adversely on the quality of her evidence that it renders her entire testimony as unreliable or untruthful.[47] On the contrary, her initial reluctance to disclose the physical assault, her uneasiness about disclosing the sexual assault and rape, and her reaction after confessing to her are aspects that serve to show her innocence, thereby dispelling any notion of a conspiracy. In my view, there is simply no room for regarding her reaction as bolstering the applicant's claim of a conspiracy to falsely implicate him.[48]

[121] It remains to consider whether the applicant's version, weighed against the complainant's credible account, was reasonably possibly true. In his evidence, the applicant asserted that the complainant's averments were fabricated. He stated that Ms H and Ms V had conspired with her to falsely implicate him. He alluded to several aspects which collectively constituted a motive for falsely implicating him. He described the complainant as a 'problem child' who resisted discipline. This problem started because the complainant was unable to adjust to having a sibling after the birth of her younger sister. He testified that since the complainant started associating with Ms V and her sister, her ill-discipline worsened, as she started to emulate their bad behaviour by smoking and drinking. Due to this bad behaviour, he had barred the complainant from associating with them. The complainant, Ms V

[47] *Naidoo v The State* (333/2018) [2019] ZASCA 52 (1 April 2019) para 51.
[48] See S v *Cornick*, note 18 above. In that matter, the complainant had not told her own parents or grandparents, with whom she was staying, about the rape. The complainant in that matter was 14 years old at the time of the rape and reported the matter to the authorities about 19 years after the incident. The secrecy about the rape and the delay in reporting it were not considered to have any bearing on her credibility.

and her sister were unhappy about his intervention. This, according to the applicant, was one of the reasons why the complainant had decided to conspire with Ms H's family against him.

[122] He further testified that Ms H also had a personal grudge against him on account of him having agreed to take Ms V and her sister to the police station and thereafter to a social worker, to lodge a complaint of assault against her (Ms H). A couple of weeks after this incident, the complainant, with the collaboration of Ms H's family, fabricated false allegations of sexual assault and rape against him. When asked by his counsel about the blue eye allegedly sustained by the complainant, he stated that the complainant was always involved in fights at school and came home bruised. He stated that when her mother asked her about it, she had said that she fought at school. All of this was never put to the complainant for her comment. I find it odd that his counsel would leave this crucial aspect out of his cross-examination when he had been meticulous enough to question the complainant about the fact that she had stolen sweets when she was much smaller. My conclusion is that the reason why all these aspects were not put to the complainant during cross-examination was simply because they never happened.

[123] The applicant admitted that when the social worker suggested that the complainant step outside so that they could discuss the matter in private, he had signalled to the complainant to refrain from disclosing anything to the social worker, by putting his finger on his lips. His explanation for doing so was that he did not want the complainant to be taken away from their home. The explanation proffered makes no sense, given that the complainant was,

on the applicant's version, a "problem child" who resisted discipline and had even gone to the point of making false allegations against him.

[124] One would have expected that if the complainant had indeed been a difficult child, the applicant would, long before this incident, have invited the social worker to his home for an intervention, just like he had done when he, on Ms H's request, summoned a social worker to her home. He had seen for himself that in that instance, the social worker had intervened without taking Ms H's children away from their home.

[125] As regards the applicant's assertion that the complainant's mother had told him that the complainant had returned home 'bruised and bloodied', it is difficult to imagine a caring mother not going to her child's school to investigate why she was coming home in that state or at least asking for assistance from a social worker who had already assisted the family when it faced financial hardships. On probabilities, the only reason why the applicant signalled to the complainant to keep quiet when she was walking out with the social worker was to discourage her from revealing his deeds, knowing that they constituted serious offences.

[126] This brings me to the majority judgment's acceptance that Ms H and her family bore a grudge against the applicant and that this may be behind the conspiracy of falsely implicating the applicant. In my view, this conclusion fails to take into account that the nub of the applicant's version about why each family member bore a grudge against him was not put to Ms V and Ms H for comment. The existence of the so-called conspiracy was also not put to the complainant for her comment. The applicant's failure to put his version to

the complainant, Ms V and Ms H for comment is not without consequences, as it related to the crux of his defence.

[127] The legal implications of a failure by a party cross-examining a witness to put up their version to witnesses who have testified were articulated by the Constitutional Court as follows in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*:[49]

'[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness' attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* (1893) 6 R 67 (HL) and has been adopted and consistently followed by our courts.

[62] The rule in *Browne v Dunn* is not merely one of professional practice but is "essential to fair play and fair dealing with witnesses". [See the speech of Lord Herschell in *Browne v Dunn*, above.] . . .

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed . . . particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence *is* to be challenged but also *how* it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.'

[49] 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) paras 61-63.

It is abundantly clear that the applicant's cross-examination did not meet the standard laid down in the passage above.

[128] The existence of a conspiracy is, in any event, dispelled by various aspects of evidence. Had the complainant been hell-bent on laying trumped up charges against the applicant, as he claimed, she would simply have indicated certain dates as those on which the deeds were perpetrated. She did not do so and was honest enough to say that she could not remember the specific dates. Furthermore, if the complainant and Ms V had indeed conspired to falsely implicate the applicant, they would have rehearsed their evidence so as to eliminate any possibility of contradiction in their evidence.

[129] Moreover, it is difficult to understand why Ms V would bear a grudge against the applicant for responding positively when she and her sister requested him to take them to the police station after their mother had assaulted them. On this aspect, it bears mentioning that the applicant's willingness to transport Ms V and her sister to the police station on account of their mother having assaulted them, is incompatible with the applicant's evidence regarding how he disliked them due to their bad behaviour. In any event, if Ms V indeed wanted to falsely implicate the applicant she, being much older and more mature than the complainant, would probably have taken it upon herself to lay charges of indecent assault against the applicant, instead of taking a chance of luring the applicant's own step daughter to falsely implicate him. This is more so because during her evidence, she stated that the applicant had, on a few occasions, fondled her breasts and touched her private parts.

[130] As for Ms H, the applicant's counsel expressly acknowledged, during Ms H's cross examination, that she was indeed a friend to the complainant's mother. Ms H's evidence that her friendship with the complainant's mother still continued after the applicant's arrest, was not disputed. Surely, the complainant's mother would not have continued to associate with Ms H after realising that she was part of a conspiracy to falsely implicate the applicant. It is clear that the applicant's version relating to the State witnesses' motive for falsely implicating him was nothing else but a ruse. Considering the body of evidence adduced by the State witnesses, the trial court correctly took a dim view of his failure to present his conspiracy theory to all the alleged conspirators. It's finding that he was an evasive witness is also borne out by the record.

[131] The applicant called the complainant's mother as a defence witness. It is quite curious that she did not, despite having heard the complainant's version,[50] deny that the complainant had ever informed her about the rape. Notably, she also did not, in her laconic account of events, testify about the complainant's alleged failure to adjust to the fact that she was no longer an only child; the alleged ill-discipline she exhibited by stealing and being generally rebellious over the years; about her ill-advised association with Ms H's daughters and that on the day of the theft of chocolates, she had returned from school bruised and bloodied and had told her that she had been in a fight at school. Although this evidence would have corroborated the applicant's version, she did not mention any of those things. This is quite telling. What is also striking is that the complainant's mother also did not try to refute the

[50] The record shows that she was present in court when the complainant testified.

evidence of the social worker about her not having denied that the complainant had told her about the rape. The social worker was an independent witness and could not have had any motive to make a false allegation about the complainant's mother. These are all aspects that the trial court took into consideration.

[132] The majority judgment[51] finds that the complainant was 'careful to make the time of the rape in the caravan coincide with the time that the applicant would have been off work, in the morning'. There is no basis for this conclusion, given the fact that the applicant's own version was that he would sometimes be off duty over weekends, which obviously meant that he would have been home both in the morning and at night.

[133] The majority judgment further states that the complainant was deeply aggrieved by the beating and concludes that 'she had reason to implicate him'. I disagree with this point of view. It must be borne in mind that the applicant's version was that he only smacked the complainant on her buttocks and was not responsible for the blue eye that she sustained. Notably, the complainant's assertion that the applicant had previously chastised her ('n pak slae gegee) was not denied by the applicant. As correctly stated by the trial court, it would simply defy logic for the complainant to feel so aggrieved by being smacked on the buttocks that she would falsely implicate the applicant, when she had previously not taken chastisement by her uncle, grandfather and the applicant personally.

[51] Majority judgment para 56.

[134] In any event, if the severe beating was indeed the motive for falsely implicating the applicant, the probabilities are that the complainant would not have shown any reluctance before telling Ms V that the applicant had molested and raped her. The complainant's initial reluctance to disclose both the assault and the molestation and rapes to Ms V and later to the social worker dispels any notion of a conspiracy to falsely implicate the applicant. In my view, the version of the applicant, unsupported by the evidence of his own witness, cannot stand. The trial court correctly found that the State had proven its case against the applicant beyond reasonable doubt.

[135] Having considered all the circumstances of this case, I am of the respectful view that the majority judgment's harsh criticism of the complainant's evidence arises from viewing bits and pieces of evidence in isolation despite the trite principle that a court's conclusion must account for all the evidence.[52]

[136] Having had the benefit of the conspectus of the record, it is clear that the trial court's verdict was based on a careful analysis of all the evidence that was adduced during the trial. The trial court had the benefit of observing the complainant and the other witnesses during their testimony. Its credibility findings in respect of all the witnesses are borne out by the record. On appeal, the court a quo found that the credibility findings it made, cannot be faulted.[53] I agree. Since the finding and decision of the trial court in respect of the counts of which the applicant was convicted were not vitiated by any misdirection or

[52] *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449f – 450a, cited and approved in *S v Van Aswegen* 2001 (2) SACR 97 (SCA).
[53] *K v S* [2018] ZAGPPHC 330 paras 11 and 29.

erroneous findings,[54] there is no basis for setting aside the decision of the court a quo.

[137] Before I conclude, I am constrained to comment on the following passage from the majority judgment:

'No wonder then that the foster mother, who was called by the State, in aggravation of sentence, and who had lived with her for a few years, testified that she had told her that she had accused the applicant to get her own back at him. This evidence, of course was not available to the magistrate before conviction. Neither was the evidence of the foster mother that she bragged publicly about how she had stolen sweets.'[55]

It is clear from the foregoing extract that the majority judgment accepts the foster parent's evidence as corroboration of the applicant's evidence.

[138] It bears mentioning that the foster mother testified that she had, on several occasions, interacted with the complainant's grandmother, who happens to be the applicant's biological mother. As the foster parent testified after the applicant's conviction, this obviously means that the trial court reached its verdict before her evidence was adduced. In his heads of argument, counsel for the applicant implores this court to accept the foster parent's evidence using its 'power to review option'. The majority judgment has not pronounced itself on this request. It is therefore necessary for me to underscore the principles that this Court and the Constitutional Court have laid down in relation to the acceptance of 'fresh evidence' that comes to light after judgment.

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[54] Ibid.
[55] Majority judgment para 67.

[139] The following warning sounded by this Court in *Colman v Dunbar*[56] still rings true today:

'To allow fresh evidence on a point which calls in question evidence already led would necessitate a rehearing of the witnesses whose evidence is questioned, so as to give them an opportunity of answering the fresh evidence. This means that the case would be largely reopened which militates against finality. . . .'

In *S v Wilmot*,[57] this court aptly stated as follows:

'Accordingly the power to hear new evidence on appeal or to remit a matter to a trial court to hear such evidence will be sparingly exercised and only when the circumstances are exceptional. A further factor which weighs against the exercise of the power of remittal is the possibility of fabrication of testimony after conviction and the possibility of witnesses being bribed to retract evidence given by them'.

The foregoing sentiments succinctly lay bare the prejudice that would be suffered by the prosecution in this matter if this Court were to accept the foster mother's evidence on appeal.

[140] In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*,[58] the Constitutional Court stated the following:

'[41]… Important criteria relevant to determining whether evidence on appeal should be admitted were identified in *Colman v Dunbar*. Relevant criteria include the need for finality, the undesirability of permitting a litigant who has been remiss in bringing forth evidence to produce it late in the day, and the need to avoid prejudice. One of the most important criteria was the following:

"The evidence tendered must be weighty and material and presumably to be believed, and must be such that if adduced it would be practically conclusive, for if not, it would still leave the issue in doubt and the matter would still lack finality."

. . .

[56] 1933 AD 141 at 161.
[57] 2002 (2) SACR 145 (SCA) 42 para 31
[58] 2005 (2) SA 359 (CC).

[42] In *Van Eeden v Van Eeden*, the Cape High Court held that it was well established that the court's powers as derived from s 22*(a)* of the Supreme Court Act should be exercised sparingly. The court held, further, that in that case the additional evidence related to facts and circumstances which had arisen after the judgment of the court *a quo*. This raised the question whether it was competent for the court, in the exercise of its power under s 22*(a)*, to receive such evidence or to authorise its reception. Comrie J held that the section did not include any express limitation which would exclude the reception of the evidence then sought to be tendered and that the court exercising appellate jurisdiction had a discretion whether or not to allow the evidence to be admitted, which discretion should be exercised sparingly and only in special circumstances. From time to time, he held, cases did arise which cried out for the reception of post-judgment facts.

[43] In my view, this approach is correct. The Court should exercise the powers conferred by s 22 "sparingly" and further evidence on appeal (which does not fall within the terms of rule 31) should only be admitted in exceptional circumstances. Such evidence must be weighty, material and to be believed.' (Footnotes omitted).

[141] It is clear that the evidence of the foster mother does not meet any of the requirements mentioned in the foregoing paragraphs. Furthermore, it is noteworthy that in one of her answers under cross-examination, she described the phrase 'getting back' at the applicant as wanting him 'to take responsibility'. She, in the same breath, testified that the complainant often cried, stating that she did not understand why her mother was taking the applicant's side when she had actually informed her about the applicant's deeds. Self-evident from the foster mother's evidence is that the complainant never disavowed the legitimacy of the sexual assault and rape charges she laid against the applicant. Under those circumstances, it would be wrong to ignore the parts of her evidence that are in favour of the complainant and to focus only on what is favourable to the applicant.

[142] It is also of significance that the applicant's heads of argument acknowledge that the foster mother contradicted the testimony she had given earlier. Clearly, her contradictory evidence is not conclusive on any issue. Her testimony is incapable of affecting the outcome of the trial as the State did not rely on any part of it in convicting the applicant. Given the principles laid down in all the authorities mentioned in paragraphs 133 to135 of this dissent, the ineluctable conclusion is that the foster parent's testimony ought not to be accepted by this Court as 'fresh evidence' that came to light after the verdict. Doing so would impermissibly elevate the foster mother's evidence to corroboration of the applicant's version.

[143] For all the reasons mentioned above, I am of the view that the court *a quo* correctly dismissed the appeal that served before it. In this Court, the applicant has not laid a basis for the granting of special leave to appeal. I would therefore dismiss the application for leave to appeal.

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M B MOLEMELA JA

JUDGE OF APPEAL

Appearances

For applicant:	A Pretorius
Instructed by:	JG Kriek & Cloete Attorneys, Bloemfontein
For respondent:	A Simpson
Instructed by:	Director of Public Prosecutions, Bloemfontein